CALIFORNIA REPORTER REFERENCES

40 CALIFORNIA REPORTS, 2d SERIES

Cal.	P.2d	
Page	Vol.	Page
33	250	593
43	251	4
55	251	10
65	251	1
70	251	324
81	251	949
91	251	321
97	251	673
102	251	955
139	251	975
146	252	321
160	252	1
170	251	945
178	252	1
179	253	10
192	253	18
203	252	945
207	253	1
217	253	8
221	253	6

Cal.	P.2d	
Page	Vol.	Page
224	253	441
235	253	649
254	253	447
271	253	464
289	253	25
294	253	457
307	253	969
317	253	659
334	253	670
341	253	673
343	256	329
344	254	6
368	254	544
382	254	553
392	254	559
412	254	510
424	254	572
433	254	578
436	254	29
459	254	42

Cal.	P.2d	
Page	Vol.	Page
461	254	1
470	254	22
477	254	26
483	254	501
492	254	497
498	254	20
503	254	520
516	254	528
546	254	517
552	254	865
564	254	506
572	255	1
583	255	416
600	255	426
608	255	7
614	255	785
630	255	795
642	255	772
656	255	431

Cal.	P.2d	
Page	Vol.	Page
669	255	802
682	256	4
709	256	317
732	256	20
740	255	810
745	255	782
749	255	784
751	256	309
764	256	305
772	256	1
778	256	947
799	256	962
823	256	933
845	256	569
852	257	1
876	256	911
903	255	781
905	256	573
906	256	573

116 CALIFORNIA APPELLATE REPORTS, 2d SERIES

Cal.App.	P.2d	
Page	Vol.	Page
1	252	1003
5	253	486
8	253	68
20	253	28
31	253	88
39	253	83
44	253	86
48	253	95
55	253	65
59	253	75
65	252	1007
68	253	131
75	253	525
85	253	515
96	253	43
98	253	41
102	253	93
106	253	99
113	258	116
132	253	126
139	253	60
147	253	111
155	253	488
162	253	492

Cal.App.	P.2d	
Page	Vol.	Page
167	253	79
174	253	723
187	253	531
198	253	495
203	253	483
207	255	452
212	255	54
219	253	510
227	253	474
242	253	499
254	253	690
264	253	486
266	253	744
273	253	522
278	253	773
290	253	1005
301	253	702
306	253	1002
310	253	675
320	253	733
328	253	543
332	253	756
345	254	58
360	253	765

Cal.App.	P.2d	
Page	Vol.	Page
373	253	705
381	254	71
404	253	681
412	253	748
419	254	51
425	255	75
431	253	686
438	254	103
445	254	85
466	253	752
473	253	731
475	254	100
480	254	107
485	253	1034
498	251	430
504	253	1021
512	253	780
523	253	1011
531	254	123
533	253	1016
541	253	977
550	254	128
556	253	997
559	253	1026

Cal.App.	P.2d	
Page	Vol.	Page
565	254	110
570	253	700
572	253	696
580	254	153
594	254	120
598	254	124
604	254	67
610	253	975
610	255	29
615	254	919
635	254	47
638	254	131
641	254	168
649	254	122
652	254	49
656	254	150
660	254	98
664	254	113
670	254	594
677	254	587
681	254	644
692	254	140
694	254	146
698	254	161

116 CALIFORNIA APPELLATE REPORTS, 2d SERIES—Continued

Cal.App.	P.2d	
Page	Vol.	Page
702	254	148
705	254	163
713	254	182
719	254	137
724	254	185
729	254	141
736	254	638
746	254	666
752	255	10
759	254	673
765	254	176

Cal.App.	P.2d	
Page	Vol.	Page
769	254	651
769	255	464
779	254	613
786	254	626
790	254	656
798	254	663
802	254	179
807	254	590
813	254	628
820	254	583
824	254	907

Cal.App.	P.2d	
Page	Vol.	Page
833	254	949
841	254	589
843	254	603
845	254	897
849	254	605
853	254	604
856	254	935
864	254	610
869	254	599
875	254	871

Cal.App.	P.2d	
Page	Vol.	Page
883	254	903
891	254	899
893	254	884
901	254	954
911	253	483
911	254	175
913	254	902
915	253	537
921	253	1043
925	255	484

117 CALIFORNIA APPELLATE REPORTS, 2d SERIES

Cal.App.	P.2d	
Page	Vol.	Page
1	254	622
7	254	669
13	254	579
19	254	877
29	254	585
32	254	913
35	254	661
40	254	598
42	255	36
50	255	70
59	254	886
62	254	918
64	254	132
66	254	931
70	254	948
73	254	941
78	254	134
81	254	967
86	255	85
89	254	888
96	254	945
101	255	105
109	254	970
114	254	893
121	255	114
126	255	25
132	254	940
134	255	79
144	255	16
147	255	29
147	256	90
156	255	87
167	255	445

Cal.App.	P.2d	
Page	Vol.	Page
175	255	59
186	255	23
190	255	94
194	255	102
200	255	18
203	255	97
206	255	98
211	255	48
217	255	20
221	255	473
230	255	15
233	255	51
237	255	65
245	255	35
247	255	110
254	255	863
268	256	62
285	255	850
292	255	857
303	256	25
315	255	464
319	255	872
322	255	482
326	255	814
334	256	54
347	255	827
352	255	837
362	255	835
364	255	843
373	255	438
376	255	456
379	256	71

Cal.App.	P.2d	
Page	Vol.	Page
389	255	849
391	255	883
398	255	830
400	256	34
404	255	874
406	255	881
410	256	355
428	255	855
432	256	52
434	256	48
441	256	366
441	257	755
455	256	81
462	256	389
470	256	393
485	256	46
489	256	32
492	256	603
511	256	340
519	256	677
541	256	637
556	256	595
565	256	338
568	256	85
576	256	334
581	256	330
588	256	580
598	256	591
607	256	346
610	256	339
612	256	629
618	256	588

Cal.App.	P.2d	
Page	Vol.	Page
624	256	646
634	256	618
639	256	1022
649	256	577
653	256	1033
664	256	626
667	256	622
672	256	1040
681	256	634
686	256	601
688	256	625
691	256	1012
698	256	586
701	256	1028
709	256	616
712	256	574
718	256	1049
728	256	628
731	256	614
735	256	1009
740	256	1017
749	256	999
752	257	68
761	256	1005
768	257	60
772	257	47
787	257	41
792	256	995
800	257	458
810	256	354
810	257	44
813	256	403

Digitized by the Internet Archive
in 2025

https://archive.org/details/bwb_S0-DTS-663_259-260

CALIFORNIA REPORTER

COVERING CASES REPORTED IN

PACIFIC REPORTER
SECOND SERIES

259 P.2d – 260 P.2d

CITE BY VOLUME AND PAGE
OF THE
PACIFIC REPORTER
SECOND SERIES
Thus:
259 P.2d 1

ST. PAUL, MINN.
WEST PUBLISHING CO.
1954

COPYRIGHT, 1953, BY WEST PUBLISHING CO.
Pacific Reporter, Second Series, Vol. 259, Nos. 1-4;
Vol. 260, Nos. 1-4.

COPYRIGHT, 1954, BY WEST PUBLISHING CO.

Cal.Rep. 259-260 P.2d
3rd Reprint—1979

JUDGES AND OFFICERS

SUPREME COURT

Chief Justice

PHIL S. GIBSON	San Francisco

DEPARTMENT ONE

Presiding Judge

JOHN W. SHENK	San Francisco

Associate Justices

JESSE W. CARTER	San Francisco
B. REY SCHAUER	San Francisco

DEPARTMENT TWO

Presiding Justice

DOUGLAS L. EDMONDS	San Francisco

Associate Justices

ROGER J. TRAYNOR	San Francisco
HOMER R. SPENCE	San Francisco

Clerks

William I. Sullivan	Clerk	San Francisco
Harry M. Gardiser	Chief Deputy Clerk	San Francisco
A. Robert Fairwell	Deputy Clerk	San Francisco
Raymond J. Bell	Deputy Clerk	San Francisco
Joseph M. Rogers	Deputy Clerk	San Francisco
A. F. Bradovich	Deputy Clerk	Sacramento
William J. Sinkford	Deputy Clerk	Los Angeles
David Blomgren	Deputy Clerk	Los Angeles

Attorney General

EDMUND G. BROWN	San Francisco

DISTRICT COURTS OF APPEALS

FIRST DISTRICT—SAN FRANCISCO

Division 1

PRESIDING JUSTICE

RAYMOND E. PETERS	San Francisco

ASSOCIATE JUSTICES

A. F. BRAY	San Francisco
FRED B. WOOD	San Francisco

Division 2

PRESIDING JUSTICE

JOHN T. NOURSE	San Francisco

ASSOCIATE JUSTICES

C. J. GOODELL	San Francisco
MAURICE T. DOOLING, Jr.	San Francisco

CLERKS

WALTER S. CHISHOLM	Clerk	San Francisco
L. R. ELKINGTON	Deputy Clerk	San Francisco
PAUL DINOIA	Deputy Clerk	San Francisco

SECOND DISTRICT—LOS ANGELES

Division 1

PRESIDING JUSTICE

THOMAS P. WHITE	Los Angeles

ASSOCIATE JUSTICES

WILLIAM C. DORAN	Los Angeles
LOUIS C. DRAPEAU	Los Angeles

Division 2

PRESIDING JUSTICE

MINOR MOORE	Los Angeles

ASSOCIATE JUSTICES

MARSHALL F. McCOMB	Los Angeles
W. TURNEY FOX	Los Angeles

DISTRICT COURTS OF APPEALS—Cont'd.

Division 3

Presiding Justice

CLEMENT L. SHINN	Los Angeles

Associate Justices

PARKER WOOD	Los Angeles
PAUL VALLÉE	Los Angeles

Clerks

James E. Brown	Clerk	Los Angeles
Eugene B. Stanley	Deputy Clerk	Los Angeles
John Alley	Deputy Clerk	Los Angeles
Paul H. Blomgren	Deputy Clerk	Los Angeles

THIRD DISTRICT—SACRAMENTO

Presiding Justice

B. F. VAN DYKE	Sacramento

Associate Justices

PAUL PEEK	Sacramento
ANDREW R. SCHOTTKY	Sacramento

Clerks

L. A. Endres	Clerk	Sacramento
Thomas J. Dillon	Deputy Clerk	Sacramento

FOURTH DISTRICT

Fresno—San Bernardino—San Diego

Presiding Justice

CHARLES R. BARNARD	Fresno

Associate Justices

LLOYD E. GRIFFIN	San Diego
STANLEY MUSSELL	San Bernardino

Clerks

Earl J. Verdeckberg	Clerk	San Diego
Lloyd E. Hidden	Deputy Clerk	San Bernardino
Roy M. Bostwick	Deputy Clerk	Fresno
George J. Kobelin	Deputy Clerk	San Diego

APPELLATE DEPARTMENT, SUPERIOR COURT

LOS ANGELES COUNTY

Presiding Judge

HARTLEY SHAW	Los Angeles

Judges

EDWARD T. BISHOP	Los Angeles
JULIUS V. PATROSSO	Los Angeles
DANIEL N. STEVENS	Los Angeles

Clerk

J. J. MacGregor	Los Angeles

SAN FRANCISCO COUNTY

Presiding Judge

HERBERT C. KAUFMAN	San Francisco

Judges

PRESTON DEVINE	San Francisco
EDWARD MOLKENBUHR	San Francisco

Clerk

Joseph F. Whitman	San Francisco

SAN DIEGO COUNTY

Presiding Judge

L. N. TURRENTINE	San Diego

Judges

ROBERT B. BURCH	San Diego
WILLIAM A. GLEN	San Diego

SACRAMENTO COUNTY

Presiding Judge

GROVER W. BEDEAU	Sacramento

Judges

MALCOLM C. GLENN	Sacramento
JAY L. HENRY	Sacramento

ALAMEDA COUNTY

Presiding Judge

S. VICTOR WAGLER	Oakland

Judges

RALPH HOYT	Oakland
THOMAS J. LEDWICH	Oakland

APPELLATE DEPARTMENT, SUPERIOR COURT —Continued

CONTRA COSTA COUNTY

PRESIDING JUDGE

HAROLD JACOBY	Martinez

JUDGES

HOMER W. PATTERSON	Martinez
HUGH H. DONOVAN	Martinez

FRESNO COUNTY

PRESIDING JUDGE

ARTHUR C. SHEPARD	Fresno

JUDGES

PHILIP CONLEY	Fresno
GEORGE M. DE WOLF	Fresno

KERN COUNTY

PRESIDING JUDGE

ROBERT B. LAMBERT	Bakersfield

JUDGES

W. L. BRADSHAW	Bakersfield
NORMAN F. MAIN	Bakersfield

RIVERSIDE COUNTY

PRESIDING JUDGE

OAKLEY K. MORTON	Riverside

JUDGES

RUSSELL S. WAITE	Riverside
JOHN G. GABBERT	Riverside

SAN BERNARDINO COUNTY

PRESIDING JUDGE

MARTIN J. COUGHLIN	San Bernardino

JUDGES

ARCHIE D. MITCHELL	San Bernardino
CARL B. HILLIARD	San Bernardino

SANTA CLARA COUNTY

PRESIDING JUDGE

WILLIAM F. JAMES	San Jose

JUDGES

JOHN FOLEY	San Jose
BYRL SALSMAN	San Jose

STANISLAUS COUNTY

PRESIDING JUDGE

B. C. HAWKINS	Modesto

JUDGES

H. L. CHAMBERLAIN	Modesto
SHERRILL HALBERT	Modesto

NEW APPELLATE DEPARTMENTS, SUPERIOR COURTS

Effective January 5, 1953.

ORANGE COUNTY

PRESIDING JUDGE

FRANKLIN G. WEST	Santa Ana

JUDGES

KENNETH E. MORRISON	Santa Ana
ROBERT GARDNER	Santa Ana

SAN JOAQUIN COUNTY

PRESIDING JUDGE

M. G. WOODWARD	Stockton

JUDGES

R. M. DUNNE	Stockton
GEORGE F. BUCK	Stockton

SAN MATEO COUNTY

PRESIDING JUDGE

AYLETT R. COTTON	Redwood City

JUDGES

EDMUND SCOTT	Redwood City
MURRAY DRAPER	Redwood City

CASES REPORTED

Vols. 259–260 P.2d

	P.2d	
	Vol.	Page
Abrams v. Abrams, App.	259	700
Adams; People v., App.	259	56
Alameda County; Paxton v., App.	259	934
Albert; Plotts v., App.	260	621
Alexander v. Mitchell, App.	260	261
Allen; People v., App.	259	474
Allen v. Superior Court In and For Los Angeles County, Sup.	259	905
Alves v. Public Utilities Commission of Cal., Sup.	260	785
American Independent Medical & Health Ass'n; Maloney v., App.	259	503
Amor; Rhodes v., App.	259	35
Anaheim Union Water Co.; Yorba v., Sup.	259	2
Annin v. Belridge Oil Emp. Federal Credit Union, Super.	260	295
Arak; Chomistek v., App.	260	149
Argonaut Ins. Exchange v. Industrial Acc. Commission, App.	260	817
Atchison, T. & S. F. Ry. Co.; Greene v., App.	260	834
Atchison, T. & S. F. Ry. Co.; Price v., App.	259	664
Attorney General of Cal. v. Superior Court In and For City and County of San Francisco, Sup.	259	1
Baird's Estate, In re, App.	260	1052
Baker; People v., App.	259	737
Baldwin v. Harney, App.	260	991
Bank of America Nat. Trust & Sav. Ass'n v. Pauley, App.	259	714
Banks v. Housing Authority of City and County of San Francisco, App.	260	668
Bardeen v. Langford, App.	260	1014
Barr v. Barr, App.	259	957
Barry; Wilson v., App.	259	991
Bartholomae Corp. v. W. B. Scott Inv. Co., App.	259	28
Beabout v. Beam, App.	260	145
Beam; Beabout v., App.	260	145
Bean v. Wilson, App.	260	134
Bechtel; People v., Sup.	260	31
Belridge Oil Co.; City of Los Angeles v., App.	260	217
Belridge Oil Emp. Federal Credit Union; Annin v., Super.	260	295
Bennett; People v., App.	259	476
Berry; City of South San Francisco v., App.	260	1045
Birnbaum v. Ronniger, App.	259	31
Birnbaum; Ronniger v., App.	259	32
Black v. Taylor, App.	259	1014
Blair Holdings Corp.; Crofoot v., App.	260	156
Blair Holdings Corp.; Rice v., App.	260	156
Board of Trade of San Francisco; Masoni v., App.	260	205
Boshes v. Miller, App.	259	447
Bowers v. Olch, App.	260	997
Braden v. Lewis, App.	259	16
Branch; People v., App.	260	27
Breeden v. Smith, App.	260	185

	P.2d Vol.	Page
Breschini's Estate, In re, App.	260	804
Brickman; People v., App.	259	917
Brown v. Jensen, Sup.	259	425
Buckhantz v. Davidson, App.	260	794
Buckhantz' Estate, In re, App.	260	794
Bullok; Rardin Logging Co. v., App.	260	81
Burbank Amusement Co.; Kennerson v., App.	260	823
Burrows; People v., App.	260	137
Butler; De Aryan v., App.	260	98
Cacioppo v. Triangle Co., App.	260	985
Cannon; Powell v., App.	260	202
Carlson v. Lindauer, App.	259	925
Carnine; People v., Sup.	260	16
Chain v. Chain, App.	259	454
Choate v. State Bar of Cal., Sup.	260	609
Chomistek v. Arak, App.	260	149
Churchill v. White, App.	259	974
City and County of San Francisco; Denton v., App.	260	83
City and County of San Francisco; Peters v., Sup.	260	55
City Court of City of Seal Beach, Orange County; Monterey Oil Co. v., App.	260	846
City Court of City of Seal Beach, Orange County; Monterey Oil Co. v., App.	260	851
City of Carlsbad; Dickson v., App.	260	226
City of Long Beach; Thompson v., Sup.	259	649
City of Los Angeles v. Belridge Oil Co., App.	260	217
City of Los Angeles; Howard Park Co. v., App.	259	977
City of Los Angeles; Howard Park Co. v., App.	260	980
City of Los Angeles; Lorenson v., Sup.	260	49
City of South San Francisco v. Berry, App.	260	1045
Civil Service Commission of San Diego County; Turner v., App.	259	698
Clements v. T. R. Bechtel Co., App.	260	626
Cockerell v. Title Ins. & Trust Co., two cases, App.	260	801
Complete Service Bureau v. San Diego County Medical Soc., App.	260	1038
Conerly; People v., App.	260	986
Connor v. Grosso, Sup.	259	435
Consolidated Fisheries, Inc.; Norton v., App.	260	617
Cook; Shirley v., App.	259	25
Coontz; People v., App.	259	694
Corbett; Maguire v., App.	259	507
Corodas; Rosenblum v., App.	260	151
Coviello v. State Bar, Sup.	259	7
Cox; People v., App.	260	1050
Creswell; People v., App.	259	455
Crofoot v. Blair Holdings Corp., App.	260	156
Dalis; Lehmann v., App.	259	727
Dandini v. Dandini, App.	260	1033
Daniels' Estate, In re, App.	260	991
Danville Warehouse & Lumber, Inc.; Markey v., App.	259	19
David D. Bohannon Organization; Kelly v., App.	260	646
Davidson; Buckhantz v., App.	260	794
Davis & Co. v. Richards, App.	260	805
De Aryan v. Butler, App.	260	98
Denny v. Title Ins. & Trust Co., App.	260	801
Denton v. City and County of San Francisco, App.	260	83
Department of Public Works, People By and Through v. Thompson, App.	260	658

	P.2d Vol.	Page
Department of Social Welfare; Los Angeles County v., Sup.	260	41
Deutchman; Oppenheimer v., App.	259	457
Dick v. Schoener, App.	260	965
Dickson v. City of Carlsbad, App.	260	226
Dominguez Estate Co. v. Los Angeles Turf Club, App.	259	962
Dow; Hutchinson v., App.	260	970
Dow's Estate, In re, App.	260	970
Dunn; Mockbee v., App.	260	964
Dunn's Estate, In re, App.	260	964
E. A. Davis & Co. v. Richards, App.	260	805
Elbert, Limited v. Federated Income Properties, App.	259	478
Elbert, Limited v. Gross, Sup.	260	35
Ephraim v. Jamestown Judicial Dist. Court, App.	260	641
Erickson v. Gospel Foundation of Cal., App.	259	512
Erickson v. Water Land Truck Lines, App.	259	484
Erkinger; People v., App.	259	492
Farmers & Merchants Nat. Bank of Los Angeles v. U. S. Nat. Bank of Denver, App.	260	111
Federated Income Properties; Elbert, Limited v., App.	259	478
Feigin; Rosenberg v., App.	260	143
Fine; McKenna v., App.	259	952
Foster; Stallings v., App.	259	1006
Fowler; People v., App.	260	89
Frank W. Dunne Co; Ross v., App.	260	104
Fuentes v. Panella, App.	260	853
Fuller; Singleton v., App.	259	687
Furst v. Scharer, App.	260	198
Futch; Perry v., App.	259	971
Gainey v. Gainey, App.	259	984
Galway; People v., App.	260	212
Gardner v. Snow, App.	259	95
Gates; Hauger v., App.	260	139
Giambone; People v., App.	259	10
Gianaclis; Massow v., App.	260	655
Gioldi v. Sartorio, App.	259	62
Gore's Estate, In re, App.	260	859
Gospel Foundation of Cal.; Erickson v., App.	259	512
Gould; Hart v., App.	259	49
Greene v. Atchison, T. & S. F. Ry. Co., App.	260	834
Grosjean; Hadsell v., App.	260	1021
Gross; Elbert, Limited v., Sup.	260	35
Grosso; Connor v., Sup.	259	435
Grosso; Herzog v., Sup.	259	429
Gudelj v. Gudelj, Sup.	259	656
Hadsell v. Grosjean, App.	260	1021
Hadsell's Estate, In re, App.	260	1021
Haeussler; People v., Sup.	260	8
Haiden; Karsh v., App.	260	633
Hall v. Hall, App.	259	733
Hamrick v. Hamrick, App.	260	188
Hardin v. San Jose City Lines, Sup.	260	63
Hardison; People v., App.	260	178
Hardware Mut. Ins. Co. of Minn. v. Valentine, App.	259	70
Hardy v. San Fernando Val. Chamber of Commerce, App.	259	728
Harney; Baldwin v., App.	260	991
Hart v. Gould, App.	259	49

	P.2d Vol.	Page
Hart; Los Angeles County v., App.	259	703
Hart's Estate, In re, App.	259	703
Hauger v. Gates, App.	260	139
Hays, Ex parte, App.	260	1030
Helms v. Thomas, App.	260	1016
Henderson; People v., App.	260	639
Henderson; People v., App.	260	641
Henigbaum v. Security First Nat. Bank, App.	260	1052
Herrscher v. Herrscher, Sup.	259	901
Herrscher v. Jackson, Sup.	259	901
Hersum v. Latham, App.	260	988
Hertz Driv-Ur-Self Stations, Inc. v. Schenley Distilleries Corp., App.	260	93
Herzog v. Grosso, Sup.	259	429
Hiles; Robinson v., App.	260	194
H. Moffat Co. v. Rosasco, App.	260	126
Homekraft Baking Co.; Sunlite Bakery v., App.	259	711
Housing Authority of City and County of San Francisco; Banks v., App.	260	668
Howard v. Howard, App.	259	41
Howard Park Co. v. City of Los Angeles, App.	259	977
Howard Park Co. v. City of Los Angeles, App.	260	980
Huling; People v., App.	260	1015
Hutchinson v. Dow, App.	260	970
Hyvari v. Municipal Court of City & County of San Francisco, App.	260	833
Imperial Horsemen's Ass'n; Reams v., App.	260	125
Industrial Acc. Commission; Argonaut Ins. Exchange v., App.	260	817
International Longshoremen's and Warehousemen's Union; Juneau Spruce Corp. v., App.	259	23
Jackson; Herrscher v., Sup.	259	901
Jackson; People v., App.	260	1023
Jamestown Judicial Dist. Court; Ephraim v., App.	260	641
Jensen; Brown v., Sup.	259	425
Juneau Spruce Corp. v. International Longshoremen's and Warehousemen's Union, App.	259	23
Karsh v. Haiden, App.	260	633
Katz; Murphy v., App.	260	247
Keeler v. Schulte, App.	259	37
Kelly v. David D. Bohannon Organization, App.	260	646
Kennerson v. Burbank Amusement Co., App.	260	823
Kipp v. Kipp, App.	260	644
Kirsch v. Kirsch, App.	259	444
Krupp v. Mullen, App.	260	629
Kruse; Shipman v., App.	260	969
Kruse's Estate, In re, App.	260	969
Kurkjian v. Ohanneson, Sup.	259	897
Laguna Salada Union Elementary School Dist. v. Pacific Development Co., App.	259	498
Lamb v. Ward, App.	260	975
Lambrechs v. Ostrander, App.	259	999
Lamendola; People v., App.	259	982
Langford; Bardeen v., App.	260	1014
Langley; People v., App.	259	453
Latham; Hersum v., App.	260	988
Laubisch v. Roberdo, App.	259	66
Laubisch v. Roberdo, App.	260	1004
Lawrance; People v., Sup.	259	439
Lehmann v. Dalis, App.	259	727

	P.2d Vol.	Page
Lewis; Braden v., App.	259	16
Lindauer; Carlson v., App.	259	925
Livingston Rock & Gravel Co. v. Los Angeles County, App.	260	811
Logan; People v., Sup.	260	20
Longo; People v., App.	259	53
Lorenson v. City of Los Angeles, Sup.	260	49
Los Angeles, City of, v. Belridge Oil Co., App.	260	217
Los Angeles County v. Department of Social Welfare, Sup.	260	41
Los Angeles County v. Hart, App.	259	703
Los Angeles County; Livingston Rock & Gravel Co. v., App.	260	811
Los Angeles County v. Southern Counties Gas Co. of Cal., App.	259	665
Los Angeles Transit Lines v. Superior Court of State, In and For Los Angeles County, App.	259	1004
Los Angeles Turf Club; Dominguez Estate Co. v., App.	259	962
Lukin v. State Bd. of Equalization, App.	260	1046
McClellan; Williams v., App.	259	12
Macco Const Co.; Schmidt v., App.	260	230
MacFarlane's Candies; Sanders v., App.	259	1010
McKenna v. Fine, App.	259	952
McNamara's Estate, In re, App.	260	182
Maguire v. Corbett, App.	259	507
Maloney v. American Independent Medical & Health Ass'n, App.	259	503
Manicap; People v., App.	260	137
Marcus; People v., App.	260	1051
Mariani v. Steele, App.	259	487
Marino v. Valenti, App.	259	84
Markey v. Danville Warehouse & Lumber, Inc., App.	259	19
Masoni v. Board of Trade of San Francisco, App.	260	205
Massow v. Gianaclis, App.	260	655
Meizel; Zainudin v., App.	259	460
Metro-Goldwyn-Mayer Pictures; Palmer v., App.	259	740
Meyer v. Parobek, App.	259	948
Miles & Sons Trucking Service; Sasser v., App.	259	488
Miller; Boshes v., App.	259	447
Miller; Moffett v., App.	260	215
Milotz; San Diego County v., Super.	260	282
Mirabile v. Smith, App.	260	179
Mitchell; Alexander v., App.	260	261
Mockbee v. Dunn, App.	260	964
Moffat Co. v. Rosasco, App.	260	126
Moffett v. Miller, App.	260	215
Monterey Oil Co. v. City Court of City of Seal Beach, Orange County, App.	260	846
Monterey Oil Co. v. City Court of City of Seal Beach, Orange County, App.	260	851
Moore; People v., App.	260	1011
Morton v. Superior Court In and For San Mateo County, App.	260	215
Mullen; Krupp v., App.	260	629
Municipal Court of City & County of San Francisco; Hyvari v., App.	260	833
Murphy v. Katz, App.	260	247
Nelson & Sloan; Perin v., App.	259	959
New York Cas. Co.; Southern Heaters Corp. v., App.	260	1048
Nobell; Wilson v., App.	259	720
Nolan v. Public Utilities Commission, Sup.	260	790
Noonan's Estate, In re, App.	260	247
Northern Timber, Inc.; Pacific Bal Industries v., App.	259	465

	P.2d Vol.	Page
Norton v. Consolidated Fisheries, Inc., App.	260	617
Ohanneson; Kurkjian v., Sup.	259	897
Olch; Bowers v., App.	260	997
One 1951 Ford V–8 Custom Club Coupe, 1952 License No. 1 S 81536, Engine No. BILB 136813; People v., App.	259	693
Oppenheimer v. Deutchman, App.	259	457
Ostrander; Lambrechs v., App.	259	999
Ostrander's Estate, In re, App.	259	999
Otto Sales Co.; Shafford v., App.	260	269
Pacific Bal Industries v. Northern Timber, Inc., App.	259	465
Pacific Development Co.; Laguna Salada Union Elementary School Dist. v., App.	259	498
Pacific Greyhound Lines; Silva v., App.	259	743
Palmer v. Metro-Goldwyn-Mayer Pictures, App.	259	740
Panella; Fuentes v., App.	260	853
Park Co. v. City of Los Angeles, App.	259	977
Park Co. v. City of Los Angeles, App.	260	980
Parker; Summers v., App.	259	59
Parobek; Meyer v., App.	259	948
Pauley; Bank of America Nat. Trust & Sav. Ass'n v., App.	259	714
Paxton v. Alameda County, App.	259	934
People v. Adams, App.	259	56
People v. Allen, App.	259	474
People v. Baker, App.	259	737
People v. Bechtel, Sup.	260	31
People v. Bennett, App.	259	476
People v. Branch, App.	260	27
People v. Brickman, App.	259	917
People v. Burrows, App.	260	137
People v. Carnine, Sup.	260	16
People v. Conerly, App.	260	986
People v. Coontz, App.	259	694
People v. Cox, App.	260	1050
People v. Creswell, App.	259	455
People v. Erkinger, App.	259	492
People v. Fowler, App.	260	89
People v. Galway, App.	260	212
People v. Giambone, App.	259	10
People v. Haeussler, Sup.	260	8
People v. Hardison, App.	260	178
People v. Henderson, App.	260	639
People v. Henderson, App.	260	641
People v. Huling, App.	260	1015
People v. Jackson, App.	260	1023
People v. Lamendola, App.	259	982
People v. Langley, App.	259	453
People v. Lawrance, Sup.	259	439
People v. Logan, Sup.	260	20
People v. Longo, App.	259	53
People v. Manicap, App.	260	137
People v. Marcus, App.	260	1051
People v. Moore, App.	260	1011
People v. One 1951 Ford V–8 Custom Club Coupe, 1952 License No. 1 S 81536, Engine No. BILB 136813, App.	259	693
People v. Ranson, App.	259	910
People v. Robinson, App.	259	683

	P.2d	
	Vol.	Page
People v. Roth, App.	260	225
People v. Rupp, Sup.	260	1
People v. Sandoval, App.	260	153
People v. Silva, App.	259	74
People v. Silva, App.	260	251
People v. Thompson, App.	260	1019
People v. Tullous, App.	259	955
People v. Turley, App.	259	724
People v. Warren, App.	260	973
People, By and Through Department of Public Works v. Thompson, App.	260	658
Perin v. Nelson & Sloan, App.	259	959
Perry v. Futch, App.	259	971
Perry v. Perry, App.	259	953
Peters v. City and County of San Francisco, Sup.	260	55
Plotts v. Albert, App.	260	621
Powell v. Cannon, App.	260	202
Price v. Atchison, T. & S. F. Ry. Co., App.	259	664
Public Utilities Commission; Nolan v., Sup.	260	790
Public Utilities Commission; Southern Pac. Co. v., Sup.	260	70
Public Utilities Commission of Cal.; Alves v., Sup.	260	785
Ranson; People v., App.	259	910
Rardin Logging Co. v. Bullok, App.	260	81
Reagh v. San Francisco Unified School Dist., App.	259	43
Reams v. Imperial Horsemen's Ass'n, App.	260	125
Rhodes v. Amor, App.	259	35
Rice v. Blair Holdings Corp., App.	260	156
Richards; E. A. Davis & Co. v., App.	260	805
Richards v. Stanley, App.	260	277
Ritchie, Petition of, App.	260	182
Roberdo; Laubisch v., App.	259	66
Roberdo; Laubisch v., App.	260	1004
Robinson v. Hiles, App.	260	194
Robinson; People v., App.	259	683
Ronniger; Birnbaum v., App.	259	31
Ronniger v. Birnbaum, App.	259	32
Rosasco; H. Moffat Co. v., App.	260	126
Rosenberg v. Feigin, App.	260	143
Rosenblum v. Corodas, App.	260	151
Ross v. Frank W. Dunne Co., App.	260	104
Ross v. Ross, App.	260	652
Ross v. San Francisco Unified School Dist., App.	260	663
Roth; People v., App.	260	225
Rouse; Rutherford, Inc. v., App.	260	808
Rupp; People v., Sup.	260	1
Rusalem; Schlothan v., Sup.	260	68
Rutan's Estate, In re, App.	260	111
Rutherford, Inc. v. Rouse, App.	260	808
Rutledge v. Rutledge, App.	259	78
Rutledge v. Rutledge, App.	259	79
Sanders v. MacFarlane's Candies, App.	259	1010
San Diego County v. Milotz, Super.	260	282
San Diego County Medical Soc.; Complete Service Bureau v., App.	260	1038
Sandoval; People v., App.	260	153
San Fernando Val. Chamber of Commerce; Hardy v., App.	259	728
San Francisco Unified School Dist.; Reagh v., App.	259	43
San Francisco Unified School Dist.; Ross v., App.	260	663

	P.2d Vol.	Page
San Jose City Lines; Hardin, v., Sup.	260	63
Sapp v. Superior Court of State, In and For Los Angeles County, two cases, App.	260	119
Sargavak's Estate, In re, Sup.	259	897
Sartorio; Gioldi v., App.	259	62
Sasanoff v. Sasanoff, App.	260	840
Sasser v. Miles & Sons Trucking Service, App.	259	488
Sattler v. Van Natta, App.	260	982
Scharer; Furst v., App.	260	198
Schenley Distilleries Corp.; Hertz Driv-Ur-Self Stations, Inc. v., App.	260	93
Schlothan v. Rusalem, Sup.	260	68
Schmidt v. Macco Const. Co., App.	260	230
Schoener; Dick v., App.	260	965
Schulte; Keeler v., App.	259	37
Schwartz v. Schwartz, App.	259	33
Schwartz v. Slenderella Systems of Cal., App.	260	256
Security First Nat. Bank; Henigbaum v., App.	260	1052
Shafford v. Otto Sales Co., App.	260	269
Sharp; Wilson v., App.	260	623
Shipman v. Kruse, App.	260	969
Shirley v. Cook, App.	259	25
Shultz; Stafford v., App.	259	494
Sides v. Sides, App.	259	708
Silva v. Pacific Greyhound Lines, App.	259	743
Silva; People v., App.	259	74
Silva; People v., App.	260	251
Singleton v. Fuller, App.	259	687
Slenderella Systems of Cal.; Schwartz v., App.	260	256
Smith; Breeden v., App.	260	185
Smith; Mirabile v., App.	260	179
Snow; Gardner v., App.	259	95
Southern Counties Gas Co. of Cal.; Los Angeles County v., App.	259	665
Southern Heaters Corp. v. New York Cas. Co., App.	260	1048
Southern Pac. Co. v. Public Utilities Commission, Sup.	260	70
South San Francisco, City of, v. Berry, App.	260	1045
Stafford v. Shultz, App.	259	494
Stallings v. Foster, App.	259	1006
Stanley; Richards v., App.	260	277
State Bar; Coviello v., Sup.	259	7
State Bar of Cal.; Choate v., Sup.	260	609
State Bd. of Equalization; Lukin v., App.	260	1046
Steele; Mariani v., App.	259	487
Stellman v. Stellman, App.	260	209
Stewart v. Stewart, Sup.	260	44
Suffern; Upper v., App.	259	988
Summers v. Parker, App.	259	59
Sunlite Bakery v. Homekraft Baking Co., App.	259	711
Superior Court In and For City and County of San Francisco; Attorney General of Cal. v., Sup.	259	1
Superior Court In and For El Dorado County; Wetsel v., App.	260	242
Superior Court In and For Los Angeles County; Allen v., Sup.	259	905
Superior Court In and For San Mateo County; Morton v., App.	260	215
Superior Court of State, In and For Los Angeles County; Los Angeles Transit Lines v., App.	259	1004
Superior Court of State, In and For Los Angeles County; Sapp v., App.	260	119
Taylor; Black v., App.	259	1014

	P.2d Vol.	Page
Taylor's Estate, In re, App.	259	1014
Thomas; Helms v., App.	260	1016
Thompson v. City of Long Beach, Sup.	259	649
Thompson; People v., App.	260	1019
Thompson; People, By and Through Department of Public Works v., App.	260	658
Thrifty Drug Co.; Vogel v., App.	259	450
Title Ins. & Trust Co.; Cockerell v., App.	260	801
Title Ins. & Trust Co.; Denny v., App.	260	801
T. R. Bechtel Co.; Clements v., App.	260	626
Triangle Co.; Cacioppo v., App.	260	985
Tullous; People v., App.	259	955
Turley; People v., App.	259	724
Turner v. Civil Service Commission of San Diego County, App.	259	698
U. S. Nat. Bank of Denver; Farmers & Merchants Nat. Bank of Los Angeles, v., App.	260	111
Upper v. Suffern, App.	259	988
Valenti; Marino v., App.	259	84
Valentine; Hardware Mut. Ins. Co. of Minn. v., App.	259	70
Van Natta; Sattler v., App.	260	982
Verdier v. Verdier, App.	260	209
Vogel v. Thrifty Drug Co., App.	259	450
Ward; Lamb v., App.	260	975
Warren; People v., App.	260	973
Water Land Truck Lines; Erickson v., App.	259	484
W. B. Scott Inv. Co.; Bartholomae Corp. v., App.	259	28
Werner v. Werner, App.	260	961
Wetsel v. Superior Court In and For El Dorado County, App.	260	242
White; Churchill v., App.	259	974
Wieboldt's Estate, In re, App.	259	31
Wieboldt's Estate, In re, App.	259	32
Williams v. McClellan, App.	259	12
Wilson v. Barry, App.	259	991
Wilson; Bean v., App.	260	134
Wilson v. Nobell, App.	259	720
Wilson v. Sharp, App.	260	623
Yorba v. Anaheim Union Water Co., Sup.	259	2
Zainudin v. Meizel, App.	259	460

*

STATUTES CONSTRUED

Vols. 259–260 P.2d

UNITED STATES CODE ANNOTATED

Tit.
26, § 811—260 P.2d 794, 120 A.C.A. 121
26, § 812(d)—260 P.2d 794, 120 A.C.A. 121
26, § 812(e) (1) (A)—260 P.2d 794, 120 A.C.A. 121
29, § 185(b)—259 P.2d 23, 119 A.C.A. 195
29, § 187—259 P.2d 23, 119 A.C.A. 195
38, § 694 et seq.—260 P.2d 151, 119 A.C.A. 937
38, § 694a—260 P.2d 982, 120 A.C.A. 433
42, § 1410(g)—260 P.2d 668, 120 A.C.A. 1
45, § 51 et seq.—259 P.2d 664, 119 A.C.A. 459

UNITED STATES

Constitution

Amend.
1—260 P.2d 98, 119 A.C.A. 805
5—260 P.2d 811, 120 A.C.A. 149
10—260 P.2d 98, 119 A.C.A. 805
14—259 P.2d 37, 119 A.C.A. 183
14—260 P.2d 8, 41 A.C. 256
14—260 P.2d 89, 119 A.C.A. 789
14—260 P.2d 98, 119 A.C.A. 805
14—260 P.2d 668, 120 A.C.A. 1
14—260 P.2d 811, 120 A.C.A. 149

Statutes at Large

1949, July 15, ch. 338, § 302(a),
63 Stat. 423—260 P.2d 668, 120 A.C.A. 1

United States Code Congressional Service 1945

Page
1179—260 P.2d 1004, 120 A.C.A. 317
1193—260 P.2d 1004, 120 A.C.A. 317
1289—260 P.2d 1004, 120 A.C.A. 317
1293—260 P.2d 1004, 120 A.C.A. 317

United States Code Congressional Service 1942

1251—260 P.2d 1004, 120 A.C.A. 317

Executive Orders

No.
9240—260 P.2d 1004, 120 A.C.A. 317
9597—260 P.2d 1004, 120 A.C.A. 317
9600—260 P.2d 1004, 120 A.C.A. 317

President's Proclamations

1945, April 13, No. 2648,
59 Stat. 864—260 P.2d 1004, 120 A.C.A. 317
1945, Aug. 16, No. 2660,
59 Stat. 878—260 P.2d 1004, 120 A.C.A. 317

UNIFORM LAWS ANNOTATED

Uniform Criminal Extradition Act

Sec.
1 et seq.—259 P.2d 152—Cal.

CALIFORNIA

Agricultural Code

4423—259 P.2d 59, 119 A.C.A. 263

Business and Professions Code

2008—260 P.2d 1038, 120 A.C.A. 289
2137—260 P.2d 859, 119 A.C.A. 923; 120 A.C.A. 364
2380—260 P.2d 1038, 120 A.C.A. 289
2380.5—260 P.2d 1038, 120 A.C.A. 289
2399—260 P.2d 1038, 120 A.C.A. 289
2436—260 P.2d 1038, 120 A.C.A. 289
5500-5604—259 P.2d 727, 119 A.C.A. 203
5501—259 P.2d 727, 119 A.C.A. 203
5537—259 P.2d 727, 119 A.C.A. 203
6067—260 P.2d 609, 41 A.C. 411
6078—260 P.2d 609, 41 A.C. 411
6103—260 P.2d 609, 41 A.C. 411
6731—259 P.2d 727, 119 A.C.A. 203
6733—259 P.2d 727, 119 A.C.A. 203
6736—259 P.2d 727, 119 A.C.A. 203
6800-6814—260 P.2d 646, 119 A.C.A. 929
6850 et seq.—260 P.2d 205, 119 A.C.A. 867
6854(a)—260 P.2d 205, 119 A.C.A. 867
6870—260 P.2d 205, 119 A.C.A. 867
6871—260 P.2d 205, 119 A.C.A. 867
7025—260 P.2d 805, 120 A.C.A. 305
7026—260 P.2d 805, 120 A.C.A. 305
7028—260 P.2d 805, 120 A.C.A. 305
7048—260 P.2d 805, 120 A.C.A. 305
7058—260 P.2d 805, 120 A.C.A. 305
7059—260 P.2d 805, 120 A.C.A. 305
14400—260 P.2d 256, 120 A.C.A. 30
14400-14402—113 F.Supp. 119

CALIFORNIA—Cont'd

Civil Code

Sec.
55 to 181—260 P.2d 119, 119 A.C.A. 779
94—259 P.2d 700, 119 A.C.A. 398
132—260 P.2d 119, 119 A.C.A. 779
132—260 P.2d 188, 119 A.C.A. 972
133—260 P.2d 119, 119 A.C.A. 779
133—260 P.2d 188, 119 A.C.A. 972
138—260 P.2d 44, 41 A.C. 455
139—259 P.2d 733, 119 A.C.A. 548
139—260 P.2d 961, 120 A.C.A. 329
158—260 P.2d 119, 119 A.C.A. 779
164—259 P.2d 656, 41 A.C. 206, 311
172—259 P.2d 656, 41 A.C. 206, 311
172-173—260 P.2d 119, 119 A.C.A. 779
172a—260 P.2d 1033, 120 A.C.A. 270
662—259 P.2d 28, 119 A.C.A. 85
711—259 P.2d 49, 119 A.C.A. 287
953—113 F.Supp. 823
954—113 F.Supp. 823
1053—113 F.Supp. 884
1053—259 P.2d 925, 119 A.C.A. 365
1056—113 F.Supp. 884
1066—260 P.2d 658, 120 A.C.A. 209
1069—259 P.2d 925, 119 A.C.A. 365
1069—260 P.2d 658, 120 A.C.A. 209
1091—113 F.Supp. 884
1092—113 F.Supp. 884
1104—259 P.2d 28, 119 A.C.A. 85
1262—113 F.Supp. 884
1262-1265—113 F.Supp. 884
1263—113 F.Supp. 884
1266—113 F.Supp. 884
1431—260 P.2d 179, 119 A.C.A. 815
1462—259 P.2d 925, 119 A.C.A. 365
1488—259 P.2d 465, 118 A.C.A. 968
1489—259 P.2d 465, 118 A.C.A. 968
1521—260 P.2d 646, 119 A.C.A. 929
1523—260 P.2d 646, 119 A.C.A. 929
1524—260 P.2d 646, 119 A.C.A. 929
1572—260 P.2d 149, 119 A.C.A. 882
1576—260 P.2d 295, 119 A.C.A. 616
1577—260 P.2d 295, 119 A.C.A. 616
1624-1627—113 F.Supp. 884
1645—260 P.2d 104, 119 A.C.A. 821
1689—113 F.Supp. 411
1714—259 P.2d 59, 119 A.C.A. 263
1732—260 P.2d 149, 119 A.C.A. 882
1735—259 P.2d 450, 119 A.C.A. 315
2100—260 P.2d 63, 41 A.C. 439
2351—260 P.2d 997, 120 A.C.A. 165, 538
2466—260 P.2d 256, 120 A.C.A. 30
2468—260 P.2d 256, 120 A.C.A. 30
2787—260 P.2d 215, 119 A.C.A. 842
2787-2866—260 P.2d 149, 119 A.C.A. 882
2794(2)—259 P.2d 687, 118 A.C.A. 876
2807—260 P.2d 215, 119 A.C.A. 842
2845—260 P.2d 215, 119 A.C.A. 842
2903—259 P.2d 478, 119 A.C.A. 122
2911—260 P.2d 644, 120 A.C.A. 89
3287—259 P.2d 447, 119 A.C.A. 402
Sec.
3294—259 P.2d 488, 119 A.C.A. 295
3300—259 P.2d 447, 119 A.C.A. 402
3300—260 P.2d 104, 119 A.C.A. 821
3301—260 P.2d 104, 119 A.C.A. 821
3306—259 P.2d 447, 119 A.C.A. 402
3357—259 P.2d 447, 119 A.C.A. 402
3369—113 F.Supp. 119
3369—260 P.2d 633, 120 A.C.A. 105
3399—260 P.2d 126, 119 A.C.A. 498
3406—113 F.Supp. 411
3439.07—259 P.2d 507, 119 A.C.A. 300
3517—260 P.2d 991, 120 A.C.A. 365
3522—259 P.2d 28, 119 A.C.A. 85
3534—259 P.2d 488, 119 A.C.A. 295

Code of Civil Procedure

12a(b)—259 P.2d 66, 119 A.C.A. 277
12a(b)—260 P.2d 1004, 120 A.C.A. 317
53—259 P.2d 435, 41 A.C. 233
284—260 P.2d 652, 120 A.C.A. 100
285—260 P.2d 652, 120 A.C.A. 100
335—259 P.2d 494, 119 A.C.A. 337
338—259 P.2d 70, 119 A.C.A. 177
340, subd. 3—259 P.2d 494, 119 A.C.A. 337
340, subd. 3—260 P.2d 997, 120 A.C.A. 165, 538
353—259 P.2d 2, 41 A.C. 269
387—259 P.2d 33, 119 A.C.A. 155, 523
388—259 P.2d 23, 119 A.C.A. 195
389—260 P.2d 668, 120 A.C.A. 1
395—259 P.2d 465, 118 A.C.A. 968
397, subd. 3—259 P.2d 974, 119 A.C.A. 577
412—259 P.2d 905, 41 A.C. 313
412—259 P.2d 991, 119 A.C.A. 751
413—259 P.2d 905, 41 A.C. 313
413—259 P.2d 991, 119 A.C.A. 751
417—259 P.2d 905, 41 A.C. 313
426, subd. 3—259 P.2d 740, 119 A.C.A. 524
430—259 P.2d 971, 119 A.C.A. 688
433—259 P.2d 971, 119 A.C.A. 688
434—259 P.2d 971, 119 A.C.A. 688
437c—259 P.2d 23, 119 A.C.A. 195
437c—260 P.2d 629, 120 A.C.A. 75
439—259 P.2d 70, 119 A.C.A. 177
439—259 P.2d 460, 119 A.C.A. 331
457—260 P.2d 629, 120 A.C.A. 75
472c—260 P.2d 277, 119 A.C.A. 982
473—260 P.2d 119, 119 A.C.A. 779
473—260 P.2d 194, 119 A.C.A. 797
473—260 P.2d 623, 120 A.C.A. 70
579—260 P.2d 179, 119 A.C.A. 815
580b—259 P.2d 425, 41 A.C. 197
581—260 P.2d 991, 120 A.C.A. 365
581, subd. 3—260 P.2d 68, 41 A.C. 407
581d—259 P.2d 84, 118 A.C.A. 983
581d—259 P.2d 901, 41 A.C. 305
583—259 P.2d 991, 119 A.C.A. 751
629—259 P.2d 988, 119 A.C.A. 309, 715
632—250 P.2d 764, 114 C.A.2d Supp. 848
632—260 P.2d 295, 119 A.C.A. 616
657—260 P.2d 295, 119 A.C.A. 616
662—259 P.2d 78, 119 A.C.A. 164

CALIFORNIA—Cont'd.

Code of Civil Procedure—Cont'd

Sec.
662—259 P.2d 79, 119 A.C.A. 166
674—260 P.2d 1004, 120 A.C.A. 317
681—259 P.2d 66, 119 A.C.A. 277
681—260 P.2d 1004, 120 A.C.A. 317
684—259 P.2d 66, 119 A.C.A. 277
684—260 P 2d 1004, 120 A.C.A. 317
685—259 P.2d 66, 119 A.C.A. 277
685—260 P.2d 1004, 120 A.C.A. 317
689—259 P.2d 507, 119 A.C.A. 300
731a—259 P.2d 19, 119 A.C.A. 17
752—259 P.2d 79, 119 A.C.A. 166
752 et seq.—259 P.2d 25, 119 A.C.A. 269
752a—259 P.2d 79, 119 A.C.A. 166
755—259 P.2d 79, 119 A.C.A. 166
756—259 P.2d 79, 119 A.C.A. 166
798—259 P.2d 478, 119 A.C.A. 122
799—259 P.2d 478, 119 A.C.A. 122
937—259 P.2d 33, 119 A.C.A. 155, 523
955—259 P.2d 988, 119 A.C.A. 309, 715
956(a)—260 P.2d 209, 119 A.C.A. 940
963—259 P.2d 25, 119 A.C.A. 269
963, subd. 2—259 P.2d 25, 119 A.C.A. 269
1000—259 P.2d 1004, 119 A.C.A. 533
1032.6—259 P.2d 507, 119 A.C.A. 300
1086—259 P.2d 1, 41 A.C. 253
1094.5—260 P.2d 215, 119 A.C.A. 796
1094.5(c)—259 P.2d 649, 41 A.C. 239
1187—260 P.2d 626, 120 A.C.A. 60
1191—260 P.2d 626, 120 A.C.A. 60
1241—260 P.2d 261, 119 A.C.A. 950
1248—260 P.2d 658, 120 A.C.A. 209
1280-1293—260 P.2d 156, 119 A.C.A. 207
1281—260 P.2d 156, 119 A.C.A. 207
1283—260 P.2d 156, 119 A.C.A. 207
1287-1293—260 P.2d 156, 119 A.C.A. 207
1288—260 P.2d 156, 119 A.C.A. 207
1288, subd. (d)—260 P.2d 156, 119 A.C.A. 207
1289—260 P.2d 156, 119 A.C.A. 207
1844—260 P.2d 617, 120 A.C.A. 115
1847—259 P.2d 693, 119 A.C.A. 743
1856—113 F.Supp. 884
1860—113 F.Supp. 884
1860—259 P.2d 720, 119 A.C.A. 411
1864—260 P.2d 658, 120 A.C.A. 209
1870, subd. 9—260 P.2d 859, 119 A.C.A. 923; 120 A.C.A. 364
1871—259 P.2d 498, 119 A.C.A. 538
1933—113 F.Supp. 884
1948—113 F.Supp. 884
1951—113 F.Supp. 884
1958—260 P.2d 63, 41 A.C. 439
1960, subd. 2—260 P.2d 256, 120 A.C.A. 30
1963, subd. 30—260 P.2d 985, 120 A.C.A. 361
1971—113 F.Supp. 884
1973—113 F.Supp. 884
1973a—113 F.Supp. 884
1985—259 P.2d 1004, 119 A.C.A. 533
2055—259 P.2d 62, 119 A.C.A. 249
2055—259 P.2d 498, 119 A.C.A. 538
2102—260 P.2d 230, 119 A.C.A. 847

Corporations Code

Sec.
800—260 P.2d 823, 120 A.C.A. 217
820—260 P.2d 823, 120 A.C.A. 217
3901—259 P.2d 37, 119 A.C.A. 183
9000 et seq.—259 P.2d 503, 119 A.C.A. 391
9200—260 P.2d 1038, 120 A.C.A. 289
9201—260 P.2d 1038, 120 A.C.A. 289
9500—259 P.2d 512, 118 A.C.A. 736
9601—259 P.2d 512, 118 A.C.A. 736
9602—259 P.2d 512, 118 A.C.A. 736
9800—259 P.2d 37, 119 A.C.A. 183
15015—260 P.2d 179, 119 A.C.A. 815
15015—260 P.2d 205, 119 A.C.A. 867

Education Code

18199—259 P.2d 727, 119 A.C.A. 203

Elections Code

8511—259 P.2d 12, 119 A.C.A. 189

Government Code

26525—260 P.2d 282, 119 A.C.A. 588
29803—260 P.2d 282, 119 A.C.A. 588
29804—260 P.2d 282, 119 A.C.A. 588
34300 et seq.—259 P.2d 12, 119 A.C.A. 189
34302—259 P.2d 12, 119 A.C.A. 189
53050—260 P.2d 55, 41 A.C. 427
53051—260 P.2d 55, 41 A.C. 427

Health and Safety Code

100—260 P.2d 98, 119 A.C.A. 805
101—260 P.2d 98, 119 A.C.A. 805
107—260 P.2d 98, 119 A.C.A. 805
4011—260 P.2d 98, 119 A.C.A. 805
4011.5—260 P.2d 98, 119 A.C.A. 805
4021—260 P.2d 98, 119 A.C.A. 805
4031—260 P.2d 98, 119 A.C.A. 805
6400 et seq.—260 P.2d 226, 119 A.C.A. 944
6518—260 P.2d 226, 119 A.C.A. 944
6540—260 P.2d 226, 119 A.C.A. 944
6545—260 P.2d 226, 119 A.C.A. 944
6900 et seq.—260 P.2d 226, 119 A.C.A. 944
11500—259 P.2d 74, 119 A.C.A. 487
11500—259 P.2d 917, 119 A.C.A. 319
11500—259 P.2d 982, 119 A.C.A. 701
11500—260 P.2d 27, 119 A.C.A. 564
11610—259 P.2d 693, 119 A.C.A. 743
21003—260 P.2d 98, 119 A.C.A. 805
26209—260 P.2d 212, 120 A.C.A. 55
26273—260 P.2d 212, 120 A.C.A. 55
26286.5—260 P.2d 212, 120 A.C.A. 55
26295—260 P.2d 212, 120 A.C.A. 55
26470.5—260 P.2d 98, 119 A.C.A. 805
34200-34368—260 P.2d 668, 120 A.C.A. 1

Insurance Code

556—259 P.2d 724, 119 A.C.A. 763
700—259 P.2d 503, 119 A.C.A. 391
1010-1016—259 P.2d 503, 119 A.C.A. 391

CALIFORNIA—Cont'd.

Labor Code

Sec.
202—260 P.2d 641, 120 A.C.A. 84
204—260 P.2d 641, 120 A.C.A. 84
216(a)—260 P.2d 641, 120 A.C.A. 84
270—260 P.2d 641, 120 A.C.A. 84
4906—259 P.2d 7, 41 A.C. 277
5505—260 P.2d 817, 120 A.C.A. 191
5506—260 P.2d 817, 120 A.C.A. 191

Penal Code

7, subd. 6—259 P.2d 53, 119 A.C.A. 460
19a—260 P.2d 1030, 120 A.C.A. 387
67—260 P.2d 1023, 120 A.C.A. 137
67½—259 P.2d 53, 119 A.C.A. 460
121—260 P.2d 55, 41 A.C. 427
182, subd. 5—260 P.2d 212, 120 A.C.A. 55
189—205 F.2d 236
189—259 P.2d 439, 41 A.C. 295
189—260 P.2d 1, 41 A.C. 379
189—260 P.2d 16, 41 A.C. 392
190—205 F.2d 236
192, subd. 3—260 P.2d 8, 41 A.C. 256
197, subd. 3—259 P.2d 910, 119 A.C.A. 446
211—260 P.2d 16, 41 A.C. 392
211—260 P.2d 1011, 120 A.C.A. 383
211a—260 P.2d 20, 41 A.C. 283
213—260 P.2d 20, 41 A.C. 283
220—260 P.2d 1, 41 A.C. 379
245—260 P.2d 20, 41 A.C. 283
288—259 P.2d 694, 119 A.C.A. 351
288a—259 P.2d 476, 119 A.C.A. 273
288a—260 P.2d 137, 119 A.C.A. 887
311—260 P.2d 833, 120 A.C.A. 309
337a, subd. 2—259 P.2d 737, 119 A.C.A. 493
449a—259 P.2d 56, 119 A.C.A. 511
459—260 P.2d 16, 41 A.C. 392
459—260 P.2d 1019, 120 A.C.A. 443
487—259 P.2d 474, 119 A.C.A. 434
487, subd. 3—260 P.2d 639, 120 A.C.A. 66
644—259 P.2d 474, 119 A.C.A. 434
647-a(1)—260 P.2d 833, 120 A.C.A. 309
654—260 P.2d 27, 119 A.C.A. 564
869—260 P.2d 282, 119 A.C.A. 588
950—259 P.2d 724, 119 A.C.A. 763
951—259 P.2d 53, 119 A.C.A. 460
951—260 P.2d 31, 41 A.C. 449
952—259 P.2d 53, 119 A.C.A. 460
954—259 P.2d 476, 119 A.C.A. 273
1018—260 P.2d 225, 120 A.C.A. 39
1023—260 P.2d 31, 41 A.C. 449
1026—260 P.2d 1, 41 A.C. 379
1096—259 P.2d 476, 119 A.C.A. 273
1096a—259 P.2d 476, 119 A.C.A. 273
1203—260 P.2d 1030, 120 A.C.A. 387
1203.1—260 P.2d 1030, 120 A.C.A. 387
1325260 P.2d 89, 119 A.C.A. 789
1387—260 P.2d 641, 120 A.C.A. 84
1547 to 1558—259 P.2d 152—Kan.
4502—260 P.2d 973, 120 A.C.A. 339
4502—260 P.2d 1051, 120 A.C.A. 431

Political Code

Sec.
10—259 P.2d 66, 119 A.C.A. 277
10—260 P.2d 1004, 120 A.C.A. 317

Probate Code

24—259 P.2d 1014, 119 A.C.A. 706
28—259 P.2d 925, 119 A.C.A. 365
50—123 N.Y.S.2d 877—Cal.
50(1)—113 F.Supp. 884
53—123 N.Y.S.2d 877—Cal.
53—260 P.2d 182, 119 A.C.A. 874
92—259 P.2d 32, 119 A.C.A. 28
92—260 P.2d 964, 120 A.C.A. 374
104—259 P.2d 95, 119 A.C.A. 673
104—259 P.2d 897, 41 A.C. 323
105—259 P.2d 897, 41 A.C. 323
107—259 P.2d 925, 119 A.C.A. 365
120—259 P.2d 925, 119 A.C. 365
142—259 P.2d 1014, 119 A.C.A. 706
222—259 P.2d 32, 119 A.C.A. 28
225—260 P.2d 969, 120 A.C.A. 336
229—260 P.2d 804, 120 A.C.A. 200
229—260 P.2d 1052, 120 A.C.A. 278
257—260 P.2d 969, 120 A.C.A. 336
258—260 P.2d 991, 120 A.C.A. 365
300—259 P.2d 925, 119 A.C.A. 365
371—260 P.2d 991, 120 A.C.A. 365
383—259 P.2d 703, 119 A.C.A. 382
718.5—259 P.2d 31, 119 A.C.A. 26
758—260 P.2d 970, 120 A.C.A. 377
786—259 P.2d 925, 119 A.C.A. 365
970—260 P.2d 794, 120 A.C.A. 121
970 to 973—260 P.2d 794, 120 A.C.A. 121
1080—259 P.2d 1, 41 A.C. 253
1200—260 P.2d 991, 120 A.C.A. 365
1232—259 P.2d 703, 119 A.C.A. 382
1233—260 P.2d 991, 120 A.C.A. 365
1240—259 P.2d 1, 41 A.C. 253
1240—259 P.2d 703, 119 A.C.A. 382
1240—260 P.2d 991, 120 A.C.A. 365
1240—260 P.2d 1021, 120 A.C.A. 351
1407—260 P.2d 44, 41 A.C. 455

Public Resources Code

6216—260 P.2d 846, 120 A.C.A. 42
6301—260 P.2d 851, 120 A.C.A. 51
6828—260 P.2d 846, 120 A.C.A. 42
6871 to 6878—260 P.2d 846, 120 A.C.A. 42
6873—260 P.2d 846, 120 A.C.A. 42

Public Utilities Code

201 et seq.—260 P.2d 785, 41 A.C. 353
213—260 P.2d 785, 41 A.C. 353
213—260 P.2d 790, 41 A.C. 400
215—260 P.2d 785, 41 A.C. 353
215—260 P.2d 790, 41 A.C. 400
705—260 P.2d 70, 41 A.C. 362
730—260 P.2d 70, 41 A.C. 362
761-763—260 P.2d 70, 41 A.C. 362
1756—260 P.2d 70, 41 A.C. 362
1757—260 P.2d 70, 41 A.C. 362
1760—260 P.2d 70, 41 A.C. 362

CALIFORNIA—Cont'd

Public Utilities Code—Cont'd,

Sec.
2106—259 P.2d 488, 119 A.C.A. 295
3501 et seq.—260 P.2d 785, 41 A.C. 353
3513—260 P.2d 785, 41 A.C. 353
3516—260 P.2d 785, 41 A.C. 353
3516—260 P.2d 790, 41 A.C. 400
3517—260 P.2d 785, 41 A.C. 353
3542—260 P.2d 785, 41 A.C. 353

Revenue and Taxation Code

3691 et seq.—260 P.2d 644, 120 A.C.A. 89
3712—259 P.2d 478, 119 A.C.A. 122
3900—259 P.2d 478, 119 A.C.A. 122

Streets and Highways Code

660–670—260 P.2d 658, 120 A.C.A. 209
5000 et seq.—259 P.2d 977, 119 A.C.A. 629
5000 et seq.—260 P.2d 980, 120 A.C.A. 311
5343—259 P.2d 977, 119 A.C.A. 629
5374—260 P.2d 226, 119 A.C.A. 944
6550—260 P.2d 35, 41 A.C. 331
6551—260 P.2d 35, 41 A.C. 331
6555—260 P.2d 35, 41 A.C. 331
6571—260 P.2d 35, 41 A.C. 331
31500 et seq.—260 P.2d 261, 119 A.C.A. 950
32500 et seq.—260 P.2d 261, 119 A.C.A. 950
33800 et seq.—260 P.2d 261, 119 A.C.A. 950

Vehicle Code

83—259 P.2d 62, 119 A.C.A. 249
236—260 P.2d 639, 120 A.C.A. 66
501—260 P.2d 8, 41 A.C. 256
510—260 P.2d 63, 41 A.C. 439
511—260 P.2d 63, 41 A.C. 439
513—260 P.2d 63, 41 A.C. 439
525(a)—259 P.2d 484, 119 A.C.A. 260
525(a) (1)—259 P.2d 484, 119 A.C.A. 260
525(b)—259 P.2d 484, 119 A.C.A. 260
564—259 P.2d 62, 119 A.C.A. 249

Welfare and Institutions Code

103.5—260 P.2d 41, 41 A.C. 463
103.6—260 P.2d 41, 41 A.C. 463
114(a)—260 P.2d 41, 41 A.C. 463
2006—260 P.2d 41, 41 A.C. 463
2021—260 P.2d 41, 41 A.C. 463
2186—260 P.2d 41, 41 A.C. 463
2187—260 P.2d 41, 41 A.C. 463
2500—260 P.2d 41, 41 A.C. 463
3003—260 P.2d 41, 41 A.C. 463
3008—260 P.2d 41, 41 A.C. 463
3025—260 P.2d 41, 41 A.C. 463
3026—260 P.2d 41, 41 A.C. 463
3087–3087.3—260 P.2d 41, 41 A.C. 463

General Laws

Act
1907, § 1 et seq.—259 P.2d 10, 119 A.C.A. 408
1970, § 1 et seq.—259 P.2d 955, 119 A.C.A. 767
3796, § 38f—260 P.2d 1046, 120 A.C.A. 342
5619, § 2—259 P.2d 934, 119 A.C.A. 465

Rules on Appeal

Rule
2(a)—259 P.2d 454, 119 A.C.A. 537
2(b)—259 P.2d 84, 118 A.C.A. 983
2(b) (2)—259 P.2d 901, 41 A.C. 305
3(a)—259 P.2d 454, 119 A.C.A. 537
3(a)—259 P.2d 988, 119 A.C.A. 309, 715
4(a)—259 P.2d 952, 119 A.C.A. 775
4(c)—259 P.2d 952, 119 A.C.A. 775
4(d)—259 P.2d 952, 119 A.C.A. 775
5(f)—260 P.2d 295, 119 A.C.A. 616
10(a)—259 P.2d 952, 119 A.C.A. 775
12(a)—259 P.2d 41, 119 A.C.A. 174
23(b)—260 P.2d 209, 119 A.C.A. 940
26—259 P.2d 703, 119 A.C.A. 382
26(a)—259 P.2d 703, 119 A.C.A. 382
31—260 P.2d 1050, 120 A.C.A. 315

Constitution

Art.
1, § 7—259 P.2d 740, 119 A.C.A. 524
1, § 13—260 P.2d 8, 41 A.C. 256
1, § 13—260 P.2d 31, 41 A.C. 449
1, § 13—260 P.2d 811, 120 A.C.A. 149
1, § 15—260 P.2d 641, 120 A.C.A. 84
1, § 21—260 P.2d 89, 119 A.C.A. 789
4, § 22—260 P.2d 41, 41 A.C. 463
4, § 25(19)—260 P.2d 89, 119 A.C.A. 789
6, § 4½—259 P.2d 23, 119 A.C.A. 195
6, § 4½—259 P.2d 917, 119 A.C.A. 319
6, § 4½—260 P.2d 16, 41 A.C. 392
11, § 6—259 P.2d 12, 119 A.C.A. 189
11, § 6—260 P.2d 98, 119 A.C.A. 805
11, § 7½—259 P.2d 12, 119 A.C.A. 189
11, § 8—260 P.2d 261, 119 A.C.A. 950
11, § 11—260 P.2d 98, 119 A.C.A. 805
11, § 11—260 P.2d 846, 120 A.C.A. 42
11, § 11—260 P.2d 1045, 120 A.C.A. 334
11, § 18¼—260 P.2d 261, 119 A.C.A. 950
12, § 16—259 P.2d 465, 118 A.C.A. 968
12, § 23—260 P.2d 70, 41 A.C. 362
13, § 17—260 P.2d 261, 119 A.C.A. 950
14, § 3—259 P.2d 2, 41 A.C. 269

City Charters

Los Angeles. Laws 1927, p. 2014, § 376—260 P.2d 49, 41 A.C. 342
Los Angeles. Laws 1935, p. 2347, § 202—260 P.2d 49, 41 A.C. 342
Los Angeles. Laws 1935, p. 2347, § 202(1–3)—260 P.2d 49, 41 A.C. 342
Los Angeles. Laws 1935, p. 2347, § 202(7)—260 P.2d 49, 41 A.C. 342
Los Angeles. Laws 1935, p. 2347, § 202(12–14)—260 P.2d 49, 41 A.C. 342
Los Angeles. Laws 1935, p. 2347, § 202(19)—260 P.2d 49, 41 A.C. 342
Los Angeles. Laws 1941, p. 3493, § 363—260 P.2d 49, 41 A.C. 342

CALIFORNIA—Cont'd.

Laws

1891, p. 223—260 P.2d 226, 119 A.C.A. 944
1905, p. 777—259 P.2d 665, 119 A.C.A. 30, 521
1905, p. 777, § 3—259 P.2d 665, 119 A.C.A. 30, 521
1911, p. 730—259 P.2d 478, 119 A.C.A. 122
1911, p. 730—260 P.2d 35, 41 A.C. 331
1919, p. 465—260 P.2d 282, 119 A.C.A. 588
1923, p. 675—260 P.2d 55, 41 A.C. 427
1923, p. 675, § 2—259 P.2d 934, 119 A.C.A. 465
1923, p. 1628, § 106—259 P.2d 649, 41 A.C. 239
1927, p. 1150—260 P.2d 282, 119 A.C.A. 588
1927, p. 2014, § 376—260 P.2d 49, 41 A.C. 342
1933, p. 1157—260 P.2d 70, 41 A.C. 362
1933, p. 1673—259 P.2d 425, 41 A.C. 197
1935, p. 1269, § 2(6)—260 P.2d 1052, 120 A.C.A. 278
1935, p. 2347, § 202—260 P.2d 49, 41 A.C. 342
1935, p. 2347, § 202(1-3)—260 P.2d 49, 41 A.C. 342
1935, p. 2347, § 202(7)—260 P.2d 49, 41 A.C. 342
1935, p. 2347, § 202(12-14)—260 P.2d 49, 41 A.C. 342
1935, p. 2347, § 202(19)—260 P.2d 49, 41 A.C. 342
1938, Ex.Sess., p. 23—260 P.2d 846, 120 A.C.A. 42
1939, p. 2074—260 P.2d 846, 120 A.C.A. 42
1941, p. 1875—260 P.2d 846, 120 A.C.A. 42
1941, p. 3219, § 1—260 P.2d 846, 120 A.C.A. 42
1941, p. 3493, § 363—260 P.2d 49, 41 A.C. 342
1945, p. 821, § 1—260 P.2d 644, 120 A.C.A. 89
1947, p. 3045—260 P.2d 646, 119 A.C.A. 929
1950, 1st Ex.Sess., p. 515—260 P.2d 35, 41 A.C. 331
1951, p. 1922—260 P.2d 668, 120 A.C.A. 1
1951, p. 2025—260 P.2d 785, 41 A.C. 353
1951, p. 2257—260 P.2d 785, 41 A.C. 353
1951, p. 2537—259 P.2d 905, 41 A.C. 313
1953, p. 1423—260 P.2d 1038, 120 A.C.A. 289

WORDS AND PHRASES

Vols. 259–260 P.2d

For all other definitions of Words and Phrases listed below see publication WORDS AND PHRASES, comprising all judicial definitions of Words and Phrases by all the Courts, State and Federal, in paragraph form under a single alphabetical arrangement.

AGAINST LAW,
Annin v. Belridge Oil Emp. Federal Credit Union, 260 P.2d 295, 302, 303, 119 A.C.A. 616.

ASSUMPTION OF RISK,
Plotts v. Albert, 260 P.2d 621, 622, 120 A.C.A. 133.

BURDEN OF PROOF,
Overman v. Loesser, C.A.Cal., 205 F.2d 521, 523.

BUSINESS,
City of Los Angeles v. Belridge Oil Co., 260 P.2d 217, 221, 119 A.C.A. 637.

CIRCUMSTANCE RENDERING SUCH PROCESS INEFFECTIVE,
Thomas v. Teets, C.A.Cal., 205 F.2d 236, 240.

COMMERCE,
Markey v. Danville Warehouse & Lumber, Inc., 259 P.2d 19, 22, 119 A.C.A. 17.

CONDITION SUBSEQUENT,
Hart v. Gould, 259 P.2d 49, 51, 119 A.C.A. 287.

COUNTY,
Williams v. McClellan, 259 P.2d 12, 15, 119 A.C.A. 189.

DANGEROUS EXPLOSIVES,
West Coast Fast Freight v. U. S., C.A.Cal., 205 F.2d 249, 251.

DESCENDANT,
In re Kruse's Estate, 260 P.2d 969, 970, 120 A.C.A. 336.

DESIGN,
Rosenthal v. Stein, C.A.Cal., 205 F.2d 633, 635.

ENTRAPMENT,
People v. Turley, 259 P.2d 724, 726, 119 A.C.A. 763.

EXECUTE,
In re Kossack, D.C.Cal., 113 F.Supp. 884, 887.

EXTRINSIC FRAUD,
Dandini v. Dandini, 260 P.2d 1033, 1036, 1037, 120 A.C.A. 270.

FILLED LANDS,
Monterey Oil Co. v. City Court of City of Seal Beach, Orange County, 260 P.2d 846, 850, 120 A.C.A. 42.

FINAL ORDER,
Higgins v. U. S., C.A.Cal., 205 F.2d 650, 652.

FIXED TERMINI,
Nolan v. Public Utilities Commission, 260 P.2d 790, 793, 41 A.C. 400.

WORDS AND PHRASES

FOUR CORNERS RULE,
In re Kossack, D.C.Cal., 113 F.Supp. 884, 889, 890.

FRAUD,
Sapp v. Superior Court of State, In and For Los Angeles County, 260 P.2d 119, 123, 119 A.C.A. 779.
Ephraim v. Jamestown Judicial Dist. Court, 260 P.2d 641, 644, 120 A.C.A. 84.

GROSS RECEIPTS,
Los Angeles County v. Southern Counties Gas Co. of Cal., 259 P.2d 665, 673, 119 A.C.A. 30, 521.

HOLIDAY,
Laubisch v. Roberdo, 259 P.2d 66, 69, 119 A.C.A. 277.
Laubisch v. Roberdo, 260 P.2d 1004, 1007, 1008, 120 A.C.A. 317.

HORIZONTAL PRICE FIXING,
Sunbeam Corp. v. Payless Drug Stores, D.C.Cal., 113 F.Supp. 31, 39.

IMPLIED CONTRACT,
Bean v. Wilson, 260 P.2d 134, 135, 120 A.C.A. 80.

INCORPORATION BY REFERENCE,
In re McNamara's Estate, 260 P.2d 182, 184, 119 A.C.A. 874.

INDUSTRIAL,
Markey v. Danville Warehouse & Lumber, Inc., 259 P.2d 19, 21, 119 A.C.A. 17.

INHERENTLY IMPROBABLE,
People v. Erminger, 259 P.2d 492, 494, 119 A.C.A. 683.

INSPECT,
Peters v. City and County of San Francisco, 260 P.2d 55, 61, 41 A.C. 427.

INSUFFICIENCY OF EVIDENCE,
Annin v. Belridge Oil Emp. Federal Credit Union, 260 P.2d 295, 302, 119 A.C.A. 616.

INTEGRATION,
In re McNamara's Estate, 260 P.2d 182, 184, 119 A.C.A. 874.

JUDGMENT IN PERSONAM,
Perry v. Perry, 259 P.2d 953, 954, 119 A.C.A. 529.

JUDGMENT IN REM,
Perry v. Perry, 259 P.2d 953, 954, 119 A.C.A. 529.

LACHES,
Carlson v. Lindauer, 259 P.2d 925, 934, 119 A.C.A. 365.

MANUFACTURE,
Markey v. Danville Warehouse & Lumber, Inc., 259 P.2d 19, 21, 119 A.C.A. 17.

MORTMAIN,
Hart v. Gould, 259 P.2d 49, 51, 119 A.C.A. 287.

MUNICIPAL,
Clements v. T. R. Bechtel Co., 260 P.2d 626, 627, 120 A.C.A. 60.

MUNICIPAL BOARD OR OFFICER,
Clements v. T. R. Bechtel Co., 260 P.2d 626, 628, 120 A.C.A. 60.

MUNICIPAL CORPORATIONS,
Williams v. McClellan, 259 P.2d 12, 15, 119 A.C.A. 189.

NECESSITY,
Southern Pac. Co. v. Public Utilities Commission, 260 P.2d 70, 77, 41 A.C. 362.

NEGLIGENCE,
Ross v. San Francisco Unified School Dist., 260 P.2d 663, 668, 120 A.C.A. 245.

ORIGINALITY,
Silvers v. Russell, D.C.Cal., 113 F.Supp. 119, 123.

PERSON INTERESTED IN THE ESTATE,
In re Buckhantz' Estate, 260 P.2d 794, 798, 120 A.C.A. 121.

POSSESSION,
People v. Brickman, 259 P.2d 917, 923, 119 A.C.A. 319.
PROBABLE,
People v. Erminger, 259 P.2d 492, 494, 119 A.C.A. 683.
RELIEVE FROM DUTY,
Lorenson v. City of Los Angeles, 260 P.2d 49, 54, 41 A.C. 342.
RETRAXIT,
Robinson v. Hiles, 260 P.2d 194, 197, 119 A.C.A. 797.
RIGHT OF WAY,
People, By and Through Department of Public Works v. Thompson, 260 P.2d 658, 661, 120 A.C.A. 209.
SUBSCRIBE,
In re Kossack, D.C.Cal., 113 F.Supp. 884, 888.
SUSPENSION,
Lorenson v. City of Los Angeles, 260 P.2d 49, 54, 41 A.C. 342.
UNDER INFLUENCE OF INTOXICATING LIQUOR,
People v. Haeussler, 260 P.2d 8, 13, 14, 41 A.C. 256.
USURIOUS TRANSACTION,
Hersum v. Latham, 260 P.2d 988, 990, 120 A.C.A. 404.
VERIFIED,
Peters v. City and County of San Francisco, 260 P.2d 55, 59, 41 A.C. 427.
WITHHOLDING TAXES,
Menick v. Hoffman, C.A.Cal., 205 F.2d 365, 368.
WORK OF ART,
Rosenthal v. Stein, C.A.Cal., 205 F.2d 633, 635.

CALIFORNIA REPORTER

259 PACIFIC REPORTER
SECOND SERIES

CALIFORNIA REPORTER

259 PACIFIC REPORTER
SECOND SERIES

41 Cal.2d 249

ATTORNEY GENERAL OF CALIFORNIA v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

S. F. 18820.

Supreme Court of California, in Bank.
July 7, 1953.

Rehearing Denied July 28, 1953.

Proceeding, by attorney general, for writ of mandate to compel Superior Court to proceed with determination of persons entitled to distribution of an estate. The Supreme Court, Spence, J., held that where Superior Court, in exercise of its jurisdiction, denied attorney general's petition on the merits, it could not be compelled by writ of mandate to rehear and redetermine and reverse its ruling; nor could attorney general present his objections by way of mandate, rather than by way of appeal, in absence of showing that legal remedy by appeal would not be speedy and adequate under circumstances.

Alternative writ of mandate discharged; petition for peremptory writ denied.

1. Mandamus ⚷4(4)

Where attorney general petitioned superior court to determine who was entitled to distribution of the estate, but superior court denied motion on ground that attorney general had no standing to petition as heir court could not be compelled by writ of mandate to rehear and redetermine and reverse its ruling; nor was attorney general entitled to present his objections by way of mandate, rather than by way of appeal, in absence of showing that legal remedy by appeal would not be speedy and adequate under circumstances. Code Civ. Proc. § 1086; Probate Code, §§ 1080, 1240.

2. Descent and Distribution ⚷71(7)

In probate proceeding where attorney general petitioned superior court to determine who was entitled to distribution of the estate, order denying petition on ground that attorney general had no standing to petition as an heir, was in effect the refusal to make an order, within the express language of Probate Code provision to effect that an appeal may be taken from an order refusing to make any order determining heirship or persons to whom distribution should be made. Probate Code, § 1240.

◆

Edmund G. Brown, Atty. Gen., and W. R. Augustine and Wayne D. Hudson, Dep. Attys. Gen., for petitioner.

No appearance for respondents.

Robert E. Hatch, San Francisco, for real party in interest.

SPENCE, Justice.

Petitioner seeks a writ of mandate to compel the respondent court to proceed with the determination of the persons entitled to distribution of an estate. The record, however, does not justify the issuance of the writ, which is available only "where there is not a plain, speedy, and adequate remedy, in the ordinary course of law." Code Civ. Proc. sec. 1086.

The estate of Ethel C. Quinn is in the process of probate pursuant to the terms of her holographic will. As here material, certain money was left "in trust" to the testatrix' husband and another, and "at their deaths * * * to charity." Both legatees predeceased the testatrix. Thereby, according to the attorney general as petitioner herein, when the will came into effect a charitable trust was established, with the corpus thereof a resource of this state and subject to his protection as representing the public. The attorney general therefore intercepted the probate proceedings by petitioning the court, under section 1080 of the Probate Code, to determine who are entitled to distribution of the estate. The matter came on for hearing and in the course thereof, one of the heirs challenged the jurisdiction of the court. Thereafter the court by minute order ruled: "Petition of Attorney General to determine interest denied under section 1080, Probate Code; the Attorney General has no standing to petition as an Heir." The attorney general then brought this mandamus proceeding to compel the respondent court to resume its hearing on his petition "for the determination of interest in the estate." Since the record does not present a factual basis for the intervention of mandamus, the merits of the attorney general's position as to the will's establishment of a valid, enforceable charitable trust and his status as a proper claimant under the mentioned code section will not be considered.

[1] The record shows that a hearing was had on the heirship petition and thereafter the order of denial was made declaring that the attorney general had no standing as an heir to make such petition. The court did not base its denial upon an assumed lack of power to adjudicate the heirship issue, so that there was a refusal to act and an undisposed of matter awaiting decision, cf. Lissner v. Superior Court, 23 Cal.2d 711, 715–716, 146 P.2d 232, but rather the denial indicates that the court, in the exercise of its jurisdiction, entertained the petition and made disposition thereof on the merits. Now the attorney general seeks to compel the court "to rehear and redetermine and reverse its ruling on a question of law in a cause it *has* heard and determined", which purposes are not the function of the writ of mandate. Lincoln v. Superior Court, 22 Cal.2d 304, 314, 139 P.2d 13, 19.

[2] Petitioner's medium for presenting his objections to the adverse order lies in an appeal. Insofar as here pertinent, section 1240 of the Probate Code provides: "An appeal may be taken * * * from an order * * * determining heirship or the persons to whom distribution should be made or trust property should pass; * * * [or] refusing to make any order heretofore mentioned in this section; * * *." As a final determination of the heirship petition, the order of denial here was in effect the refusal to make an order within the express language of the code section. Lincoln v. Superior Court, supra, 22 Cal.2d 304, 315, 139 P.2d 13. There is nothing in the record which would indicate that the legal remedy by appeal would not be speedy and adequate under the circumstances. Phelan v. Superior Court, 35 Cal.2d 363, 366, 217 P.2d 951.

The alternative writ of mandate is discharged and the petition for a peremptory writ is denied.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR and SCHAUER, JJ., concur.

41 Cal.2d 265

YORBA et al. v. ANAHEIM UNION WATER CO. et al.

L. A. 22300.

Supreme Court of California, in Bank.

July 14, 1953.

Rehearing Denied Aug. 6, 1953.

Action by landowners against water and irrigation companies to establish priority of plaintiffs' riparian rights over any water rights of defendants in river and to establish a servitude in canal. The Superior Court, Orange County, adjudicated plaintiffs' riparian rights, prescriptive rights of defendant water company in canal and to water diverted from river, and rights of irrigation company to use a portion of such water, and plaintiffs appealed. The Supreme Court, Traynor, J., held that defendant water company had established a superior prescriptive right against all plaintiffs to divert one-half of normal surface flow of river and that question of which of plaintiffs' lands still enjoyed riparian rights should not be determined as between plaintiffs themselves in such action.

Judgment reversed in part and in all other respects, affirmed.

Prior opinion, see 252 P.2d 334.

1. Easements 🔑7(5)

Limitation of Actions 🔑105(1)

The filing of an action, either by person asserting a prescriptive right or by person against whom the statute of limitations is running, will ordinarily interrupt the running of the prescriptive period and the statute will be tolled while such action is actively pending, but an action that has been dismissed or abandoned does not interrupt the running of the prescriptive period.

2. Waters and Water Courses 🔑138

Where owners of land riparian to river, instead of securing a final adjudication on merits of their riparian rights in action by water company to quiet title to one-half of water of river and enjoin diversion of water to which company claimed it was entitled, abandoned the action and acquiesced in preliminary injunction enjoining them from interfering with diversion of water by water company on condition that company deliver 200 miner's inches from its canal into ditch of irrigation company, filing of such action and entry of injunction did not interrupt the running of prescriptive period against riparian owners and in favor of water and irrigation companies Code Civ.Proc. § 356.

3. Waters and Water Courses 🔑152(8)

In action to establish priority of riparian rights of landowners over any prescriptive rights claimed by water and irrigation companies to divert water of river, evidence that defendants did whatever was reasonably possible to conserve the water supply sustained finding that water diverted by defendants had been applied to beneficial use without waste.

4. Waters and Water Courses 🔑154(1)

Any servitude in canal in favor of grantors, created by provision in deeds conveying right of way for canal that grantors should have same privileges as stockholders in obtaining water, was extinguished by running of statutory period of limitations after water company, which had acquired canal and easements therefor by prescription and not by virtue of any conveyance from grantee, asserted rights in canal adversely to grantors in action against them to quiet title to one-half of water of river and enjoin diversion thereof.

5. Waters and Water Courses 🔑152(10)

In action by landowners against water and irrigation companies to establish priority of plaintiffs' riparian rights over any water rights of defendants in river, wherein defendants established a superior prescriptive right against all plaintiffs to divert one-half of normal surface flow of river, the question of which of plaintiffs' lands still enjoyed riparian rights was immaterial for purposes of such action and should not be determined as between plaintiffs themselves in such action in which plaintiffs did not take adversary positions. Const. art. 14, § 3.

◆

Harry M. Irwin, Los Angeles, Forgy, Reinhaus & Forgy and Fred Forgy, Santa Ana, for appellants.

H. C. Head, R. C. Mize, Santa Ana, Cosgrove, Cramer, Diether & Rindge, T. B. Cosgrove, Los Angeles, Head, Jacobs & Corfman and H. C. Head, Santa Ana, for respondents.

TRAYNOR, Justice.

Plaintiffs are the owners of twenty-one parcels of land located on the north side of the Santa Ana river in Orange County. In 1874 this land was all riparian to the river and consisted of the Prudencio Yorba, Vicente Yorba, and William McKey allotments of the Rancho Canon de Santa Ana. These allotments were contiguous and each abutted on the river. They were brought under the common ownership of Prudencio Yorba by 1879, and since that date plaintiffs have succeeded to his interest. Approximately five miles upstream to the east of the easterly border of plaintiffs' land is the intake of defendant Anaheim Union Water Company's Cajon canal. This canal runs in a generally westerly direction on the north side of the river and carries the river water across plaintiffs' land for use on land lying downstream and to the west thereof. Approximately a mile and a half upstream to the east of plaintiffs' land on the south side of the river is the intake of the Santa Ana Valley Irrigation Company canal. Water diverted into this canal is used on land lying to the south of the river. At the present time the Anaheim company divides the normal surface flow of the river into two equal parts and diverts half of it into its Cajon canal. The remaining half is diverted by the Santa Ana company before it reaches plaintiffs' land. From the Cajon canal, the Anaheim company delivers one hundred miner's inches of water for use on land lying upstream from plaintiffs' land, two hundred inches to defendant Yorba Irrigation Company for use on land lying downstream from plaintiffs' land, and it supplies the remainder of the flow to its stockholders for use on their land lying downstream from plaintiffs' land. Various of the plaintiffs or their predecessors in interest tapped the canal with pipes at seven locations and use the water taken through these pipes on their land.

In 1949 plaintiffs filed this action against the Anaheim Union Water Company and the Yorba Irrigation Company. In their first cause of action they alleged that their land was riparian to the river, and they sought to establish the priority of their riparian rights over any water rights defendants might claim in the river. By their second cause of action they sought to establish a servitude in the Cajon canal. They alleged that they were entitled to the free use of water from the canal for watering stock and for domestic purposes and to the privileges of stockholders in the Anaheim company in obtaining water for other purposes. This claim was based on conditions contained in deeds, executed in 1876, by which plaintiffs' predecessors in interest granted an easement to the Canon de Santa Ana Water Company for the construction of the Cajon canal.

The trial court found that certain parcels of plaintiffs' land were riparian and that others had lost their riparian rights either by conveyances of water rights or by severance of contiguity with the river. It further found that defendants' predecessors in interest had acquired the Cajon canal and easements therefor across plaintiffs' land by prescription and not by virtue of any conveyance from the Canon de Santa Ana Water Company, and that, prior to 1903, the Anaheim company had acquired by prescription the right to divert one half of the normal surface flow of the Santa Ana river into the Cajon canal and carry such water across plaintiffs' land, subject to the right of certain upstream owners to receive 100 miner's inches and the right of the Yorba company to receive 200 miner's inches. It also found, however, that certain of the plaintiffs had acquired by prescription the right to divert water from the canal through the seven pipes hereinabove mentioned. Judgment was entered accordingly, and plaintiffs appeal.

Plaintiffs contend that there is no evidence to support the finding that the full prescriptive period had run against them prior to 1903. Defendant Anaheim Union Water Company was organized in 1884 and succeeded to the rights of various smaller water companies that had been diverting water from the north bank of the Santa Ana river. It did not, however, succeed to the water rights of the irrigators who were diverting water by means of the Yorba ditch. These irrigators later conveyed their water rights to defendant Yorba Irrigation Company, and their land, which is now supplied by the Yorba company, lies downstream from plaintiffs' land. In 1885 the Anaheim company brought an action against plaintiffs' predecessors in interest and the Yorba irrigators to quiet title to one half of the water of the river less 125 miner's inches, and to enjoin the defendants from diverting water to which the Anaheim company claimed it was entitled. It alleged that it owned various ditches and canals, including the Cajon canal, and that the defendants were interfering with its rights by diverting as much as 400 inches of water. The defendants answered and denied that the Anaheim company was the owner of the Cajon canal or the water rights claimed and alleged their own prescriptive rights to continue diverting water from the river. Although both the predecessors in interest of the plaintiffs in the present action and the Yorba irrigators were named as defendants in the 1885 action, it appears that the primary purpose of that action was to establish the respective rights of the Anaheim company and the Yorba irrigators to the half of the flow of the river being diverted on the north side. Thus in 1891 a preliminary injunction was entered in that action whereby the defendants were enjoined from interfering with the Anaheim company's diversion on condition that the Anaheim company deliver 200 miner's inches from the Cajon canal into the Yorba ditch. In 1903 the place of delivery of the water specified in the injunction was changed by agreement of the parties, but in all other respects the preliminary injunction was left in effect. The Anaheim company and the Yorba irrigators and their successor, defendant Yorba Irrigation Company, were satisfied with this division of water, and it is still in effect. No further proceedings have been taken in the 1885 action, and it is still pending.

[1] It is clear that if the diversion and division of waters formalized in the 1891 preliminary injunction had been effected solely by adverse use without the intervention of legal action, and if the water diverted had been devoted to beneficial use, defendants in this action would have perfected their prescriptive rights against plaintiffs before 1903, as the trial court found. Plaintiffs contend, however, that there is no evidence that the Anaheim company had diverted half of the normal flow of the river before the 1885 action was filed and that the filing of that action stopped the running of the prescriptive period against them. It is true that ordinarily the filing of an action, either by the person asserting a prescriptive right, or by the person against whom the statute of limitations is running, will interrupt the running of the prescriptive period, and the statute will be tolled while the action is actively pending. Knoke v. Swan, 2 Cal.2d 630, 632, 42 P.2d 1019, 97 A.L.R. 841; Estate of Richards, 154 Cal. 478, 488, 98 P. 528; Alta Land etc. Co. v. Hancock, 85 Cal. 219, 228, 24 P. 645; Spotts v. Hanley, 85 Cal. 155, 170, 24 P. 738; Newman v. Bank of California, 80 Cal. 368, 373, 22 P. 261, 5 L.R.A. 467. On the other hand, however, an action that has been dismissed or abandoned does not interrupt the running of the prescriptive period. Langford v. Poppe, 56 Cal. 73, 76–77; Breon v. Robrecht, 118 Cal. 469, 470, 50 P. 689, 51 P. 33; Dong Chun Len v. Luke Kow Lee, 7 Cal.App.2d 194, 196, 45 P.2d 827; Gibbs v. Lester, Tex.Com.App., 41 S.W.2d 28, 32, 80 A.L.R. 431; Thompson v. Ratcliff, Ky., 245 S.W.2d 592, 594; see, anno., 80 A.L.R. 439.

[2] The facts of the present case bring it within the foregoing rule. Under the pleadings in the 1885 action plaintiffs' predecessors in interest could have secured a final adjudication on the merits of their riparian rights in the river and thereby have prevented defendants from acquiring any new prescriptive rights after that action was filed. Newman v. Bank of California, supra, 80 Cal. 368, 373, 22 P. 261; Spotts v. Hanley, supra, 85 Cal. 155, 170, 24 P. 738; Breon v. Robrecht, supra, 118 Cal. 469, 470, 50 P. 689, 51 P. 33. They did not do so, however, but instead abandoned the action and acquiesced in an arrangement whereby the Anaheim company and the Yorba irrigators secured half of the normal surface flow of the river to their exclusion. The preliminary injunction did not, as plaintiffs contend, toll the statute by preventing their predecessors in interest from asserting their rights. See Code Civ. Proc. § 356; Elliott & Horne v. Chambers Land Co., 61 Cal.App. 310, 312, 215 P. 99. Although the injunction prevented them from physically interfering with the Anaheim company's diversion, it did not prevent them from establishing their rights by legal action.

[3] Plaintiffs contend that there is no evidence that the water diverted by defendants has been applied to beneficial use without waste. There is evidence, however, that the water has been used for irrigation and that the supply is frequently short. In more recent years it has been necessary to augment the water diverted from the river by pumping from wells. Plaintiffs rely on a statement made in a report of the state engineer published in 1888 that the Anaheim company's works "are not economical of the supply." Read in context, however, the engineer's statement does not indicate that water was being wasted. His report stated that "The supply of water for this district [supplied by the Anaheim company]

is short. As to the actual facts with respect to volumes, those, as far as known, will be found in the special chapter on water-supply, to follow. The works are not economical of the supply. A perfected system would probably greatly relieve the district from embarrassment on this score. The problem is not a simple one. Just what should be done for economy's sake and to insure best results is a point not to be quickly or lightly determined." The report also pointed out the difficulty of preventing loss of water through seepage into porous soil. There is evidence that the Anaheim company was endeavoring to conserve the water supply. The intake of the Cajon canal was located well upstream to prevent loss of water in the sandy bottom of the lower river. It may be inferred that the Anaheim company and the Yorba irrigators were able to prevent the loss of a considerable quantity of water in the river bed by arranging to have the Anaheim company deliver water to the Yorba ditch from the Cajon canal instead of releasing it into the river bed so that the Yorba irrigators could divert it down stream. The trial court could reasonably conclude that defendants did whatever was reasonably possible to conserve the water supply and thus applied the water to beneficial use without waste.

[4] In 1876 plaintiffs' predecessors in interest deeded the right of way for the Cajon canal to the Canon de Santa Ana Water Company. The deeds contained a provision that the grantors should "have the same privileges as full stockholders in obtaining water," and should "be supplied with the same at the lowest rate at which water is furnished," and should "have free of cost all water necessary for domestic purposes and for watering stock at convenient places on the said canal." Plaintiffs contend that this provision created a servitude in their favor in the canal. Although the predecessor in interest of the Anaheim company acquired the right of way by prescription and not by conveyance from the Canon de Santa Ana Water Company, plaintiffs contend that the right of way was not acquired adversely to their servitude. It is unnecessary to decide whether the provision in the deeds was sufficient to create a servitude in the canal in favor of the grantors that would be binding on successors in interest of the grantee. In the 1885 action the Anaheim company asserted its rights in the Cajon canal against plaintiffs' predecessors in interest. The answer denied that the Anaheim company owned the canal. Accordingly, the trial court could reasonably conclude that the Anaheim company asserted rights in the canal adversely, not only to the Canon de Santa Ana Water Company, but to plaintiffs' predecessors in interest as well. Thus the aleged servitude, if it existed at all, was extinguished by the running of the statutory period after 1885.

[5] Plaintiffs contend that the trial court erred in finding that certain parcels of their land no longer have riparian rights in the river. If plaintiffs had been successful in establishing the priority of riparian rights over defendants' appropriative rights, the findings with respect to which parcels still enjoy riparian rights would be material in determining how much of the water plaintiffs could reasonably use on their riparian lands. See, Cal.Const., Art. XIV, § 3. Since, however, defendants have established a superior prescriptive right against all of the plaintiffs to divert half of the normal surface flow of the river into the Cajon canal, the question of which of plaintiffs' lands still enjoy riparian rights is immaterial for the purposes of this action. This question might become important, however, between plaintiffs themselves with respect to the subsurface flow of the river that is not diverted by the Anaheim company and the Santa Ana Valley Irrigation Company. It might also become important if either of those companies stopped or reduced their present diversions, which together absorb the entire normal surface flow of the river. Since, however, the question is no longer material in this action, and since its determination might raise serious problems of res judicata in the event of future litigation among plaintiffs themselves, it is inappropriate that it should be determined in an action in which they have not taken adversary positions. For the same reasons no determination should be made of the question whether certain of the plaintiffs are or are not the owners of the

fee of the railroad right of way crossing their lands.

Accordingly, to the extent that the judgment determines that certain of plaintiffs' lands are not riparian to the river, and to the extent that it determines that certain plaintiffs are not the owners of the railroad right of way, it is reversed. In all other respects the judgment is affirmed. Defendants are to recover costs on this appeal.

GIBSON, C. J., and SHENK, CARTER, SCHAUER and SPENCE, JJ., concur.

---

41 Cal.2d 273

COVIELLO v. STATE BAR.

L. A. 22621.

Supreme Court of California, in Bank.
July 14, 1953.

Rehearing Denied Aug. 6, 1953.

Disciplinary proceedings against an attorney. The Board of Governors of the State Bar, after deleting a finding of local committee, approved the findings and recommendations of the local committee. On petition of the attorney, the Supreme Court held that evidence warranted finding against attorney.

Attorney suspended from practice of law for 30 days.

1. Attorney and Client 🔑49

Joinder of two unrelated counts in proceedings before local committee on charges against an attorney did not invalidate proceedings when the charges were separately stated, separate findings made, and when there was nothing to indicate that attorney was prejudiced because the two charges were heard together.

2. Attorney and Client 🔑53(2)

Evidence in disciplinary proceedings against an attorney supported finding that pursuant to an agreement with client in compensation case the attorney had accepted additional compensation over that allowed by commission for representing client with respect to her claim. Labor Code, § 4906.

3. Attorney and Client 🔑38
Workmen's Compensation 🔑1981

Provision of Labor Code that no charge claim, or agreement for legal services or disbursements for attorney's fees in industrial accident cases is enforceable, valid, or binding in excess of a reasonable amount, and that commission may determine what constitutes reasonable amount, has purpose of protecting claimants before commission from exaction of excessive fees, and it constitutes professional misconduct for an attorney to secure or attempt to secure fees in excess of those allowed by commission. Labor Code, § 4906.

4. Attorney and Client 🔑46

State Bar was not precluded from bringing disciplinary proceedings against attorney because of acceptance by him of fees in compensation case in excess of those allowed by commission by fact that client had agreed to pay a greater amount, thereby inducing attorney to refrain from seeking an increased award from the commission. Labor Code, § 4906.

5. Attorney and Client 🔑53(2)

Evidence in disciplinary proceedings against an attorney was insufficient to warrant finding of misconduct on part of attorney in attempting to secure larger fee for probating estate than he had agreed to accept originally, when additional fee was sought for bona fide reasons of misrepresentation by client of value of estate, and performance by attorney of unanticipated services.

6. Attorney and Client 🔑42

Where attorney who had agreed with client that certain amount would be fee for probating estate thereafter informed client by letter that because of greater value of estate than was originally represented, and unanticipated services, he would claim the statutory fees, attorney was entitled to assume that when client signed petition for fees and distribution she had agreed to his proposed modification of original contract, and attorney was not guilty of an attempt to mislead probate court by failing to inform it of the original contract.

John C. Miles, Los Angeles, for petitioner.

Samuel L. Kurland, Los Angeles, and Jerold E. Weil, San Francisco, for respondent.

PER CURIAM.

Petitioner was charged in two counts with violations of his oath and duties as an attorney and counselor at law, Bus. & Prof. Code §§ 6103, 6067, 6068, and with the commission of acts involving moral turpitude and dishonesty. Bus. & Prof.Code § 6106.

Count one. The local committee found that petitioner accepted professional employment from Mrs. Wiedmer with respect to a claim before the Industrial Accident commission approved a compromise whereby Mrs. Wiedmer agreed to settle her claim for $765. From this amount the commission awarded petitioner a fee of $75. Petitioner received a check for $690, payable to Mrs. Wiedmer, representing the amount due her under the settlement. At petitioner's request she endorsed this check to him, and pursuant to an agreement with her, petitioner retained $170 as an additional fee over that allowed by the commission. The committee concluded that this conduct constituted a violation of sections 4903 and 4906 of the Labor Code.

Count two. The local committee found that petitioner made a written agreement with Mrs. Hughes to probate her husband's estate for $150. He later claimed that the estate was of greater value than Mrs. Hughes had represented to him and that he had been required to perform additional services not contemplated when the agreement was made. He informed Mrs. Hughes that he intended to charge additional fees and prepared and filed a petition for distribution in which he asked for the statutory fee of $550. In the petition he alleged that $150 had been paid on account. He did not inform the probate court of the written agreement, and he made no effort to have it modified or rescinded or cancelled in any respect.

The local committee also found that there were extenuating circumstances, but it did not feel that they excused or justified petitioner's conduct. It recommended that petitioner be suspended for three months. The Board of Governors of the State Bar corrected a clerical error in one of the findings and deleted the finding with respect to extenuating circumstances. In all other respects it adopted the findings and recommendations of the local committee.

[1] Petitioner contends that it was improper to join two unrelated counts and that he was prejudiced by confusion of issues before the local committee. The charges were separately stated, however, and separate findings were made on each count. Petitioner made no objection to the procedure before the local committee, and there is nothing that indicates that he was prejudiced because the two charges were heard together.

Petitioner contends that he should have been permitted to present additional evidence before the board or have been allowed a hearing de novo. The affidavits in support of his motion before the board were admitted in evidence by stipulation, however, and petitioner did not allege he had any other material evidence to present. See Rule 39.1 of the Rules of Procedure of the State Bar of California.

[2] Petitioner contends that the evidence does not support the findings and conclusions of the board. With respect to count one he contends that the additional payment was voluntarily made to him for past services performed for Mrs. Wiedmer and not as additional compensation for representing her before the Industrial Accident Commission. The testimony with respect to the understanding reached between petitioner and Mrs. Wiedmer is conflicting and confusing. Petitioner testified himself, however, that he had pointed out to Mrs. Wiedmer that she had tentatively agreed to the extra payment "for past services and for my taking care of the case." He then asked her if she was satisfied that that was their agreement and if she was satisfied with it. She said that it was fine. It thus appears that the evidence supports the finding that pursuant to an agreement with Mrs. Wiedmer petitioner accepted additional compensation over that allowed by the commission for representing her with respect to her claim.

[3] Section 4906 of the Labor Code provides that "No charge, claim, or agreement

for the legal services or disbursements mentioned in subdivision (a) of section 4903 [providing for attorney's fees in industrial accident cases] * * * is enforceable, valid, or binding in excess of a reasonable amount. The commission may determine what constitutes such reasonable amount." The obvious purpose of this section is to protect claimants before the commission from the exaction of excessive fees, and it constitutes professional misconduct for an attorney to secure or attempt to secure fees in excess of those allowed by the commission. Goldstone v. State Bar, 214 Cal. 490, 497, 6 P.2d 513, 80 A.L.R. 701; Barbee v. State Bar, 213 Cal. 296, 299–300, 2 P.2d 353.

[4] Petitioner contends that Mrs. Wiedmer should be estopped to complain of his fee on the ground that the amount allowed by the commission was inadequate, and that by agreeing to pay more, she induced him to refrain from seeking an increased award from the commission. The question presented here, however, is not whether petitioner actually received more for his services before the commission than he might have been awarded had he sought a rehearing, or whether aside from the provisions of the Labor Code he charged an excessive fee. As noted above, the commission was given jurisdiction to determine attorney's fees for the protection of claimants before it. Petitioner does not contend that he was unfamiliar with the provisions of section 4906 of the Labor Code, and to permit him to contend that the State Bar is estopped to bring disciplinary proceedings because his client entered into an invalid agreement with him would defeat the purpose of the statute.

[5] With respect to the second count, it is the position of the board that petitioner employed improper means in attempting to secure a larger fee for the probating of Mr. Hughes' estate than he agreed to accept originally, and that he misled the probate court by failing to disclose to it the existence of the written contract. We have concluded that the evidence does not establish any misconduct in this respect. Petitioner testified that he agreed to handle the probate of the estate on the assumption that it consisted of one piece of real property worth approximately $8,000. Thereafter he learned that the property was worth $14,000. He also testified that he was required to file an amended petition for probate because Mrs. Hughes had failed to inform him of the existence of other heirs, and to prepare an affidavit for inheritance tax purposes because Mrs. Hughes had gone to her husband's safety deposit box without the inheritance tax appraiser. After he made the agreement he also learned of other property that had been held in joint tenancy by Mrs. Hughes and her husband, and he did some work in connection therewith. Before the estate was closed, petitioner wrote Mrs. Hughes a letter and enclosed a petition for fees and distribution for her to sign as executrix. In the letter he pointed out to her that the estate was worth more than he had understood it to be when he agreed to probate it for $150 and that he had been required to do a great deal of extra work. He stated in the letter that "I am willing to accept the fees fixed by Court on inventory filed, and waive my fees for services in connection with the joint tenancy property, in order to close this estate for you." The petition for fees and distribution, which was later signed by Mrs. Hughes, asked for statutory fees and stated that $150 had been paid on account. Mrs. Hughes testified that she paid no attention to the request for fees when she signed the petition because she was relying on her written agreement and petitioner had never told her he desired any change in it. The amount of the statutory fees, $550, was not set out in the petition. Petitioner testified, however, that before Mrs. Hughes signed the petition they discussed the question of fees and that she was aware of the amount of the statutory fees and expressed no dissatisfaction.

[6] It is clear that petitioner had bona fide grounds for requesting additional fees for probating the estate. His testimony that Mrs. Hughes misrepresented the value of the property to him is substantiated by the fact that she signed the petition for probate, which stated that the estate was worth less than $10,000. Petitioner was also required to perform some unanticipated services. Under these circumstances he was justified in seeking a modification of the

original agreement. He clearly stated his position to Mrs. Hughes in the letter he wrote her. He asked only for the statutory fees. Whether or not Mrs. Hughes read the letter and understood what it meant, petitioner was entitled to assume that when she signed the petition for fees and distribution she had agreed to his proposed modification of their original contract. Under these circumstances it cannot be said that he sought to mislead the probate court by failing to inform it of the original contract. The fact that the parties had originally agreed to less than the statutory fees would have been of no interest to the court unless that agreement was still in effect. Petitioner had every reason to believe, however, that the agreement was not still in effect and that Mrs. Hughes had agreed to its modification. In the light of her apparent acquiescence no purpose would have been served by burdening the court with a review of the past arrangements between the parties.

In arriving at its recommendation of a suspension of three months, the Board of Governors relied upon Count Two, which is not supported by the evidence. In view of the fact that petitioner has had no prior disciplinary record, see, Clark v. State Bar, 39 Cal.2d 161, 174, 246 P.2d 1, we have concluded that he will be sufficiently punished if he is suspended from the practice of law for 30 days.

It is ordered that A. P. Coviello be suspended from the practice of law for a period of 30 days commencing 30 days after the filing of this opinion.

---

119 Cal.App.2d 338

PEOPLE v. GIAMBONE.

Cr. 4943.

District Court of Appeal, Second District,
Division 3, California.

July 23, 1953.

Defendant was convicted of two offenses of soliciting for a prostitute and living and deriving support and maintenance from earnings of prostitution. The Superior Court of Los Angeles County, Edwin L. Jefferson, J., entered order denying motion for a new trial, and defendant appealed. The District Court of Appeal, Shinn, P. J., held that evidence sustained conviction of living and deriving support and maintenance from the earnings of prostitution.

Order affirmed.

1. Prostitution 🔑4

Prosecution need not prove that earnings of prostitution were expended for support and maintenance of accused in order to establish that accused lived and derived support and maintenance from earnings of prostitution in violation of statute. Gen.Laws, Act 1907, § 1 et seq.

2. Prostitution 🔑2

That accused had a sufficient income from other sources is not a defense to charge that he lived and derived support and maintenance from earnings of prostitution in violation of statute. Gen.Laws, Act 1907, § 1 et seq.

3. Prostitution 🔑4

Evidence sustained conviction of offense of living and deriving support and maintenance from earnings of prostitution. Gen.Laws, Act 1907, § 1 et seq.

4. Criminal Law 🔑1177

Any error in finding accused guilty on both counts of information charging two offenses of living and deriving support and maintenance from earnings of prostitution based on receipt of money from same prostitute on two occasions separated in time by only four days was not prejudicial to accused, where trial court directed that imprisonment on each count and terms of probation run concurrently. Gen.Laws, Act 1907, § 1 et seq.

Zeman & Hertzberg, Leland E. Zeman, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

This is an appeal from an order denying a motion for a new trial following two convictions in a nonjury trial of violations of Act 1907, Deering's General Laws, Volume 1, page 856, in that on April 4, 1952 and on April 8, 1952, knowing one "Jennie" to be a prostitute, defendant did solicit and receive compensation for soliciting for said prostitute and lived and derived support and maintenance in whole or in part from the earnings and proceeds of the prostitution. Defendant's motion for new trial was denied and he was placed on probation upon the condition, among others, that he serve 6 months in the county jail. He gave notice of appeal from the order denying his motion for a new trial.

The statute creates separate offenses, namely, soliciting for a prostitute, and living and deriving support and maintenance from the earnings of prostitution. The information, in each count, charged the offenses in the conjunctive. The soliciting feature is not discussed in the briefs. The sole question argued is whether there was sufficient evidence that defendant lived and derived support and maintenance from the earnings of prostitution.

There was evidence of the following facts: Officers installed a microphone in an apartment over which they heard defendant call "Bonnie" (evidently an abbreviation of "Jennie's" middle name), and ask her to come to the apartment; the girl came as directed, was given a telephone number by defendant, called the number and arranged an assignation with a man; defendant called a cab for her which took her to the arranged destination; presently she returned, exhibited $50 as the proceeds of her visit and divided the same equally with defendant. On this occasion the girl admitted she had received $15 for another "trick" and, upon demand of defendant, divided it with him. Four days later defendant telephoned the girl again, she came to the apartment as directed, received a telephone number from defendant, called the number and arranged another assignation. In the meantime defendant telephoned one Lou Delgado to come over, saying the girl was going to do a trick for $50 and he, defendant, would get $25. Delgado appeared and he, defendant and the girl left together. The girl kept her appointment. Defendant and Delgado returned to the apartment; the girl later returned and when questioned by defendant as to how much she had received produced $50 and was then heard to say: "Sal, do not grab." The girl testified that she was 18 years of age, that on her first appointment she received $75 of which she gave defendant $25. Defendant had expected her to get as much as $100 and accused her of cheating him. Between the first and second occasions defendant was heard to tell the girl that he had a book of names valued at $2,000, which he offered to sell to her for $50 as he was "busted" and in need of money. He told the officers the book had been given to him to be given to some prostitute.

Defendant did not deny the occurrences testified to by the officers. He claimed to have previously paid $50 to a doctor for medical treatment of the girl and that the money he received from her was merely reimbursement. It was stipulated that a named doctor would testify that he had treated the girl in the previous year and that his bill of $50 was paid by the defendant. Defendant says it was not proved that he received the money for his support or maintenance, in whole or in part, and that having advanced money for the girl its return was a legitimate business transaction. The girl testified that there was no arrangement for her to pay defendant the amount of the doctor's bill and that she did not understand she was paying him, although she admitted having received the treatments.

[1–3] In order to establish that the accused lived and derived support and maintenance from the earnings of prostitution it is not necessary for the prosecution to prove that the money was expended for that purpose. People v. Navarro, 60 Cal. App. 180, 212 P. 403. It is not a defense that the accused had a sufficient income from other sources, People v. Coronado, 90 Cal.App.2d 762, 766–767, 203 P.2d 862, where it was said that opulent violators of the statute are certainly more odious than impecunious ones. However, when defendant was arrested he had on his person only $25.67 and admitted to the officers that $25 of the amount had been received from the girl. He had also been heard to state that he was "busted" and in need of money, and for that reason was willing to sell a book of some one hundred names and telephone numbers for $50, when he considered it to be worth $2,000. Although, as defendant says, the officers listened in on their microphone for a week and overheard but two money transactions between defendant and the girl, we cannot agree with the contention of defendant that this was insufficient to justify an inference that defendant received the money for his partial support and maintenance. That he was in need of money for the necessities of life appeared from his own statement, if, indeed, such an inference was not reasonably to be drawn from the fact that he was engaged in the nefarious business described. Although he took the stand he did not testify that he was employed or had any means of livelihood other than half of the money the girl received from customers which he supplied. From the undisputed evidence and defendant's admissions he appeared to be a person who was living in whole or in part on the earnings of a prostitute.

[4] While the point is not mentioned it may be questioned whether defendant was shown to be guilty of two offenses of living off the earnings of a prostitute, which is the only offense mentioned in the briefs. However this may be, no prejudice could result since in its order the court directed that the imprisonment on each count and the terms of probation run concurrently. People v. Dallas, 42 Cal.App.2d 596, 604, 109 P.2d 409; People v. Winthrop, 88 Cal. App. 591, 597, 264 P. 263; People v. Anderson, 75 Cal.App. 365, 371, 242 P. 906; People v. Sharp, 58 Cal.App. 637, 639, 209 P. 266.

The order is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

---

119 Cal.App.2d 138

WILLIAMS et al. v. McCLELLAN et al.

Civ. 4588.

District Court of Appeal, Fourth District, California.

July 9, 1953.

Rehearing Denied Aug. 3, 1953.

Hearing Denied Sept. 4, 1953.

Action by individual taxpayers of purported city to enjoin members of city council from incorporating purported city as city of sixth class and to contest legality of election authorizing incorporation. The Superior Court of San Diego County, L. N. Turrentine, J., entered judgment sustaining demurrer, and taxpayers appealed. The District Court of Appeal, Mussell, J., held that complaint, wherein taxpayers sought to contest legality of election pertaining to incorporation on ground that conspiracy existed between deputy district attorney, county supervisor, and local newspaper which caused election to be carried for incorporation, but did not allege acts of misconduct, fraud, causes for election contest, nor illegalities in notices of incorporation election or proceedings pursuant to incorporation, failed to state cause of action.

Judgment affirmed.

1. Counties 🔑3

Only such provisions of county charter as are authorized by state constitution supersede state laws in conflict therewith and then only to extent that such provisions are not limited by the constitution.

2. Counties 🔑3

It is not mandatory that a freeholders' charter contain provisions relative to formation of municipal corporation within chartered county in view of fact that powers of such county are set forth in state constitution, and, if such provisions were included, it would be in derogation of express constitutional dictate that creation of municipal corporations shall be provided for by the legislature. Const. art. 11, §§ 6, 7½.

3. Municipal Corporations 🔑6

Community, which had been part of incorporated county under freeholders' charter for almost 20 years, could secede from such union and be incorporated as city of sixth class under General Municipal

Incorporation Law under constitutional and statutory provisions providing for such secession. Government Code, §§ 34300 et seq., 34302; Const. art. 11, §§ 6, 7½.

4. Counties ⚿1

Municipal Corporations ⚿3, 57

Municipal corporations proper are called into existence through direct solicitation, or by free consent, of people composing them, but counties are legal subdivisions of state, created by sovereign power of state, of its own sovereign will, and without particular solicitation, consent, or concurrent action of inhabitants, and, therefore, cities have reserved to them by law certain powers of self-government within areas embraced by them that are not possessed by counties.

5. Municipal Corporations ⚿18

Complaint, wherein city taxpayers sought to contest legality of election pertaining to incorporation of city on ground that conspiracy existed between deputy district attorney, county supervisor, and local newspaper which caused election to be carried for incorporation, but did not allege acts of misconduct, causes for election contest, nor illegalities in notices of incorporation election or proceedings pursuant to incorporation, failed to state cause of action. Government Code, § 34300 et seq.; Elections Code, § 8511.

6. Municipal Corporations ⚿18

Quo Warranto ⚿5

Where city has been incorporated, proper remedy to test incorporation of area as municipal corporation is by quo warranto proceedings, and regularity of incorporation proceedings cannot be questioned in suit by an individual taxpayer.

◆

Clifton Williams in pro. per. for appellants.

T. Bruce Smith, Carlsbad, for respondents.

MUSSELL, Justice.

Plaintiffs seek, by this action filed July 16, 1952, to enjoin the defendants from incorporating "Carlsbad", in San Diego county, as a city of the sixth class. Defendants demurred to the complaint on the grounds that the facts alleged were insufficient to constitute a cause of action against the defendants and that the complaint shows on its face that the plaintiffs have no legal capacity to sue. The demurrer was sustained with time allowed to amend and plaintiffs elected to stand on the complaint as filed. Plaintiffs then appealed from the judgment sustaining the demurrer.

The defendants were elected as members of the city council of the city of Carlsbad pursuant to proceedings under Title 4, Division 2, Part 1, Chapter 1 of the Government Code. On June 24, 1952, an election was conducted by order of the board of supervisors of San Diego county and after completion of the canvass of the ballots, on July 11, 1952, the said board of supervisors determined and declared that the city of Carlsbad was incorporated as a sixth class city and that the defendants herein were the elected members of the city council. On July 15, 1952, a copy of this order of the board of supervisors was received by the Secretary of State and thereafter the incorporation of Carlsbad as a sixth class city was complete.

It is alleged in the first count of the complaint that plaintiffs are taxpayers, owning property in Carlsbad; that the election ordered by the board of supervisors was unlawful because it was ordered without any effort having been made to remove the area sought to be incorporated from the "charter area of said charter of the county of San Diego"; that the defendants are proceeding unlawfully to try to organize a city of the sixth class over said "Carlsbad area of the charter area of San Diego county" although the State Constitution provides that said charter became the organic law of said area on July 1, 1933, and it has remained as such ever since.

Plaintiffs' contentions in this connection are that the incorporation proceedings were void as there was no land available for a city of the sixth class; that San Diego is a chartered county, a municipal corporation, and as such has "complete county home rule" over the land involved; that

Section 34302 of the Government Code is superseded by Section 7½ of Article XI of the State Constitution and that the community of Carlsbad has been a part of a municipal corporation since the adoption of the county charter in 1933 and therefore not subject to incorporation. These contentions are without merit.

Article XI, Section 6, of the State Constitution provides, among other things, that the legislature shall, by general laws, provide for the incorporation, organization and classification, of cities and towns, which laws may be altered, amended or repealed. Section 34302 of the Government Code provides that "Any portion of a county, if such portion contains not less than five hundred inhabitants and is not incorporated as a city, may become incorporated pursuant to this chapter, and when incorporated is a sixth class city." The incorporation proceedings herein were conducted under such direct constitutional and statutory authority which authorizes the incorporation of a portion of a county. The constitution, in Article XI, Section 7½, provides that any county may frame a charter for its own government consistent with and subject to the Constitution. The provisions allowable in such a charter are set forth in this section and there is no inclusion therein of provisions relating to the incorporation of cities within such counties. It is also provided in said section that upon approval by the legislature, such charter shall become the charter of such county and shall become the organic law thereof relative to the matters therein provided, and supersede any existing charter framed under the provisions of this section, and all amendments thereof, and shall supersede all laws inconsistent with such charter relative to the matters provided in such charter.

[1] As was said in Wilkinson v. Lund, 102 Cal.App. 767, 770, 283 P. 385, 386:

> "It requires no argument to show that only such provisions of a county charter as are authorized by the Constitution supersede state laws in conflict therewith and then only to the extent that such provisions are not limited by the Constitution."

This court said in Whelan v. Bailey, 1 Cal.App.2d 334, 336–337, 36 P.2d 709, 710:

> "* * * such charters are authorized and may be framed for the purpose of giving a certain local control over the means of carrying out governmental functions in such counties, with the limitation that anything in the charters, so authorized, shall be consistent with the Constitution and shall relate only to matters authorized by that fundamental law. While a county is thus authorized to provide for a measure of self-government, this authorization must be and is confined to providing for such functions as are properly governmental in their nature and which are consistent with our general scheme of government."

[2] Since the powers of the county are set forth and enumerated in Section 7½ of Article XI of the Constitution, it is not mandatory that a freeholders' charter contain any provisions relative to the formation of a municipal corporation within such chartered county. If such provision were to be included in the charter, it would be in derogation of the express constitutional dictate that the creation of municipal corporations shall be provided for by the state legislature. The charter of the county of San Diego is not before us. However, the statement is made in the respondent's brief, and not denied, that such county charter contains no reference or provision relative to the incorporation of cities therein. Where, as here, the county charter is silent on the matter, the general law controls the procedure to be followed in the incorporation proceedings involved herein. Cline v. Lewis, 175 Cal. 315, 318, 165 P. 915.

[3] Plaintiffs state in their opening brief:

> "The law peak of this case.—The main legal proposition.—is this question.—Can the community of Carlsbad, which has been a part of the corporation of 'County of San Diego' under a freeholders' charter for almost twenty years, secede from that union and be incorporated as a city of the sixth

> class under the general municipal incorporation law without any disentangling effort?"

This question is answered by the stated provisions in the State Constitution authorizing the legislature to provide for the incorporation of cities of the sixth class and by the provisions of the Government Code, Title 4, Division 2, Part 1, Chapter 1. The provisions of the Constitution and statutes provide the method whereby the community of Carlsbad "seceded" and became "disentangled" from the county of San Diego.

[4] Plaintiffs also apparently contend that the county of San Diego, by adopting its freeholders' charter, became a municipal corporation, and as such, the sole repository for all the powers, duties and functions of such a corporation. However, there is a difference between a city and a county as was pointed out in Kahn v. Sutro, 114 Cal. 316, 319, 46 P. 87, 88, 33 L.R.A. 620, where it is said:

> "'Municipal corporations proper are called into existence through the direct solicitation, or by the free consent, of the people who compose them. Counties are legal subdivisions of a state, created by the sovereign power of a state, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them. The former organization is asked for, or at least assented to, by the people it embraces. The latter is superimposed by a sovereign and paramount authority.'"

And in County of San Mateo v. Coburn, 130 Cal. 631, 636, 63 P. 78, 80, 621, it is said:

> "A county is a governmental agency or political subdivision of the state, organized for purposes of exercising some functions of the state government, whereas a municipal corporation is an incorporation of the inhabitants of a specified region for purposes of local government." See, also, Otis v. City of Los Angeles, 52 Cal.App.2d 605, 611, 126 P.2d 954 and Butler v. Compton Junior College District, 77 Cal.App.2d 719, 728, 176 P.2d 417.

It is evident, therefore, that cities have reserved to them by law certain powers of self-government within the areas embraced by them that are not possessed by counties even though a county may have incorporated cities within its boundaries.

[5] In the second count of the complaint plaintiffs are apparently contesting the legality of the election held on June 24, 1952, on the ground that because of a conspiracy between two county officials, namely: Bertram McLees, Deputy District Attorney, and Dean Howell, County Supervisor, and a local newspaper, the election was caused to be carried for incorporation. No acts of misconduct of any of the defendants named herein are therein alleged and no cause of action for fraud is stated. In this connection it may be noted that counsel for plaintiffs in his oral argument before this court, stated: "I will be frank with the court. That fraud count was put in there as a sort of a safety valve." If we assume that plaintiffs are attempting to contest the election in count two of the complaint, they have failed to set forth therein any of the causes for such a contest as provided in Section 8511 of the Elections Code. Furthermore, we find no allegations in either count of the complaint purporting to set forth illegalities or defects in the notices of incorporation election or in the proceedings had pursuant to the said provisions of the Government Code.

[6] Carlsbad was incorporated as a city of the sixth class on July 16, 1953, when the copy of the order of the board of supervisors was received by the Secretary of State and the complaint herein was filed the same day. If the city was then incorporated, the proper remedy to test the incorporation of the area as a municipal corporation was by *quo warranto* proceedings, Beaumont v. Samson, 5 Cal.App. 491, 90 P. 839, and the regularity of the proceedings cannot be questioned in a suit by an individual or taxpayer. VanWagener v. MacFarland, 58 Cal.App. 115, 120, 208 P. 345.

The prayer of plaintiffs' complaint is for injunctive relief to restrain the defendants from performing further administrative or ministerial acts by virtue of the incorporation election. The complaint does not state facts sufficient to constitute a cause of action and the demurrer to both counts thereof was properly sustained.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

119 Cal.App.2d 84

BRADEN et al. v. LEWIS et al.

Civ. 8164.

District Court of Appeal, Third District, California.

July 7, 1953.

In action wherein, inter alia, transferor sought an accounting of sums due under agreement giving him right to portion of profits realized by transferee from sale of property, the Superior Court, Sacramento County, Grover W. Bedeau, J., rendered a judgment from which cross-appeals were taken. The District Court of Appeal, Jones, J. pro tem., held that under agreement giving transferor of corporate shares right to share in profits "of the sale" of corporate assets, the transferor was not entitled to earnings on transferred stock from time of transfer to date of sale of corporate assets.

Affirmed.

1. Account 🔑4

Where property is transferred but an interest is reserved in profits which may be realized from sale or operation of property, fiduciary relationship is created and transferee is bound to account to transferor for amount of profits.

2. Account 🔑1

If plaintiff has cause of action of which court has jurisdiction and it is necessary to have an accounting to determine his rights, it will be done.

3. Account 🔑20(3)

In action wherein transferor sought an accounting of sums due under agreement giving him right to portion of profits realized by transferee from sale of property, fact that transferee might have agreed to pay his attorney a specified sum for his endeavors toward effecting the sale would not be binding and court would be bound to allow as a deduction for that purpose only such sum as to it appeared just and reasonable.

4. Appeal and Error 🔑996

In action wherein transferor sought an accounting of sums due under agreement giving him right to portion of profits realized by transferee from sale of property, where record disclosed facts from which inference that lesser sum than that agreed upon between transferee and his attorney should be allowed for attorney's endeavors toward effecting the sale, a reviewing court could not substitute a different deduction from that arrived at by trial court.

5. Corporations 🔑116

Under agreement giving transferor of corporate shares right to share in profits "of the sale" of corporate assets, transferor was not entitled to earnings on transferred stock from time of transfer to date of sale of corporate assets.

6. Estoppel 🔑92(1)

Transferee could not accept the benefit of a judgment adjudicating title in him and disclaim liability for purchase price for property acquired.

7. Trial 🔑66

It is within discretion of trial court to reopen case at any time before decision to permit further evidence, where it is believed by court that ends of justice will be subserved by so doing.

8. Trial 🔑66

In action wherein transferor sought an accounting of sums due under an agreement giving him right to portion of profits realized by transferee from sale of property, it was not error for trial court to reopen case to permit proof of profits realized from sale.

Brandenburger & White, Sacramento, for Winfred C. Braden and another.

Wallace S. Myers, San Anselmo, for George W. Lewis, William B. Anater and Laird Medical Bldg., Inc.

JONES, Justice pro tem.

The plaintiffs in this action appealed in the first instance from the whole of the judgment but abandoned this appeal by an amended notice limiting the appeal to that portion of the judgment awarding them $4,353.51 against the defendant and cross-complainant, Lewis. Defendant Lewis appeals from the same portion of the judgment.

In the complaint it is charged that plaintiffs owned 216 shares of the capital stock of the Laird Medical Building, Inc., and that the defendants, Lewis, Anater, and the corporation converted this stock to their own use to the damage of plaintiffs in the sum of $36,000. The defendants have denied this charge, and Lewis individually filed a cross action to quiet title to the stock. Judgment went for him on his cross-complaint, but on their action against him plaintiffs were given a monetary judgment in the amount of $4,353.51. No appeal has been taker from the portion of the judgment quieting Lewis' title to the stock, and that portion of the judgment has now become final.

The Laird Medical Building, Inc., was organized in March, 1946, with an authorized capital of 900 shares of common stock with a par value of $100 per share. This stock was issued, 216 shares to John T. Laird; 216 shares to Frank A. Girard; 216 shares to Winfred C. Braden; 216 shares to George W. Lewis; and 36 shares to William B. Anater. All of the stock was delivered to Lewis, who paid over $90,000 to the corporation. Concurrently, and as part of the transaction, Braden executed and delivered to Lewis his promissory note in the amount of $21,600, this being at the rate of $100 per share for his 216 shares of stock. The note thus given provided that is was not to bear interest and was to be paid out of such sums as Braden would receive from the corporation, other than payments to him for services. It is not questioned that the stock given to Lewis by Braden was to secure the payment of Braden's note.

The $90,000 paid over to the corporation by Lewis was applied on payment for the construction of the Laird Medical Building, and for the purchase of the lot on which it was built. The purchase price of the lot was $12,181.13 and the cost of the building, $104,857.33, making a total expenditure for land and building of $117,038.46. The excess of the total cost over the $90,000 advanced by Lewis was obtained by the corporation by borrowing.

The building consisted of units for doctors and a space for a drugstore. Braden, a pharmacist by profession, was employed by the corporation to operate the drugstore for a period of five years. The drugstore failed to make a profit and in July, 1947, his contract of employment was terminated by mutual consent and he and his brother, one C. C. Braden, were given a lease of the drugstore premises for a term of five years, with an option for renewal for a like term. Upon the execution of the lease Braden endorsed and delivered to the defendant Anater, who was acting for Lewis, the 216 shares of stock and was given in exchange his promissory note for $21,600. In addition, and as a part of the transaction, Anater executed and delivered to Braden an instrument in writing, reading as follows:

> "Dated: July 10, 1947
>
> "Receipt is hereby acknowledged of Stock Certificate No. 2—Laird Medical Bldg. Inc. Covering 216 Shares of Common Stock, owned by Winfred C. Braden or Winona L. Braden.
>
> "By relinquishing ownership in this stock, Winfred C. Braden shall share in the profit or loss *of the sale* of the assets of the Laird Medical Building Inc. at 24%.
>
> William B. Anater"
>
> (Italics added.)

After the trial of the case but before judgment the building was sold and a motion to reopen the case was made by Braden. This motion was granted and a further hearing had. The proof shows that the building brought $127,500 from which costs of sale in the amount of $250 were deducted by the trial court. The cost of the land was established at $12,181.13 and the cost of the building at $104,857.33, making a total of $117,038.46, total cost of land and building. To get at the present value of the building the court deducted the write-offs claimed by the corporation owner in determining its net income. The three years for which depreciation was claimed were taken as the period for computing this deduction. The resultant figure amounted to $6,291.42. The original cost of $117,038.46, less the $6,291.42, claimed as depreciation, resulted in a present value of $110,747.04 for the building and the land. By deducting this figure from the net sales price of $127,250 the trial court determined the profit from the sale to be $16,502.96. 24% of this sum is $3,960.71, which amount the court allowed to Braden. Interest was allowed on this sum from July 10, 1947, at the rate of 7% per annum to date of judgment, which was computed to be $392.80, making the total award to Braden $4,353.51.

[1-4] Throughout the trial each side proceeded upon the theory that the jurisdiction of the trial court was invoked to take an account and determine the net profits resulting from the sale of the corporate property out of which Braden was to receive 24%. It has been held in similar cases that where property is transferred to another and an interest is reserved in profits which may be realized from the sale or operation of the property, a fiduciary relationship is created and the transferee is bound to account to the party from whom the property was received for the amount of the profits. Schaake v. Eagle, etc., Can Co., 135 Cal. 472, 485, 63 P. 1025, 67 P. 759. As the court said in Coward v. Clanton, 122 Cal. 451, 453–454, 55 P. 147, 148, "If plaintiff has a cause of action of which the court has jurisdiction, and it is necessary to have an accounting to determine his rights, it will be done." In accordance with this rule evidence was given of charges and credits which each of the parties contended should be allowed, and the rejection of some of these items is made the basis of their respective appeals. Lewis contends that the court should have deducted an item of $2,500 for attorney fees which he claims was incurred by him as an expense in making the sale in addition to a real estate broker's commission, and that no depreciation should have been allowed in arriving at the present value of the property. The fact that Lewis may have agreed to pay his attorney $2,500 for his endeavors toward effecting a sale does not by any means bind the court in taking an account to find that this amount should be allowed out of the gross proceeds. The court was bound to allow as a deduction for this purpose only that sum which to it appeared just and reasonable under all of the facts and circumstances of the case. And where the record discloses facts from which the inference that a lesser sum than that contended for should be allowed, the reviewing court may not substitute a different deduction from that arrived at by the trial court. Richter v. Walker, 36 Cal.2d 634, 640, 226 P.2d 593; Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183. The finding with respect to the item of depreciation is likewise substantially supported and under the rule stated in the cited cases this finding may not be disturbed on appeal.

[5] Cross-appellants make the contention that notwithstanding the fact that their stock was transferred to Lewis on July 10, 1947, they are entitled to the earnings on the transferred stock to the date of the sale of the building. The agreement does not so provide. By its terms they are entitled to share in the profits realized from the sale of the corporate property and not from its operation. The determination of the trial court to this effect is also conclusive.

[6] Lewis' contention that there are no grounds for a judgment against him is not consistent with the adjudication that he acquired the title to the 216 shares of stock held by Braden. He can not, on the one hand, accept the benefit of a judgment adjudicating title in him, and, on the other, disclaim liability for the purchase price of that which he has acquired. One of the considerations for the transfer of the stock to him was the payment of a share of the profits from the sale of the corporate property under his control. The profits having been properly ascertained by the court upon the accounting, and the funds being in the

hands of Lewis, payment of Braden's share to him was properly enforced by judgment against Lewis.

[7, 8] Nor was it error for the trial court to reopen the case to permit proof of the profits realized from the sale of the corporate property. Dolan v. Carmel Canning Co., 71 Cal.App. 197, 203, 234 P. 926. As it is said in Badover v. Guaranty Trust, etc., Bank, 186 Cal. 775, 778, 200 P. 638, 639: "There can be no qeustion, it seems to us, of the discretionary power of the trial court to permit further evidence in any cause at any time before decision, where it is believed by the court that the ends of justice will be subserved by so doing. * * * To our minds the trial court has this discretionary power in all cases, and so long as the power is exercised with due regard to the adverse party's right to fully present his side of the case there can be no prejudice of which he has the right to complain on appeal." Neither appellant here was denied an opportunity to present all facts material to his case at either of the hearings and there exists no ground for a claim of prejudice to a substantial right. The second hearing simply brought before the court all facts available, to the end that the rights of the parties in the premises could be fully determined and completely and finally set at rest in the one proceeding.

The portion of the judgment appealed from is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

119 Cal.App.2d 1

MARKEY v. DANVILLE WAREHOUSE & LUMBER, Inc., et al.

Civ. 15437.

District Court of Appeal, First District, Division 2, California.

July 3, 1953.

Proceeding to permanently enjoin defendants from operating a cement mixing plant in violation of zoning ordinance. From judgment rendered by Superior Court, Contra Costa County, Benjamin C. Jones, J., granting the injunction, the defendants appealed. The District Court of Appeal, Nourse, P. J., held that evidence supported finding that concrete mixing plant was heavy industrial use of property prohibited by zoning ordinance.

Affirmed.

1. Municipal Corporations ⚷601(18)

In construing zoning ordinance, same rules are normally applicable as in construing statutes in general, and accordingly a zoning ordinance must be construed reasonably, considering objects sought to be attained and general structure of ordinance as a whole.

2. Municipal Corporations ⚷601(20)

The making of ready mixed or transit mixed concrete in its plastic state is "manufacture", involving transformation, that is, the fashioning of raw materials into a change of form for use, and as such is distinct from "commerce", but is included in "industrial" in zoning ordinances.

See publication Words and Phrases, for other judicial constructions and definitions of "Commerce", "Industrial" and "Manufacture".

3. Counties ⚷21½

Ready mixed or transit mixed concrete plant was an industrial plant which could not be maintained in general commercial district created by county zoning ordinance which permitted manufacture or processing of concrete in heavy industrial districts, notwithstanding that part of mixing may have taken place when trucks were in transit.

4. Counties ⚷21½

Premises which had been used for small scale storage of sand and gravel and cement prior to enactment of county zoning ordinance classifying premises as general commercial district and permitting manufacture or processing of cement in heavy industrial districts and continuance of established nonconforming uses could not be industrially used after enactment of ordinance for making ready mixed or transit mixed cement on any theory that prior use was an industrial use which could be continued as a prior nonconforming use.

5. Counties ⚷21½

Issuance of county building inspector's permit for building of concrete mixing plant after inspector obtained favorable opinion of deputy district attorney and approval of county planning commission did not result in creation of any rights to use premises in general commercial district for concrete mixing plant in violation of county zoning ordinance.

6. Nuisance ⚷3(1), 61

Where cement mixing plant was being operated in general commercial district where such use was not permitted, it was not error to hold concrete mixing plant to be a public and private nuisance without evidence of employment of unnecessary and injurious methods of operation since codal provision prohibiting injunctions was only applicable where business was operated in its appropriate zoning district. Code Civ. Proc. § 731a.

7. Nuisance ⚷33, 84

In action to enjoin operation of cement mixing plant, evidence that dirt and grit from cement mixing plant pervaded homes of residents of unincorporated town and that residents were disturbed by loud noises of motors, trucks, falling gravel, pounding with hammers and late operations sustained findings that plant was nuisance to public in general and was nuisance privately to owner of and resident on property contiguous to plant.

◆

Carlson, Collins, Gordon & Bold, Robert Collins, Steven H. Welch, Jr., Richmond, for appellants.

Roscoe D. Jones, John D. Martin, Roscoe D. Jones, Jr., Oakland, for respondent.

NOURSE, Presiding Justice.

This is an appeal from a judgment permanently enjoining defendants from the processing of cement or the preparation, processing, compounding, manufacturing et cetera of ready mix concrete or of any paving or building material or any other product or the erection, operation or maintenance of any building, structure, machinery or equipment for the use in any such activity on certain premises in the unincorporated town of Danville, County of Contra Costa, as violative of the Zoning Ordinance of the County of Contra Costa, as amended, and as a public nuisance and a private nuisance as to the plaintiff and ordering certain defendants, who now appeal, to permanently remove from said premises any such building, structure, machinery or equipment, stated in the injunction in more detail.

The injunction relates to a ready-mix or transit mix concrete plant. The erection of the plant was commenced in the summer of 1948 and the first delivery from it was made in September, 1948. Ownership and operation of the plant have presented some changes and complications but as all persons and companies involved were joined as defendants by stipulation and their distinction is of no importance for this appeal we need not state names and qualities in detail.

The operation of the plant involves the use of nearly four acres of land, bunkers, hoppers, chutes, elevator or conveyor systems with electro motors, a fleet of transit mixing trucks and semi-tractor trucks, and a truck repair shop, all of which is now owned and operated by appellants, the Humphreys, husband and wife, and/or their corporation. Large quantities of sand, aggregates and cement are brought to the plant by truck or railway car and dumped in an underground hopper, from which they are transported to elevated bunkers, the sand and gravel by a conveyor system of endless belts, the cement by an enclosed bucket operation. By means of weighing hoppers the materials are weighed in the proportions required for the manufacture of the concrete to be delivered and through spouts dropped into mixing trucks. With the addition of water the actual mixing takes place in the revolving drum of the mixing truck when this truck has been or is being loaded. The mixing process requires only some minutes of revolving although further agitation may be required to keep the concrete plastic. Part of the mixing takes place during the driving on the premises. The mixing trucks are parked, cleaned and repaired on the premises.

On February 17, 1947, the Board of Supervisors of the County of Contra Costa adopted a Zoning Ordinance for the unincorporated area of said county, which ordinance took effect 30 days thereafter and thus was in effect when the concrete plant was erected. Under this ordinance and its later amendments the premises here involved are classified as "General Commercial". Section 4, subdivision D of the ordinance permits the following uses of property so classified: "Subsection 1. All of the uses permitted in single family residential districts, multiple family residential districts, retail business districts, transition residential agricultural districts, forestry recreation districts, together with such uses as are permitted by the provisions of this ordinance after the granting of land use permits for the special uses authorized to be granted in any of the said districts.

"Subsection 2. All types of wholesale business, warehouses, railroads, railroad terminals and stations and freight houses, and automobile and air freight terminals.

* * * * * *

"Land use permits for the special uses enumerated in subsection 1 of this subdivision * * * may be granted after application therefor in accordance with the provisions of this ordinance."

None of the uses permitted in the districts enumerated in subsection 1, either with or without a land use permit includes the manufacture or processing of concrete. The manufacture or processing of cement, one of the component materials of concrete, is mentioned in section 4, subdivision J, subsection 2 of the ordinance as an example of a use permitted in a Heavy Industrial District. The trial court found that the operation of the concrete mixing plant was a heavy industrial use of the property, prohibited by the Zoning Ordinance.

Section 5 provides in part that any use of any land, building or structure contrary to the provisions of the ordinance is a public nuisance, to be abated in an action instituted on order of the Board of Supervisors, in addition to other available remedies.

Section 8 of the ordinance permits the continuation of a lawful use existing at the time the ordinance becomes effective though not conforming to the provisions of the ordinance. At the time the ordinance became effective the business conducted on the premises was a wholesale business in hay, grain, feed, lumber and other building materials. Sand, gravel and cement were kept and stored at ground level in small quantities. No mixing of concrete for delivery took place on the premises. If mixing was required a hand mixer was sent to the site of the job. The trial court found that the cement mixing operations complained of were completely different from the small scale storage of materials carried on when the Zoning Ordinance went into effect and that prior to that time the property had never been subjected to any light or heavy industrial use.

[1-4] The main contention of appellants, who do not attack the validity of any provision of the ordinance, is that the above findings are not supported by the evidence because no manufacture of concrete takes place at the new plant, but only the warehousing and selling of cement, aggregate and sand, permitted in Section 4, subd. D, subs. 2, supra, whereas the mixing, which constitutes the manufacture of concrete takes place in the trucks in transit. The contention is without merit.

In construing a zoning ordinance the same rules are normally applicable as in construing statutes in general, City of Yuba City v. Cherniavsky, 117 Cal.App. 568, 571, 4 P.2d 299, and accordingly a zoning ordinance must be construed reasonably considering the objects sought to be attained and the general structure of the ordinance as a whole, Yokley Zoning Law and Practice, p. 318; Petros v. Superintendent and Inspector of Buildings, 306 Mass. 368, 28 N.E.2d 233, 235, 128 A.L.R. 1210. The Contra Costa ordinance distinguishes light and heavy industrial use from general commercial use. It does not permit industrial use in a general commercial district, except that land use permits may be granted for lumber yards, cabinet shops and sheet metal shops (Section 4, subd. D, subs. 1 together with subd. C, subs. 2). The making of ready mixed or transit mixed concrete in its plastic state is manufacture, Commonwealth v. McCrady-Rodgers Co., 316 Pa. 155, 174 A. 395, 396, involving transformation—the fashioning of raw materials into a change of form for use—and as such is distinct from commerce, Kidd v. Pearson, 128 U.S. 1, 20, 9 S.Ct. 6, 32 L.Ed. 346, but included in "industrial" in zoning ordinances. Murdock v. City of Norwood, Ohio Com.Pl., 67 N.E.2d 867, 869. There was in this case expert evidence that in the general vicinity here involved concrete mixing plants are normally classified in zoning ordinances as belonging in light or heavy industrial areas and that also when the component materials of the concrete are delivered into mixing trucks the plant should be classified as an industrial concrete mixing plant because it makes dust and noise like any other concrete mixing plant. In construing the ordinance in a reasonable and purposeful manner the trial court could hold that the whole process of elevating the materials, weighing and combining them in mixing trucks in the correct proportions and mixing them by means of said trucks constituted one integrated industrial manufacturing process and gave the plant an industrial character not permitted by the ordinance in a general commercial district although part of the mixing may have taken place when the trucks were in transit. The court was fully informed as to the factual character of the particular plant not only by the testimony of several witnesses but also by personal examination made and used as evidence by stipulation of the parties. His decision as to the character of the plant and its position under the ordinance will not be disturbed by us.

[5] As against the trial court's decision appellants urge the following facts: In November, 1947, their predecessor applied for a land use permit for the sand and cement bunkers used in the present plant together with a land use permit for a lumber storage building on adjacent land zoned for retail business use; because the County Planning Commission felt that for storage buildings and bunkers in a commercial district a permit was not required this part was eliminated from the application and a land use permit granted by the Board of Supervisors as to the lumber storage building in the retail business district only. Thereafter building permits were granted by the County Building Inspector for the building of the concrete mixing plant after he had obtained a favorable opinion of a Deputy District Attorney and approval of the County Planning Commission.

Appellants fail to show how the above facts can avail them. The ordinance gives the Board of Supervisors power to grant land use permits for enumerated purposes only among which a concrete mixing plant in a general commercial district is not included. The Board has then no power to grant such permit until the ordinance is amended through proper legislative procedure. Johnston v. Board of Supervisors, 31 Cal.2d 66, 74, 187 P.2d 686. Even an express permit granted by the Board contrary to the terms of the ordinance would be of no effect. Johnston v. Board of Supervisors, supra; Magruder v. City of Redwood, 203 Cal. 665, 674–675, 265 P. 806. Not only was there no amendment of the ordinance but the application is without any importance for the matter before us because neither its terms nor the plan accompanying it show in any way the different industrial use intended to be made of the premises. This new use was known when the building permit was granted, but the acts of the administrative and legal functionaries involved can certainly no more influence the force of the ordinance or cause a vested right in appellants or an estoppel than an invalid permit of the Board of Supervisors itself. Lima v. Woodruff, 107 Cal.App. 285, 287, 290 P. 480; In re Application of Ruppe, 80 Cal.App. 629, 637, 252 P. 746; Maguire v. Reardon, 41 Cal.App. 596, 601–602, 183 P. 303; Annotations 119 A.L.R. 1509; 6 A.L.R.2d 960.

[6, 7] Appellants contend that it was error to hold the concrete mixing plant to be a public and a private nuisance without evidence of the employment of unnecessary and injurious methods of operation, relying on section 731a of the Code of Civil Procedure. Section 731a applies only to

eliminate injunctive relief where a business is operated in its appropriate zoning district (in which the use is "expressly permitted") and causes injury and nuisance although operated in a careful and efficient manner. Gelfand v. O'Haver, 33 Cal.2d 218, 220, 200 P.2d 790. As here the appellants are operating an industrial plant in a general commercial district where such use is not permitted, the section has no application. The transcript is replete with evidence as to dust and grit from the plant pervading the homes of the residents of Danville and of loud noises of motors, trucks, falling gravel, pounding with hammers and late operation disturbing them, which fully support, apart from section 5 of the Zoning Ordinance, supra, the findings of a nuisance as to the public in general and as to plaintiff, an owner of and resident on property contiguous to the plant, privately.

The final contention that the operation of the plant is as a matter of law a non-conforming use permitted by section 8 of the ordinance is evidently without merit as an industrial use has taken the place of the mere storage use in existence when the ordinance took effect.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.

---

119 Cal.App.2d 144

JUNEAU SPRUCE CORP. v. INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION et al.

Civ. 15423.

District Court of Appeal, First District, Division 2, California.

July 10, 1953.

Hearing Denied Sept. 4, 1953.

Action on foreign judgment obtained by plaintiff against defendant union in Federal District Court for the Territory of Alaska. The Superior Court in and for the County of Marin, Jordan L. Martinelli, J., entered judgment from which defendant appealed. The District Court of Appeal, Dooling, J., held that action on a money judgment is an action to recover upon a debt or upon a liquidated demand within meaning of statute authorizing entry of summary judgment in actions of that character.

Judgment affirmed.

1. Judgment 🔑180

An action on a money judgment is an action to recover upon a debt or upon a liquidated demand within meaning of statute authorizing entry of summary judgment in such actions. Code Civ.Proc. § 437c.

2. Judgment 🔑180

A judgment for a specific sum of money is to be treated as a debt.

3. Judgment 🔑829(2)

Where judgment entered against union in favor of plaintiff by district court for territory of Alaska had been affirmed by the United States Supreme Court, union could not, in action on judgment, successfully attack jurisdiction of Alaska Court to render its judgment.

4. Appeal and Error 🔑1170(12)

Where plaintiff obtained judgment against union in federal District Court of Alaska, and suit was thereafter brought on judgment in California, entry by California court of its judgment before final affirmance of Alaska judgment, even if erroneous, was without prejudice when Alaska judgment was shortly thereafter affirmed by the United States Supreme Court, since same judgment as that which had been entered by California court would necessarily have followed if court had delayed its action until final affirmance. Code Civ. Proc. § 388; Const. art. 6, § 4½; Labor Management Relations Act of 1947, §§ 301 (b), 303, 29 U.S.C.A. §§ 185(b), 187.

5. Associations 🔑20(2)

Under statute authorizing the bringing of suits against unincorporated associations, suit is not merely permitted against the associates in the name of the association, but the association is, for the purposes of such suit, considered a legal entity distinct from its members. Code Civ.Proc. § 388.

6. Labor Relations ⚷759

Provision of Taft-Hartley Act making union a legal entity for purpose of imposing liability, and California statutory provision making union legal entity for purpose of being sued in state, are complementary, in that California statute provides statutory vehicle for judicial enforcement against union, as a legal entity, of liability which Taft-Hartley Act imposes upon union as a legal entity. Code Civ.Proc. § 388; Labor Management Relations Act of 1947, §§ 301 (b), 303, 29 U.S.C.A. §§ 185(b), 187.

7. Associations ⚷20(2)

Where a statutory liability is created only against an association and not against its individual members, the limitation of individual liability in statute authorizing suits against association becomes unnecessary, but the limitation does not, in any event, affect the liablity of the association to be sued in its common name upon any legal liability which may be incurred by association as such. Code Civ.Proc. § 388; Labor Management Relations Act of 1947, §§ 301(b), 303, 29 U.S.C.A. §§ 185(b) 187.

◆

Gladstein, Andersen & Leonard, San Francisco, for appellant.

Thelen, Marrin, Johnson & Bridges, San Francisco, for respondent.

DOOLING, Justice.

The defendant union appeals from a summary judgment. The action was on a foreign judgment entered against appellant union in the District Court for the Territory of Alaska. The nature of the proceeding is fully disclosed in the opinions of the United States Circuit Court and the Supreme Court of the United States affirming the Alaska judgment. International Longshoremen's, etc. v. Juneau Spruce Corp., 9 Cir., 189 F.2d 177; International L. & W. U. v. Juneau Corp., 342 U.S. 237, 72 S.Ct. 235, 96 L.Ed. 275.

[1, 2] The action was on a money judgment. We cannot agree that an action on a money judgment is not "an action to recover upon a debt or upon a liquidated demand" within the meaning of Code Civ. Proc. sec. 437c, authorizing the entry of summary judgments in actions of that character. A judgment for a specific sum of money has always been treated as a debt by the courts. Miller v. Murphy, 186 Cal. 344, 347, 199 P. 525; Grotheer v. Meyer Rosenberg, Inc., 11 Cal.App.2d 268, 272–273, 53 P.2d 996; Schwartz v. Cal. Claim Service, 52 Cal.App.2d 47, 54, 125 P.2d 883. A judgment for alimony that is subject to future modification stands on a different basis, which explains the holding in Southard v. Southard, 133 Misc. 259, 232 N.Y.S. 391, 392, that an action on a judgment for alimony was not one on "a judgment for a stated sum" within the meaning of the New York summary judgment statute. See MacDonald v. Butler, 68 Cal.App.2d 120, 156 P. 2d 273.

[3] The jurisdiction of the Alaska court to render its judgment is argued by appellant but it can not be successfully attacked in the face of the affirmance of that judgment by the highest court of the land.

[4] The summary judgment was entered on November 20, 1951 and the opinion of the U. S. Supreme Court affirming the Alaska judgment was filed on January 7, 1952. We see no purpose in discussing the interesting question whether a foreign judgment which is treated as final for the purpose of suit in the jurisdiction where rendered even though an appeal is pending, may be the basis of a judgment in the courts of this state before the final decision on appeal. See Taylor v. Shew, 39 Cal. 536; Dowdell v. Carpy, 137 Cal. 333, 70 P. 167. Even if the court was in error in entering its judgment before the final affirmance of the Alaska judgment the error was without prejudice since the same judgment would necessarily have followed if the court had delayed its action for the few weeks intervening between November 20, 1951 and the January 7 following. Const. Art. VI, sec. 4½.

In its closing brief appellant tardily raises a new question. The Alaska judgment was based on the Taft-Hartley Act, 29 U.S.C.A. §§ 185(b), 187, which imposes a liability only on the labor organization as an entity but not on the individual members thereof.

[5] Sec. 388, Code Civ.Proc. which is the authorization for bringing suits against unincorporated associations in California, provides:

> "When two or more persons, associated in any business, transact such business under a common name * * * the associates may be sued by such common name * * * and the judgment in the action shall bind the joint property of all the associates, and the individual property of the party or parties served with process, in the same manner as if all had been named defendants and had been sued upon their joint liability."

From the qualifying language limiting the property which shall be bound by (liable to execution upon) such a judgment appellant argues that suit is authorized by the section against an unincorporated association only when an individual liability exists against its members.

While some jurisdictions hold that a statute permitting suits against unincorporated associations "merely permits an action to be brought against the *associates* in the name of the association * * * (i)n California, the entity theory has been established by a number of decisions." Jardine v. Superior Court, 213 Cal. 301, 309, 2 P.2d 756, 759, 79 A.L.R. 291. Under this theory the association "is, for the purposes of the section, a legal entity distinct from its members". Artana v. San Jose Scavenger Co., 181 Cal. 627, 630, 185 P. 850, 851. That an association is a legal entity for the purpose of being sued under sec. 388 was not questioned in Juneau, etc., Corp. v. Intl. Longshoremen, 37 Cal.2d 760, 235 P.2d 607. The effect of that opinion is that while such an association is a legal entity for the purpose of being sued under sec. 388 "it does not follow that the association may be regarded as an entity for all other purposes." 37 Cal.2d at page 763, 235 P.2d at page 609.

[6] The Taft-Hartley Act makes the union a legal entity for the purpose of imposing the liability which was the basis of the Alaska judgment. Sec. 388 makes the union a legal entity for the purpose of being sued in California. The two statutes in this respect are complementary, and sec. 388 provides a perfect statutory vehicle for the judicial enforcement against the union as a legal entity of a liability which the Taft-Hartley Act imposes upon the union as a legal entity.

[7] Where, as in this case, a statutory liability is created only against the association and not against its individual members it results that the limitation of individual liability in the latter clause of sec. 388 becomes unnecessary; but the limitation of individual liability in that clause of sec. 388 does not affect the liability of the association to be sued "by such common name" upon any legal liability which may be incurred by the association as an association.

The judgment is affirmed.

NOURSE, P. J., and GOODELL, J., concur.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.

---

119 Cal.App.2d 220

SHIRLEY v. COOK.

Civ. 4300.

District Court of Appeal, Fourth District, California.

July 13, 1953

Action for declaration of plaintiff's alleged partnership interest in realty the title to which stood in name of defendant and defendant's wife jointly, for an accounting of partnership operation, and for dissolution and winding up of partnership. The Superior Court of Imperial County, Elmer W. Heald, J., entered interlocutory judgment declaring realty and its income to be partnership property, requiring an accounting, but continuing ultimate question of a final accounting and disposition, and the defendant appealed. The District Court of Appeal, Griffin, J., held that in view of fact that plaintiff did not seek sale or partition of the realty and that no disposition of the realty, according to proportionate interest of each party, was attempted, judgment was not appealable.

Appeal dismissed.

1. Judgment ⚷216

Where, after a decree, anything further in nature of judicial action on part of court is necessary to a final determination of the rights of the parties, such decree is interlocutory. Code Civ.Proc. § 963.

2. Appeal and Error ⚷66

No appeal lies from an interlocutory decree. Code Civ.Proc. § 963.

3. Appeal and Error ⚷80(3)

In action where plaintiff sought declaration of alleged partnership interest in certain realty, an accounting, and winding up of partnership, but where plaintiff did not seek sale or partition of such realty, interlocutory judgment, which declared realty and its income to be partnership property but which continued ultimate question of final accounting and disposition of respective interests in partnership for further order and final judgment, and attempted no disposition of realty, was not appealable. Code Civ.Proc. §§ 752 et seq., 963, subd. 2.

4. Partition ⚷49

In action for declaration that plaintiff had partnership interest in realty to which defendant and defendant's wife had joint title, and for dissolution of partnership, where court entered only interlocutory judgment declaring plaintiff's partnership interest in the realty and ordering accounting, plaintiff, if he were proceeding under theory of partition, or if he desired to dispose of record title of defendant's wife, might amend complaint and bring in proper parties before final judgment. Code Civ. Proc. § 752 et seq.

◆

R. I. French, Brawley, and Ernest R. Utley, Los Angeles, for appellant.

Horton & Knox, El Centro, for respondent.

GRIFFIN, Justice.

Plaintiff and respondent brought this action alleging generally that there was an oral agreement of partnership pursuant to which plaintiff and this appealing defendant conducted general farming operations in Imperial County. The principal conflict revolved around the question of the terms of this oral agreement of partnership and whether or not the real property in question was, pursuant to the oral agreement of partnership, acquired as an asset of the partnership. Plaintiff, in his complaint, alleged that the real property, although paid for by defendant, was acquired by defendant for the partnership. (Title thereto was taken in defendant's name and that of his wife, Eleanor M. Cook, as joint tenants.) The wife was not made a party to this action. The prayer was for an order directing that the books and records of the partnership be made available for the purpose of making an accounting of the partnership operations, for the appointment of a referee for that purpose, and for an "order declaring the interest of the plaintiff in and to the real property hereinbefore described and the rentals received and derived therefrom heretofore and to be derived therefrom hereafter, and for a dissolution and winding up of the said partnership. * * *".

Defendant's answer denies generally the allegations of the complaint, alleges that the general partnership to carry on certain farming operations did exist, and alleged that the real property involved was not partnership property but was, at all times, community property of defendant and his wife.

After trial, the court found generally in favor of plaintiff and that the "said property is an asset of the partnership"; was not the community property of defendant and his wife except as to defendant's interest therein; that plaintiff did not discover title was taken in the names of defendant and his wife until shortly before the commencement of the action; that the income therefrom, after deducting taxes paid by defendant, should be accounted for; that there never has been a complete accounting in connection with the real property but only with the partnership operations; that it is necessary that such an accounting be had; and that defendant be required to furnish such an accounting to the satisfaction of the court. It then provides that the "Court reserves jurisdiction to supervise the making of said final account and to pass upon said final account, and to do all other things necessary to effect a complete termination of the partnership relation and a winding up and distribution of the partnership assets." The interlocutory judgment so recites and reserves jurisdiction to approve and settle such account, to terminate the partnership, and to make such orders as are necessary to carry the judgment into effect.

The ultimate effect of the interlocutory judgment was to declare that the real property and its income was partnership property. No disposition of the real property, according to the proportionate interest of each party, was attempted; no sale or partition was sought by the plaintiff, nor was it ordered in the judgment entered. The ultimate question of a final accounting and disposition of the respective interests in the partnership was continued for a further order and final judgment.

[1–3] No provision is made in Section 963 of the Code of Civil Procedure for an appeal from an interlocutory judgment unless by such interlocutory judgment no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the decree. Where anything further in the nature of judicial action on the part of the court is necessary to a final determination of the rights of the parties, the decree is interlocutory. From such interlocutory decree no appeal lies. See, Bakewell v. Bakewell, 21 Cal.2d 224, 130 P.2d 975. The facts in that case indicating that the decree entered was not an interlocutory decree are much stronger than in the instant case. It was an action to dissolve a partnership. The trial court there found that during the existence of the partnership defendant obtained title to certain property. It ordered a division to be made of the cash and securities, in kind, and the remainder of the assets sold. It decreed plaintiff's right to money due him from the partnership but left the amount thereof to be subsequently determined and to be incorporated in the final judgment. The court there held that in an action to dissolve a partnership a judgment is interlocutory and not appealable even though it directs the division of certain property in kind and the sale of other property, where it does not establish the proportional rights of the partners; where the judgment contemplates a further audit of partnership books to ascertain the amount due; and where it actually contemplates the making of payment of amounts found due upon the entry of a final judgment. To the same effect are Swarthout v. Gentry, 73 Cal.App.2d 847, 167 P.2d 501, and cases cited; and Heck v. Heck Bros., 57 Cal.App.2d 599, 134 P.2d 853. We therefore conclude that the interlocutory judgment here entered was not appealable.

Appellant's only answer to this conclusion is that "The instant partnership dissolution action is essentially to effect *a partition* of the real and personal property of the partnership according to the legal and equitable rights of the parties under respondent's asserted partnership contract" and that "the procedural aspects are governed by section 752 et seq. of the Code of Civil Procedure", and that accordingly the judgment is appealable under section 963, subdivision 2 of the Code of Civil Procedure, which provides that an appeal lies from an interlocutory judgment "in actions for partition as determines the rights and interests of the respective parties and directs partition to be made * * *."

In the instant action the plaintiff does not seek a partition of the real property and the interlocutory judgment did not determine the respective rights and interests of the several parties, nor does it direct partition to be made. Defendant's wife held record title to the property with defendant as a joint tenant. The procedure in partition actions is governed by section 752 et seq. of the Code of Civil Procedure. Therein it is provided that the interests of all parties to the action, known or unknown, must be set forth in the complaint and the rights of the several parties may be put in issue and determined in such action.

In Solomon v. Redona, 52 Cal.App. 300, 198 P. 643, it was held that in a suit for partition it is indispensable that all cotenants who have not united in the complaint be made parties defendant, for if one of the co-owners is not bound by the decree the purpose of the suit fails of accomplishment since no one will then become a tenant in severalty.

[4] If plaintiff is proceeding under this claimed theory or desires to dispose of the record title of defendant's wife in and to the property, proper amendment to the complaint may be sought and the proper parties may be brought in which will allow a complete disposition of all interests involved upon a final judgment to be subsequently rendered.

Appeal dismissed.

BARNARD, P. J., and MUSSELL, J., concur.

---

119 Cal.App.2d 41

BARTHOLOMAE CORP. v. W. B. SCOTT INV. CO. et al.

Civ. 19300.

District Court of Appeal, Second District, Division 1, California.
July 6, 1953.

Rehearing Denied July 20, 1953.

Hearing Denied Sept. 4, 1953.

Controversy between adjacent ranch owners involving claim of respondents to two easements over ranch of plaintiff. The Superior Court of Los Angeles County, Victor R. Hansen, J., entered judgment from which plaintiff appealed. The District Court of Appeal, Doran, J., held that evidence warranted finding that an easement by implication, complementary to the documented easement of respondents, existed in favor of respondents.

Judgment affirmed.

1. New Trial 🔑164

Under provision of Code of Civil Procedure conferring powers upon trial court in ruling on motion for new trial to change or add to the findings, or to modify the judgment, trial court when ruling on motion for new trial in controversy between adjacent ranch owners with respect to alleged easements of respondents over ranch of plaintiff, could modify its original decision by giving to the respondents both easements claimed by them instead of the single easement originally decreed. Code Civ.Proc. § 662.

2. Appeal and Error 🔑991
Easements 🔑15

An easement may, in a proper case, be created by implication, and the question of whether such an easement exists is ordinarily one of fact for the trial court.

3. Easements 🔑15

The purpose of the doctrine permitting the creation of an easement by implication is to give effect to what may be deemed to have been the actual intent of the parties, and consequently the court, when determining whether such an easement exists, will take into consideration the particular situation of the parties and the state of the thing granted. Civ.Code, §§ 1104, 3522.

4. Appeal and Error 🔑1010(1)

Judgment of trial court determining the factual question of whether an easement by implication existed over plaintiff's ranch in favor of respondents would not be disturbed by reviewing court, if it was supported by substantial evidence, even though reviewing court might have arrived at a different conclusion.

5. Easements 🔑36(3)

In controversy between adjacent ranch owners involving claim of respondents to two easements over ranch of plaintiff, wherein it appeared that first easement was shown by documentary evidence, but that second, which was necessary to a complete traversing of plaintiff's ranch was undocumented, evidence warranted finding that the second complementary easement existed by implication.

Mize, Kroese, Larsh & Mize, Santa Ana, by R. C. Mize and Marjorie Mize, Santa Ana, for appellant.

Burr & Smith, Los Angeles, by Philip Grey Smith, Los Angeles, for respondents.

DORAN, Justice.

The present controversy involves certain rights of way referred to as the "Blue Road" and the "Red Road", the legal descriptions of which are long and involved. Appellant, claiming ownership of Diamond Bar Ranch of 7,500 acres in Los Angeles County, seeks to quiet title thereto, alleging possession by itself and predecessors for twenty years, and payment of taxes. Respondents, as owners of the adjoining Tres Hermanos Rancho of 2,500 acres, 812 acres of which lie in Los Angeles County, claim title to the above mentioned easements which provide ingress and egress to and from Tres Hermanos Rancho. Both parties derive title from one W. F. Funderberg.

Diamond Bar Ranch is bounded, in part, on the West, by Brea Canyon Road, a public highway; Tres Hermanos Rancho lies Easterly of Diamond Bar Ranch. The West end of the so-called Blue Road intersects Brea Canyon Road, is approximately 2⅛ miles long and connects with the so-called Red Road, the West end of which is about 1½ miles from Tres Hermanos. There is little controversy concerning the Red Road, respondents having documentary evidence of title to a right of way for road and highway purposes over an 80-foot strip, although as found by the trial court, the original route had been changed "at the place near which plaintiff constructed a dam", in which altered location respondents' rights attached. The main dispute relates to the Blue Road which connects with the Red Road, and according to respondents' claim, was intended to be used as a necessary connecting link with the Red Road. Concerning the Blue Road, there is no direct documentary evidence.

The trial court originally found that appellant's ownership of the Diamond Bar Ranch was subject to the respondents' "right of way for road and highway purposes over all of a strip of land eighty (80) feet wide", referred to as the Red Road, as deeded to respondents' predecessors in title but later altered as hereinbefore mentioned. The respondents were found to have no other interest in or over the Diamond Bar Ranch. Judgment was entered accordingly on August 13, 1951.

Thereafter, respondents made a motion for a new trial and on October 24, 1951 the trial judge in ruling on such motion, ordered "that the Findings and Judgment be modified to show an easement by implication 20 feet wide over the so-called 'Blue' road for access to 'Red' road". The findings were accordingly modified to show that Fundenberg, at the time of conveying the Red Road easement to respondents' predecessors, intended to and did convey by implication, "an easement twenty feet wide for road purposes (the Blue Road) connecting with and running from what is now known as Brea Canyon Road to and connecting with the westerly end of the hereinbefore described eighty-foot right of way (the Red Road) for road purposes and for access to and from the same". The present appeal questions the correctness of this modified decision which, departing from the original judgment, gives to the respondents both the Blue Road and Red Road easements.

[1] As pointed out in respondents' brief, Section 662 of the Code of Civil Procedure confers broad powers upon a trial court in ruling on a motion for a new trial. Under that section the court may "change or add to the findings, modify the judgment, in whole or in part, vacate the judgment, in whole or in part". Appellant's claim that the trial court was without authority to make the modification in the instant case is therefore without merit.

It is appellant's contention that "there is no substantial evidence to support a judgment for an implied easement" over the Blue Road, and "that the evidence refutes such a conclusion". In support of this argument certain exhibits and other evidence are analyzed in a effort to show that the trial court arrived at an erroneous conclusion.

[2, 3] That an easement may, in a proper case, be created by implication, requires no argument. Nor can it be doubted that the existence of such an easement is a question of fact for the trial court. The purpose of this doctrine is obviously to give effect to what may be deemed to have been the actual intent of the parties. "In order to determine the intent," it is stated in Orr v. Kirk, 100 Cal.App.2d 678, 224 P.2d 71, 73, and elsewhere, "the court will take into consideration the circumstances attending the transaction, the particular situation of the parties, and the state of the thing granted. 28 C.J.S., Easements, § 30, page 686."

Civil Code, section 3522, provides that "One who grants a thing is presumed to grant also whatever is essential to its use." And, according to section 1104 of the Civil Code, "A transfer of real property passes all easements attached thereto," unless, of course, such easements are expressly excepted by the terms of the deed, which is not claimed in the instant case.

[4] As noted in respondents' brief, "The pleadings were broad. The evidence taken was extensive and covered the entire transaction with respect to the roads as well as with respect to their use." As evidenced by the voluminous record, the trial court was confronted with a great mass of probative material, direct and circumstantial, presenting a somewhat confused picture. It was incumbent upon the trial court to analyze all this material and from it to arrive at a conclusion which would seem to enforce the actual intent of the parties. Even though a reviewing court might arrive at a different conclusion, the judgment of the trial court must stand if the record discloses substantial evidence in support thereof.

While it is true, as argued by appellants, that certain items of evidence may tend to rebut the idea of an easement by implication, it cannot well be doubted that the record contains very substantial evidence in support of the trial court's findings. The present record merely presents the usual conflict of evidence found in most if not all cases. The weight and credibility of such evidence is a question not for an appellate tribunal but for the trial court.

[5] Viewing the record as a whole rather than placing undue emphasis upon particular items, and considering the same in the light most favorable to the findings made, the following picture emerges. The Bartholomae Oil Corporation, appellant herein, acquired title to the Diamond Bar Ranch from one Frederic E. Lewis, who, in turn, had in 1918 purchased the same from W. F. Fundenberg. The conveyance from Fundenberg was "all subject, however, * * * to existing easements for roads". There is evidence that Lewis stated to Bartholomae that "all I could give him was what I had received with the ranch, and that is all I was selling". Before purchasing, Lewis had looked over the Diamond Bar Ranch, and there is evidence that the roads were in the same location between the years 1918 and 1943.

It appears that the so-called Blue Road connecting with the Red Road had long been in existence and had been used by Tres Hermanos Rancho, its guests and others, since 1916. Not only had these roads been in use during this long period, but the owners of Tres Hermanos during a period of over thirty years had maintained the surface of such roads. According to the testimony both the Blue and Red Roads were clearly visible; there is substantial evidence from which the trial court might conclude that they were component parts constituting a practical "right of way for road purposes" necessary for the proper enjoyment of the Tres Hermanos Rancho.

As noted in respondents' brief, "The original judgment established that the Tres Hermanos did have an easement which ran out of the Tres Hermanos across the hills of sections 14 and 15 and ended abruptly in section 15 in the heart of the Diamond Bar". It is not an unreasonable conclusion that such a dead-end road would be of little if any practical use to the owners of the easement. The modified judgment, however, arrived at after a reconsideration of all the evidence, remedies this defect by finding that a complementary easement by implication exists and must have been intended by the parties authorizing passage over the Blue Road, a connecting link which would enable the Tres Hermanos owners to bridge the otherwise existing gap between the Brea Canyon Road and the Tres Hermanos Rancho. Such a determination is neither unreasonable nor is it without legal and evidentiary support. Appellant's contentions are without merit and no ground for reversal has been presented.

The judgment is affirmed.

WHITE, P. J., and SCOTT, J. pro tem., concur.

---

119 Cal.App.2d 10

In re WIEBOLDT'S ESTATE.

BIRNBAUM v. RONNIGER.

Civ. 15523.

District Court of Appeal, First District, Division 2, California.

July 3, 1953.

Petition by administratrix of deceased's estate for authority to compromise two civil actions brought by the administrator of the estate of deceased's predeceased wife. An appearance was entered by guardian of minor grandchildren of deceased. The Superior Court, City and County of San Francisco, Thomas M. Foley, J., entered an order authorizing the compromises, and the guardian appealed. The District Court of Appeal, Nourse, P. J., held, inter alia, that even if the petition were insufficient for failure to allege that the proposed compromises were advantageous to the estate, where the evidence showed that the compromises were so advantageous and appellant made no claim that they were not, such defect would be disregarded.

Affirmed.

1. Appeal and Error 🔑1039(2)

Technical defects in petition or complaint may be disregarded on appeal when facts proved show no prejudice to appellant, and, therefore, even if petition of administratrix of deceased's estate to compromise two civil actions brought against estate were defective for failure to allege that proposed compromises were advantageous to the estate, where evidence showed that compromises were highly satisfactory to the estate and all parties interested therein, such defect in petition would be disregarded. Probate Code, § 718.5.

2. Appeal and Error 🔑1046(5)

Criticisms of remarks of trial judge relating to matters of procedure are ineffective where record discloses that appellant was given every reasonable consideration in presentation of his opposition.

3. Executors and Administrators 🔑269

The alleged mismanagement of deceased's funeral parlors had nothing to do with proposed compromises of claims against deceased's estate by administrator of estate of deceased's predeceased wife, in view of fact that entire interest in funeral parlors went to deceased's estate, and, therefore, fact that guardian of deceased's grandchildren was not permitted to cross-examine administratrix of deceased's estate to show mismanagement of funeral parlors was not error.

4. Executors and Administrators 🔑269

In proceeding on petition of administratrix of deceased's estate for authority to compromise civil actions brought against the estate, criticisms by guardian of grandchildren of deceased because of administratrix' failure to produce final accounting as guardian of deceased as an incompetent was frivolous.

◆

Abraham Setzer, San Francisco, for appellant.

Gordon W. Mallatratt, Arthur F. Edwards and Howard I. Paulson, San Francisco, for respondent.

NOURSE, Presiding Justice.

The appeal is taken from an order authorizing the administratrix of the Estate of Peter Wieboldt to compromise two civil actions brought by the administrator of the Estate of Tillie Wieboldt, the predeceased wife of Peter. The subject matter of the first action was a piece of real estate and residence transferred by gift deed to Peter by Tillie. The second action sought to impose a community interest in the funeral parlors owned and operated by Peter. At the time set for the hearing of the petition counsel for appellant appeared and was accorded a full and fair hearing. It was shown that the proposed compromise was highly satisfactory to the estate of Peter and to all parties interested therein. The compromise was thereupon approved.

The grounds raised for a reversal are highly technical. First, it is argued that the petition was insufficient under section 718.5 of the Probate Code since it did not allege that the proposed compromise was advantageous to the estate, citing In re Estate of Lucas, 23 Cal.2d 454, 144 P.2d 340. The really pertinent portion of that opinion is the following language, 23 Cal.2d at page 465, 144 P.2d at page 346: "The only prerequisite necessary for the securing of the order of approval, is the requirement that there be some showing by the respondent of the advantage to the estate resulting from the compromise."

[1] The point was here raised on a demurrer to the petition. The court suggested a doubt whether that was proper procedure. However a full hearing was permitted on the facts where it was shown that the proposed compromise was advantageous to the estate and to the minors represented by appellant. Technical defects in a petition or complaint may be disregarded on appeal when the facts proved show no prejudice to the appellant.

[2] Criticisms of remarks of the trial judge relating to matters of procedure are ineffective where the record discloses that appellant was given every reasonable consideration in the presentation of his opposition. This is particularly so where, as here, appellant advanced no claim that the proposed compromise was not advantageous to the estate, and to his clients as well, and makes no claim now that his clients will not benefit substantially by the compromise.

[3, 4] The appellant complains at length that he was not permitted to extensively cross-examine the administratrix of Peter's estate to show the "mismanagement" of the funeral parlors. This had nothing to do with the proposed compromise since the entire interest in the funeral parlors went to Peter's estate. His criticism of her failure to produce a final accounting as guardian of Peter, the incompetent, is likewise frivolous.

On the whole record it appears that appellant was given a full opportunity to present every pertinent fact in opposition to the proposed compromise and that he was not prejudiced by any of the rulings now criticized.

Order affirmed with costs to respondent.

DOOLING, J., and McCOMB, Justice assigned, concur.

---

119 Cal.App.2d 12

In re WIEBOLDT'S ESTATE.

RONNIGER v. BIRNBAUM.

Civ. 15675.

District Court of Appeal, First District,
Division 2, California.

July 3, 1953.

Proceeding involving distribution of assets of testator's estate. The Superior Court, City and County of San Francisco, I. L. Harris, J., entered an order directing distribution from which testator's only surviving daughter appealed. The District Court of Appeal, Nourse, P. J., held that the children of testator's only deceased daughter were entitled to take by right of representation one-half of the lapsed legacy to testator's predeceased wife, and the surviving daughter was entitled to the other half.

Affirmed.

Wills 🔑**552(3)**

Where testator left daughter and two grandchildren by predeceased daughter surviving, daughter took half, and grandchildren, by representation, took other half of lapsed legacy to testator's predeceased wife. Probate Code, §§ 92, 222.

Gordon W. Mallatratt, Arthur F. Edwards and Howard J. Paulson, San Francisco, for appellant.

Abraham Setzer, San Francisco, for respondent.

NOURSE, Presiding Justice.

The appeal is taken from a minute order interpreting a will, overruling objections to the report of the inheritance tax appraiser, and directing distribution of the residue of the estate—one-half to appellant and one-half to the respondent minors, share and share alike.

The testator left a legacy to each of his two daughters of $500. He made his second wife his residuary legatee without designation of a substitute. The wife predeceased him and her legacy accordingly lapsed. Section 92, Probate Code. Mrs. Birnbaum, one of decedent's daughters, also predeceased him leaving two children, the respondents herein.

The only pertinent question raised by the appeal is whether the children of the deceased daughter take by right of representation one-half of the lapsed legacy—the other half going to the surviving daughter. The answer is found in the Probate Code. Section 92 provides: "If a devisee or legatee dies during the lifetime of the testator, the testamentary disposition to him fails, unless an intention appears to substitute another in his place". Section 222 provides: "If the decedent leaves no surviving spouse, but leaves issue, the whole estate goes to such issues; and if all the descendants are in the same degree of kindred to the decedent they share equally, otherwise they take by right of representation."

Sufficient authority for the order under review is found in Re Estate of Heney, 66 Cal.App.2d 867, 869, 153 P.2d 427.

Order affirmed with costs taxed against appellant.

DOOLING, J., and McCOMB, Justice assigned, concur.

---

119 Cal.App.2d 102

SCHWARTZ v. SCHWARTZ et al.

Civ. 19480.

District Court of Appeal, Second District, Division 1, California.

July 8, 1953.

As Modified on Denial of Rehearing Aug. 4, 1953.

Divorce proceeding brought by wife. The husband and wife became reconciled, and wife requested her attorney to dismiss the case. The attorney filed a complaint in intervention for declaratory relief to settle dispute with wife. The Superior Court, Los Angeles County, Roy L. Herndon, J., struck complaint in intervention, and attorney appealed. The District Court of Appeal, Scott, J. pro tem., held that attorney was not entitled to file complaint in intervention for delaratory relief after wife and husband had become reconciled.

Affirmed.

1. Divorce ⚿73

In divorce proceeding, fact that commissioner had approved complaint in intervention which was presented by wife's attorney did not preclude reconciled wife and husband from subsequently moving to strike complaint in intervention. Code Civ.Proc. § 937.

2. Parties ⚿40(2)

The "interest" in matter in litigation to warrant intervention under statute must be direct and not consequential and must be an interest which is proper to be determined in the action in which the intervention is sought and of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment. Code Civ.Proc. § 387.

3. Divorce ⚿73

In divorce proceeding brought by wife, wife's attorney was not entitled to file complaint in intervention for declaratory relief to settle dispute with wife after wife and husband had become reconciled and after wife had requested attorney to dismiss case. Code Civ.Proc. § 387.

Huston T. Carlyle, in pro. per., for appellant.

Hahn, Ross & Saunders, Los Angeles, for respondent, Bernard Schwartz.

Alma Pauline Schwartz, in pro. per.

SCOTT, Justice pro tem.

This is an appeal from the judgment pursuant to order striking appellant's complaint in intervention for declaratory relief.

Plaintiff Alma Pauline Schwartz brought suit against defendant Bernard Schwartz for divorce and for custody of their two children. Appellant is the attorney of record for Mrs. Schwartz. After various legal proceedings and expenditure of time and effort by appellant, the parties to the divorce case became reconciled. Mrs. Schwartz instructed appellant as her attorney to dismiss the case, and told him that she and her husband "will continue to pay you as per court order". Two weeks later appellant prepared his complaint in intervention, naming his own client, Mrs. Schwartz and Mr. Schwartz as defendants, setting out that he had incurred costs and earned fees but had only received $150; that the parties defendant, Mr. and Mrs. Schwartz, had conspired to deprive him of his fees and costs; that he was entitled to additional fees and also because of their fraud and malice that he was entitled to $600 punitive damages. Appellant further alleged on information and belief that "Plaintiff (appellant) has certain property rights in the divorce proceedings herein mentioned insofar as the question of attorney's fees and court costs are therein in issue". After certain other allegations as to financial detriment to himself that he could foresee if the case were dismissed he concludes:

"With this end in view, Plaintiff respectfully suggests to this Honorable Court that an Order be made reserving jurisdiction in the above entitled Court until such time as Plaintiff may obtain a judicial determination of his rights as to the premises and issues herein set forth relative to attorney's fees and court costs earned and accrued by Plaintiff, and for which Defendants may be jointly and sever*ly* liable from the date of filing the Complaint for Divorce in the above entitled and numbered action and including June 18, 1952; and Plaintiff further respectfully suggests that if a dismissal is authorized by this Honorable Court of the aforesaid divorce action, that said dismissal be conditioned upon the fact that Defendants and each of them first pay to Plaintiff such attorney's fees and court costs and punitive damages in the total sum of $1,350.00, or to give adequate security for payment of any such additional fees, court costs and punitive damages, and for such other and further adequate relief as to this Honorable Court may seem just and equitable in the premises."

This proposed complaint in intervention was presented to one of the commissioners of the trial court who approved it for filing. This order by the commissioner doubtless was inadvertently made.

[1] The fact that such approval was given by a commissioner in no way precluded the making by the reconciled couple of a motion to strike the complaint in intervention. Sec. 937 of the Code of Civil Procedure; Alpers v. Bliss, 145 Cal. 565, 572, 79 P. 171. See also: Bryant v. Superior Court, 16 Cal.App.2d 556, 61 P.2d 483; Metropolitan, etc., Co. v. Margulis, 38 Cal.App.2d 711, 102 P.2d 459. We find nothing in the case of Townsend v. Driver, 5 Cal.App. 581, 90 P. 1071, or the other cases cited by him, which in any manner fortifies the position of appellant in resisting the trial court's order striking his complaint in intervention.

[2] At any time before trial, any person who has an interest in the matter in litigation or in the success of either of the parties, or an interest against both, may intervene in the action or proceeding. Sec. 387, Code of Civil Procedure. The interest here referred to must be direct and not consequential, and it must be an interest which is proper to be determined in the action in which the intervention is sought. It must be of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment. Jersey Maid Milk Products Co. v. Brock, 13 Cal.2d 661, 663, 91 P.2d 599.

"* * * the cases are and should be very rare when an attorney is authorized to intervene in an action instituted by him in behalf of his client for the purpose of settling a dispute between him and his client as to his attorney's fee for services rendered in the same action. They should be limited at least to those actions wherein, by virtue of the contract of employment between the attorney and client, the former is given a specific present interest in the subject-matter of the action, which interest might be jeopardized by the client's discharge of his original attorney and the employment of other attorneys to prosecute the action." Kelly v. Smith, 204 Cal. 496, 500, 268 P. 1057, 1059.

[3] Appellant had no right to refuse to follow his client's instruction to dismiss the case and then to assume a position hostile to his own client. Public policy favors the home and normal parenthood and not the disruption and distress which are inherent in the broken home. Nowhere in the record does it appear that appellant seeks to be relieved of his obligation as attorney for Mrs. Schwartz or to have that relationship ended, although Mrs. Schwartz has appeared in propria persona in opposing appellant's complaint in intervention. While still her attorney of record he filed the complaint in intervention and prosecutes this appeal asking not only compensation for work done and repayment for money expended, but *punitive damages*. It is one of the occupational hazards of an attorney, in handling domestic relation matters, that time and attention may be devoted to such a case, that emotional stress may be shared with a client and that when the maximum good is accomplished in the reconciliation of the parties that the attorney may receive a minimum fee. See Kelly v. Gross, Tex.Civ.App., 293 S.W. 325. Nevertheless, the appellant clearly had no right to file his complaint in intervention in this case and the order of the trial court was correct.

Order and judgment pursuant thereto affirmed.

WHITE, P. J., and DORAN, J., concur.

---

119 Cal.App.2d 98

RHODES v. AMOR et al.

Civ. 19429.

District Court of Appeal, Second District, Division 1, California.

July 8, 1953.

Action for personal injuries sustained by plaintiff, who sustained an electric shock and was thrown to ground when, preparatory to removing post, he attempted to cut electric wire leading to post, relying upon defendant's representation that the wire was "dead". The Superior Court, Los Angeles County, J. A. Smith, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Drapeau, J., held that evidence presented issues of fact both as to negligence and contributory negligence.

Affirmed.

1. Negligence ⊂⇒136(9)

Contributory negligence is a question of law only when court is impelled to say that from facts reasonable men can draw but one inference and that that is an inference pointing unerringly to negligence of plaintiff contributing to his injury.

2. Electricity ⊂⇒19(6, 12)

In action for personal injuries sustained by plaintiff, who sustained an electric shock and was thrown to ground when, preparatory to removing post, he attempted to cut electric wire leading to post, relying upon defendant's representation that the wire was "dead", evidence presented issues of fact both as to negligence and contributory negligence.

◆

Hunter & Liljestrom and Wendell Mackay, Los Angeles, for appellant.

Joseph Shane, Los Angeles, Frank Alef, Beverly Hills, of counsel, for respondent.

DRAPEAU, Justice.

On September 6, 1950, defendant Amor was the owner and operator of a restaurant in the City of Los Angeles. Plaintiff was a paving contractor. On that day plaintiff was preparing to pave and surface a driveway and certain portions of defendant's property to the rear of the restaurant. A wooden post obstructed the driveway. From this wooden post electric wires were strung to other posts on a vacant lot adjoining defendant's lot on the south. Light bulbs hung from the wires. Previously defendant had used this vacant lot, which was paved, for customer parking.

Immediately south of the paved lot was a brick building, to the side of which an electric meter and switch box were affixed. Electric wires ran up the side of the building; thence to a metal post on the vacant lot; and from there to the wooden post on defendant's driveway.

Defendant wanted the wooden post removed. Plaintiff testified that "Mr. Amor asked if that post could be removed because it was obstructing his driveway, and I said, 'Yes, it could be removed.' * * * And I noticed the wires leading from the posts and I said, 'What about those wires?' I said, 'We can remove the post but are not electricians and can't handle the matter of the wires.' * * * He said * * * 'I know about the wires. They have been dead for years.' * * * Then I told him that I didn't want to fool with them because they were electric wires * * * He told me, 'Don't worry about them, they are dead.' And he said, 'You can take a look if you will, that they are turned off.' Now, on the back of the lot there was a box, a switch box of some description. We started back to it * * * I stopped when we had gone about 10 feet and said, 'I would not know by looking at it whether it is turned off or on. I will have to take your word for it.' Again he said, 'Well, they are dead all right, you can depend on that.' * * * Then we went back 10 feet or so where we had been, and I said, 'Well, where do you want them cut?'" Mr. Amor indicated where he thought was a good place to cut them and again told plaintiff, "I have been here for quite a long time. I know that they are not live wires. Don't be worried about it."

Defendant testified that when plaintiff asked him whether the wires were dead or alive, he replied, "According to my opinion the wires shall be dead." The witness did not recall the conversations testified to by plaintiff.

Mr. Beltrand, an employee of plaintiff, who was assisting with the paving job, testified that he was present when the two men were discussing the removal of the wooden post. He stated that "they talked about getting the post out"; that plaintiff said, "What about the wires that are up there?" That defendant "told him to go ahead and cut them they didn't have any electricity to them and that they would have been dead. That is what Joe (defendant) said. And I told Frank (plaintiff) not to do it. I told him 'Gee, I wouldn't do it if I was you,' and he said 'Why not? Joe says here that they are dead', and I just told him 'Crap.'

"You know Joe started saying, I heard him say a couple of times that they were dead, he was sure about it, the wires were dead, and so they sent me to get the pliers."

> Plaintiff procured a ladder which was either leaning against the building or was in a truck near by, and with a pair of tin snips furnished by defendant, he climbed up the ladder and proceeded to cut the wires. While doing so, he received a severe electrical shock. As a result, he was thrown to the ground and sustained personal injuries.

By this action, plaintiff sought damages on account of these injuries. From a judgment in his favor of the sum of $7,000, defendant appeals.

Appellant urges that there is no substantial evidence to support the trial court's finding that respondent was not guilty of contributory negligence.

In support of this stand, appellant argues that respondent, a college graduate, testified that he knew as much about electricity as the average man. But that, notwithstanding such knowledge, he neglected to inspect the switch, failed to heed the warning of his employee, and without regard for his own safety proceeded to cut the wires using a metal ladder and an uninsulated pair of snips.

This argument would undoubtedly be persuasive were it not for the fact that respondent was expressly and repeatedly assured by appellant that the wires were dead and that the electric current had been turned off.

> "The effect of the assurance of safety was merely to relieve the plaintiff * * * from the claim of negligence in failing to ascertain for himself the condition of the ladder which, in the absence of an assurance which falsely lulled him into a sense of security, he, as an ordinarily prudent person, would have been under a duty to ascertain." Perry v. D. J. & T. Sullivan, Inc., 219 Cal. 384, 393, 26 P.2d 485, 489.

Appellant also contends that respondent was guilty of contributory negligence as a matter of law, in that he contacted the live wires after being warned to leave them alone.

[1] The so-called warning came from respondent's employee. So far as the record discloses, this man had no knowledge that the wires were alive. He merely said to respondent, "Gee, I wouldn't do it if I was you." Respondent's response clearly shows that he was relying on appellant's assurance to him that the wires were dead.

As stated in Freeman v. Nickerson, 77 Cal.App.2d 40, 49, 174 P.2d 688, 693, quoting from Flores v. Fitzgerald, 204 Cal. 374, 376, 268 P. 369: "' "Contributory negligence is a question of law only when the court is impelled to say that from the facts reasonable men can draw but one inference, and that an inference pointing unerringly to the negligence of the plaintiff contributing to his injury." Reaugh v. Cudahy Packing Co., 189 Cal. 335, 336, 208 P. 125, 128; Smith v. Southern Pacific Co. (201 Cal. 57), 255 P. 500. In all other cases the question of contributory negligence is a question of fact for the jury. Wahlgren Market St. Ry. Co., 132 Cal. 656, 663, 62 P. 308, 64 P. 993; Jansson v. National Steamship Co., 189 Cal. (187), 192, 208 P. 90; Smith v. Southern Pacific Co., supra.' "

And in Flach v. Fikes, 204 Cal. 329, 332, 267 P. 1079, 1080, the court said: "Contributory negligence is an affirmative defense, and it must be pleaded and proven by the defendant. Unless the evidence on the part of the plaintiff shows that the injured party was guilty of contributory negligence, the defendant must show by a preponderance of the evidence that said injured party was guilty of such negligence. * * * This question is one for the determination of the jury or the trial court, and their finding thereon is binding upon an appellate court. Scott v. San Bernardino Valley, etc., Co., 152 Cal. 604, 93 P. 677; Clark v. Bennett, 123 Cal. 275, 277, 55 P. 908; Schneider v. Market Street Ry. Co., 134 Cal. 482, 488, 66 P. 734."

[2] Under the evidence presented, both negligence and contributory negligence were issues of fact for the determination of the trial court. That determination is binding on this court.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

---

119 Cal.App.2d 132

KEELER v. SCHULTE et al.

Civ. 4505.

District Court of Appeal, Fourth District, California.

July 9, 1953.

Hearing Denied Sept. 4, 1953.

Action by treasurer of certain religious corporation in claimed representative capacity for members thereof to set aside deed conveying corporation's realty and to restrain attempted dissolution of corporation. The Superior Court of San Diego County, William A. Glen, J., entered judgment favorable to defendants and entered order granting plaintiff's motion for new trial, and defendants appealed. The District Court of Appeal, Griffin, J., held that where there was evidence that corporation's realty had been sold and charter surrendered to claimed emissaries of religious society of which corporation was member pursuant to authorization given at special meeting which had been called without proper notice, court did not abuse discretion in granting new trial.

Order affirmed.

1. Constitutional Law ⚿319

Due process clause of federal Constitution is applicable to property of a lodge ordered forfeited in the event of a suspension, revocation, or surrender of a charter. U.S.C.A.Const. Amend. 14.

2. Religious Societies ⚿25

Where allegedly contrary to by-laws of certain religious corporation a special meeting was called without proper notice, trustees were authorized at meeting to sell property of corporation and realty was thereafter sold, representative suit on behalf of members to set aside deed and restrain attempted dissolution of corporation was proper. Corporations Code, §§ 3901, 9800.

3. Religious Societies ⚿24

Where allegedly contrary to by-laws of certain religious corporation a special meeting was called without proper notice, trustees were, authorized to sell property of corporation, charter was surrendered to claimed emissaries of leader of society of which corporation was member and realty of corporation was thereafter sold, a sufficient property interest was involved which entitled court to assume jurisdiction, in representative action to set aside deed and restrain attempted dissolution. Corporations Code, §§ 3901, 9800.

4. New Trial ⚿70

The granting of a new trial on ground of insufficiency of evidence rests largely within the broad discretion vested in the court.

5. New Trial ⚿70

In representative action to set aside deed from religious corporation and restrain attempted dissolution of corporation, where there was evidence that contrary to by-laws of corporation special meeting was called without proper notice, trustees were authorized to sell property of corporation, charter was surrendered and corporation's realty was thereafter sold, court, after verdict favorable to defendants, did not abuse discretion in granting new trial on grounds that evidence was insufficient and that decision was contrary to law. Corporations Code, §§ 3901, 9800.

Rinehart, Merriam, Parker & Berg, Pasadena, for appellants.

Johnson & Johnson, San Diego, for respondent.

GRIFFIN, Justice.

Defendants prosecuting this appeal are (1) James A. Long, the present leader of The Theosophical Society, an unincorporated organization; (2) Ruth Schulte, Constance Hostler, Earl Hostler and Ross Simpson, who were and are four of seven members of the Board of Trustees of San Diego Lodge No. 1, American Section of The Theosophical Society, at Covina, California; (3) The Theosophical Endowment Corporation, a nonprofit California corporation; and (4) Kirby Van Mater. The nonappealing defendant is the Hebrew Home for the Aged Association, a corporation, alleged purchaser of the real property here involved.

Plaintiff, treasurer of and in a claimed representative capacity for the members of San Diego Lodge No. 1, American Section of The Theosophical Society, a California corporation, brought this action to set aside a deed of the lodge property and to restrain the attempted dissolution of the lodge. The lodge was originally incorporated about 1932, in the name of Katherine Tingley Lodge No. 1, and about 1945, it changed its name to the name indicated. At the time of the grievances here complained of it had 88 active members. It owned real and personal property valued at approximately $30,000. It adopted its own by-laws which provided generally that the lodge "recognizes the authority of the Constitution of the Theosophical Society (Covina)", "and shall conform with the By Laws of the American Section." They also provided for a board of directors consisting of seven members; that a quorum shall be composed of 20 members of the lodge and that "A special meeting of members may be called at any time by request of President, by a majority of members of

Board of Trustees, or by 10 per cent of members collectively, upon three days' written notice, and such notice specifying the proposed purpose of the meeting." Article IV, Section 2 thereof, provides that "The Board of Trustees shall be the legislative body of the Lodge and shall execute all corporate powers and the business affairs of the organization", and that "A majority vote shall be necessary for decision at such meetings". Article X, Section 1, provides that "The property of San Diego Lodge No. 1 shall be in the hands of the Board of Trustees, who shall have supreme power in this respect and in all legal matters pertaining to the welfare of the lodge"; that the property "now in its possession, of any kind whatsoever, whether real or otherwise, shall remain as such while working under the present Charter", and that "No member of this Lodge shall have any individual right or title to such property". Section 3 then provides that "Should this Lodge at any time be disbanded, or should its Charter be revoked, or should it by any other means go out of existence, its entire property, real, personal and mixed, shall become the property of Theosophical Endowment Corporation". The Constitution of the Theosophical Society, adopted in 1929, provides generally that applications for lodge charters shall be made to it and such lodge charters shall not be effective until signed by the leader; that when such an organization adopts "this constitution" it shall become an integral part of "The Theosophical Society". By it, the leader is given the power to declare the policy and in general to direct the affairs of the society.

It appears from the evidence that one Colonel Conger was, on February 6, 1951, leader of The Theosophical Society. He reputedly died about February 20, 1951. He had been physically handicapped and had been suffering for some time from such condition. About February 6, 1951, two claimed emissaries of his arrived in San Diego about 2 o'clock in the afternoon, called the president and secretary of the lodge on the phone, and informed them that a meeting of the lodge must be held that night at 8 o'clock. About 19 members were thereafter called on the phone about the special meeting. Shortly before 8 o'clock the two emissaries met with the trustees present and delivered a purported oral message from the leader and informed those present that two forces had been causing trouble in the church and that the Leader wanted the lodge dissolved; that the idea was to sell their present building, "get rid of everything * * * and the old scandals", and that this "came as a specific, urgent inquiry of the soul".

Thereafter, at 8 p. m., another meeting, denominated in the minutes a "Special Meeting", was called before the members present. Others attended this meeting who were not members. They were told this same purported message by the emissaries, and that they wanted the business completed that night. It was then moved that the Leader's order be carried out and that a vote of confidence follow. It carried by a rising vote and the meeting adjourned. The charter, minutes, etc. were delivered over to the emissaries. The business books and accounts were retained by plaintiff. Thereafter, the trustees authorized the sale of the real property, furniture, etc. A grant deed of the real property to the defendant Hebrew Home For the Aged Association was executed by the "Theosophical Endowment Corporation", which is a subordinate organization of The Theosophical Society, and the one named in the by-laws as the one entitled to all the lodge's property in the event of surrender of the charter. The consideration was $17,000. An escrow was opened but there was no deed executed by the lodge to the Theosophical Endowment Corporation. The escrow has not been closed.

It is appellants' contention that title thereto passed, ipso facto, under the provisions of the by-laws on the surrender of the charter. Plaintiff's contention is that only 19 members were present and the remainder of the members apparently had no knowledge of the meeting or the purpose for which it was held, and had no opportunity to defend against the accusations of slander and gossip or to participate in the vote; that no notice of a special meeting was given, as required by the corporation's by-laws; that no delegation of power to dissolve the lodge or surrender its charter and dispose of practically all of its assets is contained in the by-laws without proper notice, and that if such by-laws gave such power it was unreasonable, contrary to public policy, not in harmony with the objects of society, and in violation of sections 9800 and 3901 of the Corporations Code, which provide that a corporation may not sell all or substantially all of its assets except under authority of its board of trustees and with the vote or written consent of shareholders. In support of these propositions they cite such cases as Knights of Ku Klux Klan, Inc., v. Francis, 79 Cal.App. 383, 385, 249 P. 539; Grand Grove, etc. v. Garibaldi Grove, 130 Cal. 116, 120, 62 P. 486; and Supreme Lodge etc. v. Los Angeles Lodge No. 386, etc., 177 Cal. 132, 136, 169 P. 1040.

The trial court, in the first instance, signed detailed findings to the effect that although the members of the lodge took no formal action in reference to the sale of the property, under the by-laws the trustees alone had such power, and that its charter had been revoked and surrendered, and concluded that plaintiff, in a representative capacity for such members, was not entitled to any relief. It ordered plaintiff, as treasurer, to pay over to the Theosophical Endowment Corporation $2,377.90 cash remaining in the treasurer's hands. Judgment was entered accordingly.

The court granted plaintiff's motion for new trial on the grounds of insufficiency of the evidence and for the reason that the decision was contrary to the law.

It is appellants' position that the primary plan of plaintiff was to try the title to the office of Leader, and accordingly the court had no jurisdiction so to do, citing Rosicrucian Fellowship v. Rosicrucian Fellowship Non-Sectarian Church, 39 Cal.2d 121, 245 P.2d 481. It is also claimed that the charter of the lodge was voluntarily surrendered by the action of the trustees and that they had plenary authority thus to do; that such surrender only involved a matter of internal policy and administration of The Theosophical Society; that since the evidence would not justify a finding in favor of plaintiff under the evidence, and since there is no conflict in it, the court was not authorized to grant a new trial, citing such cases as Henningsen v. Barnard, 117 Cal.App.2d 352, 255 P.2d 837; Norden v. Hartman, 111 Cal.App.2d 751, 245 P.2d 3, 6; and Sec. 9802, Corporations Code.

[1] While there was some intimation in the testimony that appellant, James A. Long, was not a duly appointed leader of the society at that time, that is not the issue here presented nor is it the determining factor. It appears from the evidence that the lodge owned, in its own name, and enjoyed real property, cash, furnishings, records, and a charter of a value far in excess of that for which it was attempted to be sold. A property right is involved in this action. It is fundamental that under the provisions of the Constitution of the United States Amendment No. 14, no one shall be deprived of property "without due process of law". This provision has been held applicable to the property of a lodge ordered forfeited in the event of a suspension, revocation, or surrender of a charter. Supreme Lodge etc. v. Los Angeles Lodge No. 386, etc., supra; Ellis v. American Federation of Labor, 48 Cal.App.2d 440, 120 P.2d 79; Gallaher v. American Legion, 154 Misc. 281, 277 N.Y.S. 81.

In Rosicrucian Fellowship v. Rosicrucian Fellowship Non-Sectarian Church, supra, it is said (quoting from the syllabus):

> "In a controversy between religious societies as to use of property and exercise of other rights, it is necessary to ascertain from the acts, dealings and usages of the parties where the various rights rest to determine the ownership of civil and property rights, even though some so-called ecclesiastical functions are so interwoven with civil and property rights that any decision involving the latter must necessarily affect the former. * * *
>
> "In an action in the nature of an equitable proceeding, the court may consider the facts as they existed at the time of trial so that the interests of justice may be subserved."

[2–5] Sufficient facts are shown to make this a proper representative suit. Rosicrucian Fellowship v. Rosicrucian Fellowship Non-Sectarian Church, supra. A sufficient property interest is involved which would entitle the courts to assume jurisdiction. Providence Baptist Church of San Francisco v. Superior Court, 40 Cal.2d 55, 251 P.2d 10.

The granting of a new trial on the grounds of insufficiency of the evidence rests within the broad discretion vested in the court and no abuse of the discretion here appears. Grover v. Sharp & Fellows, etc. Co., 66 Cal.App.2d 736, 737, 153 P.2d 83.

Order affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

119 Cal.App.2d 122

HOWARD v. HOWARD.

Civ. 19712.

District Court of Appeal, Second District, Division 2, California.

July 8, 1953.

Rehearing Denied July 24, 1953.

Hearing Denied Sept. 4, 1953.

Divorce proceeding. The trial court granted plaintiff an interlocutory decree of divorce, and plaintiff and defendant appealed from certain portions of the judgment. Thereafter the Superior Court denied plaintiff's motion for order authorizing clerk to file copy of plaintiff's proposed findings of fact and conclusions of law, and plaintiff filed motion in District Court of Appeal for order to augment and correct record to include such proposed findings of fact and conclusions of law. The District Court of Appeal, McComb, J., held that where plaintiff's proposed findings of fact and conclusions of law were never filed in trial court and were not adopted by trial judge, such findings of fact and conclusions of law were not properly part of record in trial court and court was without authority to order them included in record on appeal.

Motion denied.

1. Appeal and Error 🔑659(3)

A motion to augment the record to include matters which were not a proper part of the record in the lower court will not be granted. Rules on Appeal, rule 12 (a).

2. Trial 🔑393(2)

Parties have the right to request the trial judge to adopt certain findings of fact and conclusions of law; however, the trial judge is not bound to adopt such findings and conclusions and he may, instead of adopting them in toto, adopt them in part or disregard them entirely.

3. Trial 🔑393(2)

Findings of fact and conclusions of law are those of the trial court, and proposed findings are merely an aid to the court in preparing its findings of fact and conclusions of law.

4. Appeal and Error 🔑837(1)

Proposed findings of fact and conclusions of law prepared by respective parties prior to signing of findings and used in settlement thereof are of no legal significance after findings are settled, signed and filed, and are of no value as evidence, and cannot be considered in determination of an appeal.

5. Appeal and Error 🔑659(3)

Where plaintiff's proposed findings of fact and conclusions of law were never filed in trial court and were not adopted by trial judge, such findings of fact and conclusions of law were not properly part of record in trial court and District Court of Appeal was without authority to order them included in the record on appeal. Rules on Appeal, rule 12(a).

Edward M. Raskin, Los Angeles, for Judith Kelly Howard.

Neil S. McCarthy and Franklin W. Peck, Los Angeles, for Lindsay Coleman Howard.

McCOMB, Justice.

After the trial of a divorce action plaintiff was granted an interlocutory decree of divorce and plaintiff's attorney was directed by the trial judge to prepare proposed findings of fact and conclusions of law. This was done and the original and a copy thereof was handed to the clerk of the court. Copies were also mailed to defendant's attorneys.

Thereafter, defendant's attorneys prepared proposed findings of fact and conclusions of law, copies of which were mailed to plaintiff's attorneys. The trial judge set May 23, 1952, as the date for the hearing on the findings of fact and conclusions of law proposed by the respective parties. After the hearing, the trial court did not adopt either plaintiff's or defendant's proposed findings of fact in toto, but directed the preparation of another set of findings of fact and conclusions of law which were signed on June 5, 1952.

Appeals were taken by both plaintiff and defendant from certain portions of the judgment of the trial court and plaintiff requested the inclusion in the clerk's transcript on appeal of the findings of fact and conclusions of law which she had proposed and handed to the clerk of the court. Plaintiff was then informed that the clerk had no record of the filing of said proposed findings of fact and conclusions of law and the trial judge informed plaintiff's attorney that they were either lost, misplaced or, most probably, thrown in the waste basket after the hearing on May 25, 1952.

On February 13, 1953, plaintiff made a motion in the superior court for an order authorizing the clerk to file a copy of plaintiff's proposed findings of fact and conclusions of law, which motion was denied.

Plaintiff now makes a motion in this court for an order augmenting the record to include her proposed findings of fact and conclusions of law.*

This is the sole question presented for our determination:

Will this court issue an order to include in the record on appeal proposed findings of fact and conclusions of law which were not filed in the trial court or made a part of the record in the trial court?

No. The following rules are here pertinent:

[1] (1) A motion to augment the record will not be granted to include as part of the record on appeal matters which were not a proper part of the record in the lower court. (Hadges v. Iverson, 95 Cal. App.2d 436, 442[3], 212 P.2d 917; cf. Burns v. Brown, 76 Cal.App.2d 639, 643[2], et seq., 173 P.2d 716; 2 Cal.Jur.2d (1952) Appeal & Error, sec. 419, p. 224.)

[2, 3] (2) Parties have the right to request the trial judge to adopt certain findings of fact and conclusions of law. However, the trial judge is not bound to accept the proffered findings of fact and conclusions of law. He may do so in toto, in part, or disregard such proposed findings and conclusions in their entirety. The findings of fact and conclusions of law are those of the trial court and proposed findings are merely an aid and assistance to the court in preparing *its* findings of fact and conclusions of law. (Cf. Weinstock-Nichols Co. v. Courtney, 26 Cal.App. 445, 446, 147 P. 218; Wheatland Mill Co. v. Pirrie, 89 Cal. 459, 462, 26 P. 964; City of Los Angeles v. Blondeau, 127 Cal.App. 136, 138[2], 15 P.2d 553; Pereira v. Smith, 79 Cal. 232, 233, 21 P. 739.)

[4] Such proposed findings of fact and conclusions of law prepared by the respective parties prior to the signing of

---

* This motion is made pursuant to the provisions of Rule 12(a), Rules on Appeal, 36 Cal.2d 14, which reads as follows:

> "(a) (Augmentation) On suggestion of any party or on its own motion, the reviewing court, on such terms as it deems proper, may order that the original or a copy of a paper, record or exhibit offered at or used on the trial or hearing below and on file in or lodged with the superior court be transmitted to it, or that portions of the oral proceedings be transcribed, certified and transmitted to it, or that an agreed or settled statement of portions of the oral proceedings be prepared and transmitted to it; and when so transmitted they shall be deemed a part of the record on appeal."

the findings and used in the settlement thereof are of no legal significance whatever after the findings are settled, signed and filed, and are of no value as evidence, and cannot be considered in the determination of an appeal. (Murphy v. Sheftel, 119 Cal.App. 467, 468[1], 6 P.2d 549; C. O. Bashaw Co. v. Wood & Stevens, 72 Cal. App. 94, 101[6], 236 P. 346.)

[5] Applying the foregoing rules to the facts in the present case it appears (1) that the proposed findings of fact and conclusions of law were never filed in the trial court. Therefore, they were not a part of the record in the superior court; and (2) since they were merely findings of fact and conclusions of law proposed by a party and not adopted by the trial judge, they were not properly a part of the record in the trial court and therefore this court is without authority to order them included in the record on appeal.

The motion is denied.

MOORE, P. J., and FOX, J., concur.

---

119 Cal.App.2d 65

REAGH et al. v. SAN FRANCISCO UNIFIED SCHOOL DIST.

Civ. 15377.

District Court of Appeal, First District, Division 2, California.

July 7, 1953.

Rehearing Denied Aug. 6, 1953.

Hearing Denied Sept. 4, 1953.

Action against school district by minor high school pupil and another for injuries suffered by pupil from spontaneous explosion of a combination of red phosphorus, which high school chemistry teacher permitted pupil to obtain from locked cabinet in which some school chemistry supplies were kept, and of potassium chlorate and sugar, which pupil alleged teacher impliedly permitted him to obtain from open shelf on which other school chemistry supplies were kept. The Superior Court, in and for the City and County of San Francisco, entered judgment on verdict for school district, and pupil and cosuitor appealed. The District Court of Appeal, Dooling, J., held that the giving of a certain instruction referrable to issue of what was proper standard of care with respect to the storing of potassium chlorate under lock and key or on open shelf, and refusal of requested instruction on same issue, constituted reversible error.

Judgment reversed.

1. Schools and School Districts 🔑122

In action by minor high school pupil against school district for injuries sustained from spontaneous explosion of chemicals, whether high school chemistry instructor, who had permitted pupil to take from locked cabinet a small quantity of red phosphorus to be used in making smoke screen for maneuvers of his military training class, gave implied permission to minor to take potassium chlorate and sugar, which minor obtained from open shelf in classroom while instructor was in adjoining office with back turned, and which, in combination with red phosphorus, exploded, was question for jury.

2. Schools and School Districts 🔑122

In action by minor high school pupil against school district for injuries sustained from spontaneous explosion of a combination of red phosphorus, which chemistry teacher had permitted minor to obtain to make smoke screen for maneuvers of his military training class, and of potassium chlorate and sugar which minor claimed teacher had impliedly permitted him to obtain, minor was not, under circumstances revealed, guilty of contributory negligence as matter of law in mixing such chemicals in clean glass container which he had brought to transport them.

3. Negligence 🔑124(3), 134(1)

In negligence action, evidence of custom in same trade or occupation is admissible for consideration of jury, but it is not conclusive on question of what constitutes ordinary care.

4. Negligence 🔑5

Conformity to the general practice or custom would not excuse a defendant's failure to act unless such conformity was consistent with due care.

5. Schools and School Districts ⚷122

In action against school district by minor high school pupil for injuries suffered from spontaneous explosion of a combination of chemicals which chemistry teacher allegedly expressly or impliedly permitted pupil to obtain from locked cabinet and from open shelves in classroom, where pupil adduced evidence that in private schools in vicinity a chemical which he obtained from shelves was always kept in locked cabinets, and school district adduced evidence that in other high schools under its jurisdiction same chemical was kept on open shelves, the refusal of proposed correct instruction that school district should have kept potassium chlorate under lock and key if person of ordinary prudence would have done so, and the giving of instruction that it was duty of school district to exercise that degree of supervision in connection with use of chemicals which jury found was ordinarily furnished by other similar schools, constituted error.

6. Negligence ⚷5, 124(3)

Evidence of custom is admissible in a negligence action merely as some evidence of the nature of the thing in question, because it indicates what is the influence of the thing on the ordinary person in that same situation; but it is not to be taken as fixing a legal standard for the conduct required by law.

7. Trial ⚷241

Language from opinions, divorced from its context, may not always safely be given as an instruction to a jury.

8. Trial ⚷296(3)

In action against school district by minor high school pupil for injuries suffered from spontaneous explosion of a combination of chemicals which he was allegedly expressly or impliedly permitted by chemistry teacher to obtain from school supplies, where natural conclusion of jury would be that erroneous given instruction referrable to issue whether one of chemicals should have been under lock and key, constituted the measure of "ordinary care" in such a situation, the error in giving instruction was not cured by other general instructions on "ordinary care".

9. Appeal and Error ⚷1064(1)

Rule that judgment will not be reversed on appeal if there is substantial evidence to support verdict on any theory unaffected by error is not applicable to a case in which jury has been precluded by erroneous instructions from considering a valid theory upon which a result different from that actually reached might have been supported, and error in such case is not cancelled by fact that jury might have found for the prevailing party on some other ground.

10. Appeal and Error ⚷1064(1)
Schools and School Districts ⚷122

In action against school district by minor high school pupil for injuries suffered from spontaneous explosion of a combination of chemicals which pupil allegedly was expressly or impliedly permitted by chemistry teacher to obtain from school supplies, the giving of erroneous instruction as to what was proper standard of care with respect to storing one of chemicals either under lock and key or on open shelf constituted error requiring reversal of verdict in favor of school district, notwithstanding that jury could have based verdict on theory that pupil had been contributorily negligent or was guilty of a tortious taking of the chemicals.

Howard Magee, H. William Ott, San Francisco, Charles Reagh, San Francisco, of counsel, for appellants.

Dion R. Holm, City Atty., George E. Baglin, Deputy City Atty., San Francisco, Irving G. Breyer, San Francisco, of counsel, for respondent.

DOOLING, Justice.

Plaintiffs appeal from a judgment for defendant following a jury's verdict.

The minor plaintiff suffered very serious injuries including the loss of his left hand in a spontaneous explosion of chemicals which he had secured in and was carrying from his chemistry classroom in Lowell High School.

The plaintiff at the time of these injuries was a student at Lowell and was just under 16 years of age. He was taking a chemistry course under a teacher named Frances Dealtry and was also enrolled for military training in the R.O.T.C. class in that school.

A day or two before the explosion he had asked Miss Dealtry if she would give him some phosphorus to make a smoke screen during certain maneuvers which the R.O.T.C. class were to engage in over the weekend. Miss Dealtry the day before the explosion gave him a small slice of white phosphorus, which he testified that he told her he could use as a trigger to ignite the red phosphorus, since white phosphorus ignites spontaneously upon exposure to the air. Miss Dealtry at the same time told him that the red phosphorus, which is more inert than the white and will not spontaneously ignite, was in short supply and for that reason she doubted how much of it she could let him have. The minor plaintiff testified, although this part of his testimony was contradicted by Miss Dealtry, that he then asked her in this same conversation if it would be all right to add potassium chlorate and sugar to the red phoshorus to increase the smoke and that Miss Dealtry told him that it would.

The day of the explosion the minor brought a clean glass container to school with him and Miss Dealtry permitted him to take from a locked cabinet a small quantity of red phosphorus, about 100 c.c., which he placed in the container. Following the class the minor remained in the classroom after the other students had left. Miss Dealtry stood with her back to him in an office adjoining the classroom talking to another chemistry teacher, Mr. Barry. The minor went to an open shelf upon which there were bottles of various chemicals including potassium chlorate and sugar and took a small quantity of sugar, about 35 C.C., and a smaller quantity of potassium chlorate, about 15 c.c., and placed them in the container with the red phosphorus. He then said good-bye to Miss Dealtry and left. On his way downstairs the mixture in the container exploded spontaneously causing the injuries which are the basis of suit.

The appellants urge various claimed errors in the giving and refusal of instructions and in the exclusion of certain evidence. Respondent counters with the contentions that it was established as a matter of law that the minor wrongfully and tortiously took the potassium chlorate, which under the authorities is a defense to the action. Frace v. Long Beach, etc., School Dist., 58 Cal.App.2d 566, 137 P.2d 60; Bradley v. Thompson, 65 Cal.App. 226, 223 P. 572; Hale v. Pacific Telephone & Telegraph Co., 42 Cal.App. 55, 183 P. 280; Nicolosi v. Clark, 169 Cal. 746, 147 P. 971, L.R.A.1915F, 638, and that the evidence also shows as a matter of law that the minor was guilty of contributory negligence.

[1] We cannot agree with either contention. Appellants admitted on the trial that no express permission was given the minor to take the potassium chlorate and sugar, but counted upon the conversation between the minor and his teacher about adding potassium chlorate and sugar to the red phosphorus to show an implied permission. The trial court submitted the question of implied permission or not to the jury as one of fact for them to determine from the evidence. The minor was repeatedly examined and cross-examined on this subject and testimony that he had given on the same subject by deposition was also read into the record. It would serve no useful purpose to detail his entire testimony on the subject. Any contradictions or inconsistencies therein were for the jury to weigh. Sufficient appears from the following testimony to permit the jury to conclude that a reasonable person might draw the conclusion from the conversation that he had permission to take potassium chlorate and sugar to add to the red phosphorus and that the minor in good faith did so believe:

"Well, I asked her if I might have some red phosphorus to use for making a smoke screen for the ROTC field maneuvers on Saturday. She said it would be the thing to use but she couldn't give me a final answer as to how much could be spared until the following day—that would be Friday. So, since it was in rather short supply, as she said, I asked her if it would be a good idea to put potassium chlorate and sugar into it in a slow-burning mixture so that I could stretch the phosphorus and not need as much of it. She said she thought it would be all right. * * * I knew that potassium chlorate and sugar would make smoke, but I wanted to make sure that it wouldn't—that the red phosphorus wouldn't react with it some way to cut down on smoking properties. So I asked her that, and she said she thought it would not."

The minor testified that while he did not remember the exact words used by either party in this conversation, "I remember quite clearly what I said and what she said." He related the conversation in several ways but the substance of it was in every instance the same. He further testified:

"I understood that I had permission, but not specific permission.

"Q. You mean from what she said you understood that you had permission to take those other articles * * * other than the phosphorus? A. Yes, sir."

[2] On the question of contributory negligence the respondent points out that the minor had been making gunpowder and similar explosives for a number of years, and that he had used potassium chlorate with other chemicals for the purpose. However the minor testified that none of the compounds which he had previously made had ever exploded spontaneously, and that he did not know that potassium chlorate mixed with sugar or red phosphorus or both would result in a spontaneous explosion. Miss Dealtry had never instructed the class in the danger of combining potassium chlorate with either of these substances although she knew that such combination might explode. Mr. Barry, although a teacher of chemistry, before this explosion did not know that potassium chlorate mixed with the other chemicals might result in a spontaneous explosion. It cannot be said that the mixing of these chemicals by the minor under the circumstances shown establishes that he was guilty of negligence as a matter of law.

[3, 4] Evidence was introduced by appellants that in certain private schools in the vicinity potassium chlorate was not kept on open shelves in the laboratory classroom but was always kept in locked cabinets, and by respondent school district that in other high schools under its jurisdiction potassium chlorate was kept on open shelves. Evidence of custom in the same trade or occupation is admissible for the consideration of the jury but it is not conclusive on the question of what constitutes ordinary care. Conformity to "the general practice or custom would not excuse the defendant's failure unless it was consistent with due care." Sheward v. Virtue, 20 Cal.2d 410, 414, 126 P.2d 345, 347; Polk v. City of Los Angeles, 26 Cal.2d 519, 529, 159 P.2d 931; Neel v. Mannings, Inc., 19 Cal.2d 647, 655, 122 P.2d 576; Irelan-Yuba, etc., Mining Co. v. Pacific Gas & Electric Co., 18 Cal.2d 557, 567, 116 P.2d 611; Mehollin v. Ysuchiyama, 11 Cal.2d 53, 57, 77 P.2d 855.

[5] The court committed error, under this rule, in giving the jury the following instruction:

"It is the duty of school authorities to use ordinary care to supervise the conduct and activities of pupils at all times while on the school premises during the time the school is open for school purposes and to use reasonable care to protect them from injury at all times when danger to pupils should reasonably be anticipated.

"If you find that the defendant, through its teacher, Frances Dealtry, undertook to instruct the plaintiff Theodore Reagh in a course of study in elementary chemistry, which course involved the use of chemicals which were inherently dangerous and hazardous to a person who was not familiar with their use and their characteristics, and if you further find that the plaintiff was not familiar with their use and characteristics and the dangers incidental thereto, it was the duty of the defendant and of the plaintiff's teacher, Frances Dealtry, to exercise that degree of supervision in connection with the use of said chemicals which you find *was ordinarily furnished* to students of the same age, intelligence and experience, *by other similar schools* which carried on the same type of work in the locality." (Emphasis ours.)

Since there was testimony produced by both parties as to the custom or practice:

in certain schools of keeping potassium chlorate locked up (those testified to by appellants' witnesses) and in others of leaving it on open shelves (those testified to by respondent's witness); and since the jury was instructed that the degree of supervision *"which you find* was ordinarily furnished * * * *by other similar schools"* fixed the measure of care to be used by Miss Dealtry we cannot know whether or not the jury found that the practice used in other schools under the jurisdiction of the respondent where potassium chlorate was also left on open shelves was the proper standard to be applied. If they did so find appellants clearly suffered prejudice from the erroneous instruction.

Respondent suggests that the instruction dealt with *supervision* not the *storing of chemicals.* We think that this construction of the instruction is narrower than the facts can justify. Evidence of the practice of other schools in storing potassium chlorate was introduced by both parties. No other instruction dealing in any manner with the practice of other schools was given by the court. We cannot believe that a jury of laymen, however astute in the niceties of language they might be, when they came to consider the evidence with regard to the practice of other schools in the storing of potassium chlorate would not feel themselves bound to follow the only instruction given by the court dealing with the practice followed in other schools.

The error is aggravated in this respect by the refusal of the court to give a correct instruction proposed by appellants dealing with the precise question. That proposed instruction read:

"If you find that a person of ordinary prudence, in the position of the defendant, and its officers, teachers and employees, would have kept the supply of potassium chlorate under lock and key, or would otherwise have controlled the same so as to prevent its being used by a student except under the supervision of a teacher, then you are instructed that it was the duty of the defendant to have observed such precautions."

This is a complete answer to respondent's statement in its supplemental brief, quoting Blanton v. Curry, 20 Cal.2d 793, 804–805, 129 P.2d 1: "If the defendant desired a further instruction to be given, he should have requested it."

Respondent's suggestion that the jury would not consider the practice used in other schools under respondent's jurisdiction in determining what was done in "other similar schools" does not produce conviction. The jury rather than excluding the practice of such schools from its consideration would be more likely to reach the opposite conclusion, that other *public high schools* were most similar to Lowell which is also a *public high school.*

Much argument is devoted to the claim that the erroneous instruction is patterned on language found in Brigham Young University v. Lillywhite, 10 Cir., 118 F.2d 836, 137 A.L.R. 598. This case was relied upon by appellants in the trial court for the proposition that evidence of the practices followed in similar institutions is admissible for the consideration of the jury (the principle for which it in fact stands) and was also cited by appellants in support of a proposed instruction in which the correct standard was stated: "a person of ordinary prudence in the position of defendant." The case was not pressed on the court by appellants for the proposition, for which it does not in fact stand, that the practice in other similar schools establishes the standard of care as a matter of law.

[6] That case in fact announces the correct rule followed in this state and generally in other jurisdictions. The court says of such evidence of custom at page 841 of 118 F.2d:

"It [i. e. evidence of custom] is admissible merely as *some evidence* of the nature of the thing in question because it indicates what is the influence of the thing on the ordinary person in that same situation. *It is not to be taken as fixing a legal standard* for the conduct required by law." (Emphasis ours.)

The court did use this sentence later on the same page: "Therefore, it became the duty of the defendant to furnish instruction and supervision, and that degree of supervision is measured in quality by what an ordinary institution of this type would have furnished under the same or similar circumstances."

The whole tenor of the opinion shows that in the use of this sentence the court did not mean to say that what other similar institutions do establishes the standard of care. It had expressly announced the contrary rule in the same opinion. The words "ordinary institution" were used cryptically or carelessly in the sense of "ordinary careful" or "ordinarily prudent" institution.

We can find no waiver by appellants to urge the error in this instruction from their reliance on the Lillywhite case for the correct principle which it actually announces, and no justification in it (even if we were bound by its careless language, which we are not) for the erroneous instruction given by the court.

[7] Even in the case of California decisions it has frequently been recognized that language from opinions, divorced from its context, may not always safely be given as an instruction to a jury. Jones v. Bayley, 49 Cal.App.2d 647, 654, 122 P.2d 293, and cases cited.

[8] We cannot hold this error to be cured by other general instructions on "ordinary care". The jury was expressly told in this instruction that the standard of care in supervision was measured by "the degree of supervision * * * which you find was ordinarily furnished * * * by other similar schools." The natural conclusion of the jury would be that this was the measure of "ordinary care" in such a situation.

[9] Finally respondent argues that since the jury could have decided the case on other issues not affected by the erroneous instruction, i. e. that the minor was guilty of contributory negligence or a tortious taking we must assume in favor of its verdict that the jury did so, and hence the error must be held without prejudice. Although there seems to be some inconsistency on this question in the California decisions the latest cases in the Supreme Court announce what we are satisfied is the correct rule: That the rule that a judgment will not be reversed on appeal if there is substantial evidence to support the verdict on any theory unaffected by error "is not applicable * * * to a case * * * in which the jury has been precluded by erroneous instructions from considering a valid theory upon which a result different from that actually reached might have been supported. The error in such a case is not cancelled by the fact that the jury might have found for the prevailing party on some other ground." Clement v. State Reclamation Board, 35 Cal.2d 628, 643, 220 P.2d 897, 906; Edwards v. Freeman, 34 Cal.2d 589, 594, 212 P.2d 883; Huebotter v. Follett, 27 Cal.2d 765, 770, 167 P.2d 193; Oettinger v. Stewart, 24 Cal.2d 133, 140, 148 P.2d 19, 156 A.L.R. 1221.

Nunneley v. Edgar Hotel, 36 Cal.2d 493, 225 P.2d 497, is not inconsistent with this rule. There both defendants, wife and husband, the owner and manager of a hotel, were held liable. An erroneous instruction was directed against the wife only as owner. Since the verdict was against both the court could see that the verdict was not affected by the erroneous instruction against the wife only.

[10] This error necessitates a reversal. Other claimed errors need not be discussed since we have concluded either that standing alone they were not prejudicial or that they are not likely to recur on another trial.

Judgment reversed.

GOODELL, J., concurs.

Hearing denied; SHENK, EDMONDS and SCHAUER, JJ., dissenting.

119 Cal.App.2d 231

HART v. GOULD et al.

Civ. 19402.

District Court of Appeal, Second District, Division 3, California.

July 17, 1953.

Hearing Denied Sept. 15, 1953.

Action for a judgment declaring that a provision in will of plaintiff's deceased father devising realty to a county for use as a park was void, and declaring that title to such property was vested in plaintiff as sole heir. The Superior Court of Los Angeles County, Ellsworth Meyer, J., granted defendants' motion for judgment on pleadings and rendered a judgment that plaintiff take nothing and plaintiff appealed. The District Court of Appeal, Parker Wood, J., held that provision of grant executed by Provisional Governor of California, then part of Republic of Mexico, upon which confirmatory patent was subsequently issued by United States, which provision prohibited devise of granted property for mortmain purposes, had been superseded.

Minute order and judgment affirmed.

1. Deeds 🔑155

A "condition subsequent" in deed is a condition by failure or nonperformance of which an estate already vested may be defeated.

See publication Words and Phrases, for other judicial constructions and definitions of "Condition Subsequent".

2. Public Lands 🔑223(1)

Any question as to restraint or restrictions upon use of property in California which was acquired by a party's predecessor in interest prior to conquest of California by United States is to be determined by American law.

3. Counties 🔑104

Provision of grant which was executed by Provisional Governor of California, then part of Republic of Mexico, and which prohibited devise of granted property for mortmain purposes, was superseded by cession of property to United States, and by confirmatory patent of United States to heirs of grantee in Mexican grant, was void under Civil Code of California, and did not preclude a devise of property to county for use as park. Civ.Code, § 711.

Freston & Files, J. R. Files, Eugene D. Williams and Sydney Wetzler, Los Angeles, for appellant.

Spray, Gould & Bowers, Los Angeles, for respondents Thomas C. Gould and William R. McKay, coexecutors.

Harold W. Kennedy, County Counsel, and John B. Anson, Deputy County Counsel, Los Angeles, for respondent Los Angeles County.

PARKER WOOD, Justice.

Plaintiff sought a judgment declaring that a provision in the will of his father, William S. Hart, devising real property to the County of Los Angeles, is void; and declaring that the title to said property is vested in plaintiff as the sole heir. Defendants County of Los Angeles and the coexecutors of the will of William S. Hart answered the complaint and made a motion for judgment on the pleadings. The motion was granted, and the judgment was that plaintiff take nothing. Plaintiff appeals from the minute order granting the motion, and from the judgment.

It is alleged in the complaint as follows: William S. Hart died June 23, 1946. William S. Hart, Jr. is the sole heir of said decedent. The decedent owned various parcels of real property (particularly described) known as the Horseshoe Ranch. All of said parcels were acquired by decedent by virtue of conveyances from various grantors (named in the complaint), whose titles were derived by mesne conveyances from the original owner of said property, Antonio del Valle. Said del Valle acquired said property, in addition to other contiguous real property, pursuant to a certain grant executed by Juan B. Alvarado, Provisional Governor of the Department of California (then part of the Republic of Mexico), which deed is dated January 22, 1839, copy of which is attached to and made a part of the complaint. Said conveyance was executed by virtue of authority of a decree of the Constituent Assembly of the Republic of Mexico of August 18, 1824, a translation of which appears in a certain volume designated "United States Congress, Thirty-first Congress, First Session, House of Representatives Executive

Document #17, California and New Mexico * * *" published in 1850, containing said decree, in Document 17, Appendix 4, Report of H. W. Halleck, Monterey, March 1, 1849, as Secretary of State of the Territory of California, a copy of which (decree) is attached to the complaint. Antonio del Valle held said title until his death. On February 2, 1848, certain real property, as well as all other property comprising what is now the State of California, was ceded by the Republic of Mexico to the United States pursuant to the Treaty of Guadalupe Hidalgo, 9 Stat. 922, which was signed February 2, 1848, ratified at Queretaro May 30, 1848, and proclaimed by Executive Proclamation on July 4, 1848. On September 9, 1850, the State of California was admitted to the Union, and on March 3, 1851 the Congress passed an act designated "An Act to Ascertain and Settle the Private Land Claims in the State of California," which provided for the creation of a commission to confirm existing land titles owned by Mexicans at the time the treaty became effective, and to respect the commitments thereof with respect to titles derived from the Provisional Governor and held by former citizens of Mexico. On September 2, 1852, the heirs of Antonio del Valle (whose names were stated in the complaint) filed with the United States Board of Land Commissioners a claim to the said real property, as well as to other contiguous property founded upon said Mexican land grant. Said grant was approved in all respects on January 2, 1855, by said board at Monterey, California, proceeding pursuant to said act of Congress. An appeal was taken to the United States District Court, and the appeal was dismissed by that court. On February 12, 1875, a confirmatory patent was issued to said vestees by the United States and was recorded March 18, 1875 in Los Angeles County, California.

It was further alleged in paragraph X of said complaint that said deed, upon which patent was thereafter issued, provides that said real property "cannot be devised for any mortmain purpose whatsoever, and that it cannot be devised except to living persons, and not for charitable, religious, educational, eleemosynary or public purposes"; that in spite of the said restriction which forbids the use of the property for mortmain purposes, the decedent, William S. Hart, purported to execute a will in violation of said provisions; a copy of the will is attached to the complaint and made a part thereof; the will was admitted to probate on July 26, 1946, and the proceedings for probate of the will are not final because a petition for revocation thereof is pending; by reason of the failure of decedent to effectively dispose of said property by will, plaintiff is entitled to the property regardless of the pending petition for revocation; the period for filing claims against the estate has expired, there are ample funds in the estate to pay all debts and charges against the estate, and therefore plaintiff is entitled to immediate possession of the property.

It was further alleged in paragraph XI of said complaint "that a controversy has arisen between the executors of said Estate [will], William R. McKay and Thomas C. Gould, and with the Board of Supervisors of the County of Los Angeles with respect to plaintiff's claim to said real property," and by reason of the fact that the purported gift to said county purports to be for the purpose of mortmain, plaintiff contends that title to the property is vested in plaintiff as an heir-at-law of said decedent; that said county contends that it is entitled to the property under the will.

The grant or deed from Governor Alvarado to Antonio del Valle, a copy of which is attached to the complaint, provides in part: "Neither the grantee nor his heirs shall divide or transfer that which is adjudicated to him, or impose upon it ground rents, entailment, surety, mortgage or any other encumbrances even for a pious cause or transfer it in mortmain."

The will of William S. Hart, a copy of which is attached to the complaint, states that he gives and devises said real property to the County of Los Angeles upon condition that the property shall be forever used and maintained by the county and its successors in interest as a public park, and that the name of the park shall be "William S. Hart Park."

In the answer of the county, it is alleged that by mesne conveyances of title, set forth in the complaint, and upon the confirmatory patent, as set forth in the complaint, the fee title to the property was vested in William S. Hart and he had full power and legal right to transfer said property by will to the county. The county denied that any restriction upon the power of alienation of the property was validly imposed by the Mexican grant or by any other means.

The coexecutors admitted, in their answer, the allegations of the complaint with reference to: the grant or deed from Governor Alvarado to Antonio del Valle; and the issuance of a confirmatory patent, to the named heirs of del Valle, by the United States. It was also alleged in their answer that the contest to revoke the probate of the will resulted in a judgment against the contestant, and that said judgment is final.

Mortmain means: "Literally, dead hand; hence, the hand or possession of ecclesiastical corporations, ecclesiastics being in the early law deemed civilly dead; later, the possession of, or tenure by, any corporation which, by reason of the nature of corporations, may be perpetual." Webster's Dictionary, Unabridged. The definition of mortmain in the New Century Dictionary is: "In *law*, the condition of lands or tenements held without right of alienation, as by an ecclesiastial corporation; inalienable possession." In Woerner's American Law of Administration (Third Ed.) Volume 3, it is said at page 1427: "The act popularly known as the Statute of Mortmain, more accurately the 'Charitable Uses Act,' prohibits the gift, conveyance, or settlement to or upon any person or body corporate of real property, * * * in trust or for the benefit of any charitable uses whatever, except by deed executed with certain formalities and enrolled a certain time before the donor's death, to take effect in possession for the charitable use, without power of revocation or reservation in favor of the donor. Under this statute, a devise to a charity in violation of its provisions does not vest the legal title, and the heir may recover at law."

Appellant contends that said provision in the Mexican grant that neither the grantee nor his heirs shall transfer the property in mortmain prohibits the transfer of the property to the county for park purposes, and that the provision in the will so devising the property is void. He argues that the restriction against transfer in mortmain was valid under Mexican Law; that the change of sovereignty did not destroy the application of Mexican law to real property in California or affect existing titles; that under the Treaty of Guadalupe Hidalgo, in 1848 (about nine years after the grant to del Valle) between the United States and the Republic of Mexico, the United States agreed that land titles of Mexicans in the ceded territory shall be inviolably respected.

Respondents contend that the mortmain restriction in said grant is ineffectual. They argue that the mortmain restriction in the grant is merely a condition subsequent, restricting alienation and is repugnant to the interest created by the grant; the restriction is void under the provisions of section 711 of the Civil Code which provides that, "Conditions restraining alienation, when repugnant to the interest created, are void"; that following the Treaty of Guadalupe Hidalgo, the enjoyment of any title previously acquired should be determined by the laws of the United States, and any condition imposed upon the title by the laws of Mexico inconsistent with the laws of the United States or its public policy was annulled by the conquest of California in the war with Mexico; California does not have a mortmain statute or a policy favoring mortmain statutes; the alleged prohibition of transfer in the Mexican grant is superseded by the cession of said property to the United States and by the patent of the United States to the heirs of the grantee (del Valle) in the Mexican grant; that plaintiff, not being a party in privity with the grantors and not claiming to derive title from any deed issued prior to the Mexican grant, has no power to bring this action and cannot make a collateral attack upon the patent of the United States.

[1, 2] The provision in the Mexican grant of 1839 to del Valle was a condition subsequent. A condition subsequent is: "A condition by the failure or nonperformance of which an estate already vested may

be defeated." Ballentine's Law Dictionary. Section 707 of the Civil Code provides: "The time when the enjoyment of property is to begin or end may be determined by computation, or be made to depend on events. In the latter case, the enjoyment is said to be upon condition." Section 708 of said code provides: "Conditions are precedent or subsequent. The former fix the beginning, the latter the ending, of the right." It is not claimed that there was any breach of the condition subsequent until more than 100 years after the Mexican grant was made to del Valle. If there had been a breach of condition, prior to the conquest of California by the United States, then a proper party might have maintained, under the Mexican law, some form of action based upon failure to observe the mortmain provision. Under the treaty, the United States was obligated to respect and protect the land titles of Mexicans who then owned land in the conquered territory. There is no question here with reference to respecting or protecting such a title. The titles of del Valle and his heirs were upheld by the United States, as shown by the confirmatory decree of the Board of Land Commissioners. Any question as to the title to property, acquired prior to the conquest, is to be determined by reference to the Mexican law at the time the property was acquired. Any question, however, as to restraint or restrictions upon the use of property, acquired prior to the conquest, is to be determined according to American law. There is no provision in the treaty that the United States would continue restrictions on the use of property owned by Mexicans prior to the conquest, or that the United States would preserve for Mexico or any citizen of Mexico the right of forfeiture or any remedy based upon the mortmain provision. The Mortmain provision, or condition subsequent, restrains alienation and is repugnant to the fee granted. The purpose of that provison or condition was to prohibit the doing of a certain act—the transfer in mortmain. Section 711 of the Civil Code, enacted in 1872 and in effect since that time, provides that: "Conditions restraining alienation, when repugnant to the interest created, are void." Said section did not apply retroactively, or at all, to divest anyone of a vested right. The mortmain provision, or condition subsequent, did not vest any right in del Valle or any other person or the Republic of Mexico. The section (711) merely precluded any action based upon said restriction as to the use of the land.

In Fremont v. United States, 17 How. 542, 58 U.S. 542, 15 L.Ed. 241, certain land, located in the Department of California (of the Mexican government), was granted in 1844 by the Republic of Mexico to Juan B. Alvarado, which grant included the following condition: "He [grantee] shall not sell, alienate nor mortgage the same, nor subject it to taxes, entail, or any other incumbrance." In 1847, Alvarado sold the land to Colonel Fremont. In 1852, the Board of Land Commissioners confirmed the claim of title by Fremont. In 1855, the Supreme Court of the United States upheld the decision of the commissioners. In said case, the court stated, 17 How. at page 557, 15 L.Ed. at page 246: "There can be no question as to the power of the Governor of California to make the grant. And it appears to have been made according to the regular forms and usages of the Mexican law. It has conditions attached to it; but these are conditions subsequent. And the first point to be decided is, whether the grant vested in Alvarado any present and immediate interest; and if it did, then second whether anything done or omitted to be done by him *during the existence of the Mexican government in California,* forfeited the interest he had acquired and revested it in the government. For if, at the time the sovereignty of the country passed to the United States, any interest, legal or equitable, remained vested in Alvarado or his assigns, the United States are bound in good faith to uphold and protect it." (Italics added.) It was also said in that case, 17 How. at page 560, 15 L.Ed. at page 247: "Regarding the grant to Alvarado, therefore, as having given him a vested interest in the quantity of land therein specified, we proceed to inquire whether there was any breach of the conditions annexed to it, *during the continuance of the Mexican authorities,* which forfeited his right and revested the title in the government." (Italics added.) It was also said therein, 17 How. at page 564, 15 L.Ed. at page 249: "But if this condition was valid by the laws of Mexico, and if any conveyance made by Alvarado would have forfeited the land under the Mexican government as a breach of this condition, or if it would have been forfeited by a conveyance to an alien, it does not by any means follow that the same penalty would be incurred by the conveyance to Fremont.

"California was at that time in possession of the American forces, and held by the United States as a conquered country, subject to the authority of the American government. The Mexican municipal laws, which were then administered, were administered under the authority of the United States, and might be repealed or abrogated at their pleasure; and any Mexican law inconsistent with the rights of the United States or its public policy, or with the rights of its citizens, were annulled by the conquest. Now, there is no principle of public law which prohibits a citizen of a conquering country from purchasing property, real or personal, in the territory thus acquired and held; nor is there anything in the principles of our government, in its policy or its laws, which forbids it. The Mexican government, if it had regained the power, and it had been its policy to prevent the alienation of real estate, might have treated the sale by Alvarado as a violation of its laws; but it becomes a very different question when the American government is called on to execute the Mexican law. And it can hardly be maintained that an American citizen who makes a contract or purchases property under such circumstances, can be punished in a court of the United States with the penalty of forfeiture, when there is no law of Congress to inflict it. The purchase was perfectly consistent with the rights and duties of Colonel Fremont, as an American officer and an American citizen; and the country in which he made the purchase was, at the time, subject to the authority and dominion of the United States."

[3] The restriction as to the use of the property herein, imposed by the Mexican grant, is inconsistent with American law and public policy. The mortmain provision in the Mexican grant is superseded by the cession of the property by Mexico to the United States, and by the patent of the United States to the heirs of the grantee (del Valle) in the Mexican grant. The mortmain provision in the grant is void under section 711 of the Civil Code.

The minute order and the judgment are affirmed.

SHINN, P. J. and VALLÉE, J., concur.

119 Cal.App.2d 416

PEOPLE v. LONGO et al.

Cr. 2880.

District Court of Appeal, First District, Division 2, California.

July 28, 1953.

Rehearing Denied Aug. 12, 1953.

Hearing Denied Aug. 27, 1953.

Defendants were convicted of bribery. The Superior Court of City and County of San Francisco denied defendants' motions for a new trial and entered judgment, and defendants appealed. The District Court of Appeal, Dooling, J., held that the indictment gave defendants sufficient notice of offense of which they were accused, and evidence was sufficient to sustain conviction.

Affirmed.

1. Statutes 🔑223.2(8)

Statute making it a felony to offer a bribe and statute defining the word bribe must be construed together. Pen.Code, § 7, subd. 6, § 67½.

2. Indictment and Information 🔑60

Notice of the particular circumstances of the offense charged are not given by detailed pleading, but by the transcript of the evidence before the committing magistrate or grand jury.

3. Bribery ⚷6(1)

Bribery indictment which charged that defendants did wilfully, unlawfully, etc., offer as a bribe to ministerial officers, employees and appointees of the city and county the sum of $25,000 was sufficient although it did not further define the word bribe. Pen.Code, §§ 951, 952; § 7 subd. 6; § 67½.

4. Bribery ⚷11

Evidence was sufficient to sustain bribery conviction.

5. Bribery ⚷1(1)

It was not an essential of the crime of bribery that bribe was offered to official with actual authority as long as official's act falls within general scope of duties, and he purported to act in official capacity. Pen.Code, § 67½.

6. Bribery ⚷7

Where indictment for bribery charged that a $25,000 bribe was offered, and evidence disclosed offer of one-half of that amount, the variance was not material. Pen.Code, § 67½.

◆

Leslie C. Gillen, San Francisco (William F. Cleary, San Francisco, of counsel), for appellants.

Edmund G. Brown, Atty. Gen., of California, David K. Lener, Deputy Atty. Gen., for respondents.

DOOLING, Justice.

By indictment appellants were charged jointly in count 1 with a violation of sec. 11500 Health and Safety Code, possession of heroin, and in count 2 with a violation of sec. 67½, Penal Code, bribery. Appellant, Lois Canant, pleaded guilty to count 1 and the two appellants were tried jointly before the court, after duly waiving jury trial, on count 2 and appellant Longo was concurrently tried on count 1. Longo was acquitted on count 1 and both defendants were convicted on count 2. Both appeal from the judgments of conviction on count 2 and from the orders denying their motions for new trial.

[1] Count 2 charged the appellants with "the crime of felony, towit: Bribery (violation of Section 67½, Penal Code), committed as follows: The said (defendants) * * * did willfully, unlawfully, corruptly, knowingly and feloniously offer as a bribe to ministerial officers, employees and appointees of the City and County of San Francisco the sum of Twenty-Five Thousand Dollars ($25,000.00) * * *." In so charging the indictment followed the language of sec. 67½, Pen.Code. The word "bribe" used in sec. 67½ is defined in sec. 7, subd. 6, Pen.Code and as pointed out in People v. Silver, 75 Cal.App.2d 1, citing earlier cases at page 4, 170 P.2d 80, the two sections must be construed together to get the elements of the complete offense. Since the indictment does not include the language of sec. 7, subd. 6, Pen.Code in charging the offense the appellants argue that it is defective in a number of particulars which it is not necessary to enumerate, since People v. Roberts, 40 Cal.2d 483, 254 P.2d 501, which was decided after the appellants' brief had been filed in this case, appears to furnish a complete answer to all of such objections.

In the Roberts case appellant and another had been charged in an information with "the crime of violating section 182 of the Penal Code a felony, committed as follows:" that they "did wilfully, unlawfully and feloniously conspire, combine, confederate and agree together to commit the crime of Felony, towit: a violation of section 11500 of the Health and Safety Code." None of the elements of the crime denounced by sec. 11500 was pleaded. The supreme court said, 40 Cal.2d at page 489, 254 P.2d at page 502:

[2] "Roberts contends that count (1) of the information is insufficient because it does not specify which particular act (possessing, transporting, etc.) denounced by section 11500 was the object of the conspiracy. It is only required that the pleading be 'in any words sufficient to give the accused notice of the offense of which he is accused.' (Pen.Code, § 952.) Notice of the particular circumstances of the offense is given not by detailed pleading but by

the transcript of the evidence before the committing magistrate (or the grand jury); defendant is entitled to such transcript under section 870 (or section 925 of the Penal Code. (People v. Pierce, 1939, 14 Cal.2d 639, 645, 96 P.2d 784; People v. Codina, 1947, 30 Cal.2d 356, 358–359, 181 P.2d 881; People v. Yant, 1938, 26 Cal.App.2d 725, 730, 80 P.2d 506.)"

[3] In this case it is not shown that the appellants were prejudiced in their defense in any manner by the form of count 2 of the indictment. The indictment was "in * * * words sufficient to give the accused notice of the offense of which (they were) accused" Pen.Code sec. 952, and notice of the particular circumstances of the offense was given them by the transcript of the evidence before the grand jury. We can find no substantial difference between this case and People v. Roberts, supra, in this particular. People v. Ward, 110 Cal. 369, 42 P. 894 and People v. Glass, 158 Cal. 650, 112 P. 281, relied on by appellants, were decided long before the amendment of sec. 952, Pen.Code permitting simplified pleadings in criminal cases. It has been held sufficient since the amendments to secs. 951 and 952, Pen.Code. to charge that the defendant "murdered" (sec. 951, Pen. Code; People v. Smith, 215 Cal. 749, 12 P.2d 945; People v. Berg, 96 Cal.App. 430, 274 P. 433 or "robbed". People v. Beal, 108 Cal.App.2d 200, 204, 239 P.2d 84 another.

The evidence showed that two police officers of the City and County of San Francisco and two federal narcotics agents entered an apartment occupied by the appellants. They discovered therein a quantity of heroin. Appellant Canant asserted that the heroin was hers and that appellant Longo had no connection with it. She asked the officers if there was any way to leave Longo out of it and pointed to a table, saying: "Well, here is a thousand dollars." One of the federal officers said "a thousand dollars isn't much" and she replied: "I mean a thousand dollars each." Longo, after suggesting that the officers were kidding or making a fool of Miss Canant, said that he had $8000 in a safety deposit box. The officers said that the money mentioned is "peanuts for people of their caliber." Longo then said that he also had $15,000 in securities in his safety deposit box. The largest sum offered aggregated $25,000.

[4] The evidence above summarized is conclusive, if believed, and it was to a large extent corroborated by the evidence of statements of both appellants made afterwards to the police, that appellants offered the four officers $25,000 in an attempt to persuade them not to arrest Longo.

The federal officers had shown their official badges to appellants as had one of the police officers of the city and county. Appellants argue that the evidence does not show that appellants knew that any of the four was an officer of the city and county, and because most of the talking was done by one of the federal officers the most that was shown was an offer to bribe federal officers not to make an arrest (which is not an offense against the state). The question of fact was for the trial judge and he could draw his own conclusion from the fact that one of the San Francisco police officers had exhibited his star.

The argument is in any event not persuasive. The appellants believed that the four men were officers with authority to arrest them. They offered them a bribe not to arrest Longo. Whether or not they knew the exact official position of any of them would seem to be immaterial. They sought to influence their official action whatever their official capacity, knowing or believing that they had the official authority to make the arrest. No case has been cited, and we apprehend that none can be found, that it is a defense to a bribery charge that the defendant offered the bribe to influence an action which the officer in fact had the authority to take under the mistaken belief that he occupied a different official position from that which he in fact held.

[5] The suggestion that the officers had no probable cause for arresting Longo is answered first by the facts, the heroin was found in an apartment occupied by him and it cannot be said that probable cause for his arrest was lacking. People v. Brite, 9

Cal.2d 666, 687, 72 P.2d 122. Second, it is not essential to the crime of bribery that the officer's action is with actual authority so long as it falls within the general scope of his duties and he is purporting to act in his official capacity. People v. Anderson, 75 Cal.App. 365, 242 P. 906; People v. Anderson, 62 Cal.App. 222, 216 P. 401; People v. Lips, 59 Cal.App. 381, 211 P. 22.

[6] The claim of variance in that the charge is that a bribe of $25,000 was offered while only one-half that amount was offered to the San Francisco officers is trivial. It is not possible to find any injury to appellants in this difference between pleading and proof. People v. Williams, 27 Cal.2d 220, 163 P.2d 692.

The judgments and orders are affirmed.

NOURSE, P. J., and GOODELL, J., concur.

---

119 Cal.App.2d 445

PEOPLE v. ADAMS.

Cr. 941.

District Court of Appeal, Fourth District, California.

July 29, 1953.

Defendant was convicted in Superior Court of San Bernardino County, Carl B. Hilliard, J., of arson and grand theft of automobile, and he appealed. The District Court of Appeal, Griffin, J., held that the evidence showed sufficient corroboration of testimony of accomplice to sustain charge of arson and sufficiently identified property alleged to have been stolen.

Affirmed.

1. Arson 🔑37(1)
Larceny 🔑58

In prosecution for grand theft and arson of automobile, evidence that burned automobile had same license plates and same mark on rear bumper as automobile belonging to prosecuting witness was sufficient identification of burned automobile. Pen.Code, § 449a.

2. Arson 🔑37(1)
Larceny 🔑58

In prosecution for arson and grand theft of automobile, testimony of accomplice that defendant and accomplice had removed radio from prosecuting witness' automobile and installed radio in defendant's automobile and testimony of prosecuting witness that radio removed from defendant's automobile was exactly similar to radio stolen from prosecuting witness' automobile sufficiently identified radio alleged to have been stolen. Pen.Code, § 449a.

3. Criminal Law 🔑511(4)

In prosecution for arson and grand theft of automobile, testimony of accomplice that defendant and accomplice had removed radio from prosecuting witness' automobile and installed radio in defendant's automobile and had subsequently burned prosecuting witness' automobile was sufficiently corroborated to support conviction on charge of arson and grand theft of automobile. Pen.Code, § 449a.

4. Criminal Law 🔑511(4)

In prosecution for grand theft and arson of automobile, testimony of special agent for automobile theft bureau that burned condition of automobile in engine compartment and burned condition of upholstery in front and rear seat of automobile were of different origin corroborated testimony of accomplice that fire had been set in two separate places and that fire was of incendiary origin and not result of accident. Pen.Code, § 449a.

5. Criminal Law 🔑1159(1)

Where evidence against defendant considered by itself without regard to conflicting evidence, tends to support verdict of guilty, the question ceases to be one of law and decision of trial court or jury is final and conclusive.

6. Criminal Law 🔑1159(2, 4)

Questions as to weight of evidence and credibility of witnesses are for trier of fact which may believe and accept a portion of testimony of witness and disbelieve remainder.

Karl F. King and Charles E. Ward, San Bernardino, for appellant.

Edmund G. Brown, Atty. Gen., and Norman H. Sokolow, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant and appellant was convicted by the court upon two counts of an information. One charged that on August 15, 1952, he committed the crime of arson (violating section 449a Penal Code—burning of a Studebaker Sedan), and in another count he was charged with grand theft of the Sedan. Judgment was that appellant be committed to State's prison. Four years probation was granted and execution of sentence was suspended on certain conditions, one being that appellant serve 60 days in the county jail. He was acquitted upon a count charging that he burned another automobile on August 13, 1952.

It is appellant's contention that the evidence does not show sufficient legal corroboration of the testimony of an admitted accomplice to sustain the charge of arson, nor sufficient identification of the property alleged to have been stolen.

One Jaco, appellant's alleged accomplice, testifying for the people, stated that he and appellant were living together in an apartment in San Bernardino; that appellant had a Studebaker Coupe and was working at a gas station near the place of Jaco's employment; that about midnight on August 14, they met at the gas station and later drove away in appellant's Coupe; that appellant asked him where he could obtain a radio; that appellant said he knew where some new cars were parked and he might obtain a radio which would fit his Studebaker; that they proceeded to the place indicated, took with them a screwdriver, pliers, and a flashlight, and entered a Studebaker car parked in an open garage; that appellant opened the door of the car and began to disassemble the radio while Jaco acted as a look-out; that appellant, with Jaco's assent, backed the car into the street and proceeded away from the premises and asked Jaco to follow him in his Studebaker; that they drove out in the Reche Canyon and appellant took the radio out of the stolen Studebaker and Jaco removed the aerial and they were put in the appellant's Studebaker; that appellant "pumped a lot of gas into the carburetor" of the stolen car, broke the gas line, and tried to start it; that this caused gasoline to be thrown all over the motor, and that appellant then set fire to it; that he set fire to the upholstery and the headlining in the car with his cigarette lighter; that they then drove appellant's Studebaker back to the gas station where appellant worked, placed it in an enclosed garage and installed the stolen radio in appellant's car; and that they later drove to their apartment. Jaco identified the stolen radio (in evidence) as the one taken from the burned Studebaker.

Mr. Rogers, the owner of the stolen car, testified that "as best he could recall", it had license plates bearing No. 9W387; that it was a 1950 Studebaker Starlight coupe and had a radio of the push-button tuning type installed; that it had a defective push-button; and that it looked exactly like the one in evidence, which was shown to have a defective push-button; that on August 14th he left his car in his open type garage and last saw it there about 9 p. m. that night; that the next time he saw it was a few days later, completely burned, and the radio was missing. He identified photographs of it which showed the remaining numbers on the license plate at "W-387". He testified that the paint on the car had been completely destroyed but he identified a mark on the rear bumper which was caused some time before.

Several officers were called to the scene where the burned car was found. They had pictures taken of it. The radio was missing and only a hole in the fender top remained where the aerial had probably been removed. The officer stated that the license plate number was 9W387.

A special agent for the Auto Theft Bureau testified as to the burned condition of the car in the engine compartment, and the burning of the upholstery in the front and rear seat of the car, and that in his opinion the fire from the engine did not pass from the engine compartment to the interior of the car.

Another witness testified she rode in appellant's car sometime in August ("It could have been the 17th"), but she did not remember, and it had a radio in the dashboard; that he might have had it in his car a week or more before that time.

Appellant's employer stated that appellant was to have worked on August 15th "but he came in with a banged up leg" and said he was unable to work. Appellant was not employed at this station after August 15th.

After the arrest appellant told a deputy sheriff that he did not have a radio in his Studebaker when he bought it but he purchased one from the Pep Boys in Long Beach in August, 1952; that he installed it at the service station where he worked. After the deputy told appellant that Jaco had told him how he and appellant were implicated in the theft and the burning of two cars, appellant remarked that he had purchased the radio from Jaco for $10 and that he knew it was stolen when he bought it; that the two of them put it in his automobile at the service station in the early morning hours on "some date in August". Another officer took the radio from appellant's car with appellant's permission, after appellant told him he bought it from Jaco for $10, and the officer placed identifying marks on it. It was received in evidence at the trial.

Appellant did not take the witness-stand to testify. He presented certain character witnesses. Appellant's father testified that appellant had a radio in his car on August 15th; that he first saw it there on August 8th and it was in all respects similar to the one in evidence. Another witness testified for defendant and he stated that on August 14, about 2 p. m., he and defendant went hunting on an Indian reservation; that appellant remained there until about 9:30 p. m., and that he noticed a radio in appellant's car at that time. There was considerable conflict in the testimony as to whether appellant was employed at the service station on the day indicated.

[1-4] An examination of the entire record clearly indicates that there was sufficient identification of the Studebaker car that was burned to demonstrate that it was the car belonging to the prosecuting witness. Hughes v. Hartman, 206 Cal. 199, 202, 273 P. 560. The radio taken from it was sufficiently identified. People v. Frahm, 107 Cal.App. 253, 265, 290 P. 678; People v. Grimes, 113 Cal.App.2d 365, 248 P.2d 130. There was sufficient corroboration of the testimony of the claimed accomplice to support a conviction on both counts here involved. People v. Henderson, 34 Cal.2d 340, 345, 209 P.2d 785; People v. King, 40 Cal.App.2d 137, 141, 104 P.2d 521; People v. Griffin, 98 Cal.App.2d 1, 25, 219 P.2d 519; People v. Gallardo, 41 Cal.2d 57, 257 P.2d 29, and foot-note. The evidence relating to the setting of the fire in two separate places in the automobile corroborated the testimony of the accomplice that it was of incendiary origin, and not the result of an accident. People v. Saunders, 13 Cal.App. 743, 110 P. 825.

[5, 6] If the evidence against the appellant, considered by itself without regard to conflicting evidence, tends to support the verdict, the question ceases to be one of law, of which this court alone has jurisdiction, and becomes one of fact upon which the decision of the trial court or jury is final and conclusive. People v. Saunders, supra. Questions as to the weight of the evidence and the credibility of the witnesses are for the trier of fact, and it may believe and accept a portion of the testimony of a witness and disbelieve the remainder. On appeal, that portion which supports the judgment must be accepted. People v. Henderson, 34 Cal.2d 340, 346, 209 P.2d 785; People v. Thomas, 103 Cal.App.2d 669, 672, 229 P.2d 836. Under the evidence and law applicable thereto, the judgment and order denying a new trial must be affirmed.

Judgment and order affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

119 Cal.App.2d 214

SUMMERS et al. v. PARKER et al.

Civ. 19503.

District Court of Appeal, Second District, Division 1, California.

July 13, 1953.

Action by automobile passengers for injuries received when automobile collided with defendant's steer, which was lying in highway after having escaped from defendant's pasture. The Superior Court of Ventura County, Walter J. Fourt, J., entered judgment adverse to defendant, and defendant appealed. The District Court of Appeal, Scott, J. pro tem., held that evidence was sufficient to sustain trial court's finding that defendant's negligence was proximate cause of accident.

Judgment affirmed.

1. Automobiles 🔑178

Cattle owner, who negligently fails to keep his cattle from straying upon highway, may be held liable in civil action arising from collision with his livestock even at point where highway is in unfenced, open range country. Agricultural Code, § 423; Civ.Code, § 1714.

2. Automobiles 🔑245(21)

In action by automobile passengers for injuries received when automobile collided with defendant's steer, which was lying in highway after having escaped from defendant's pasture, question whether defendant was free from negligence in not providing a more secure fastening for pasture gate than wooden slide which fitted into slot cut in post at opening end of gate was for trier of fact.

3. Automobiles 🔑178

If steer left defendant's pasture over inadequate fence or through open gate and got onto highway due to defendant's negligence at time plaintiff automobile passengers arrived at scene of collision between automobile and steer, plaintiffs would be entitled to recover without pointing to exact spot at which steer had escaped from pasture.

4. Appeal and Error 🔑931(1)

In action by automobile passengers for injuries received when automobile collided with defendant's steer, which was lying in highway after having escaped from defendant's pasture, where parties stipulated that trial judge, who was trier of fact, could view the premises without stating what he discovered, it would be assumed upon appeal that conditions seen at time of inspection, and inferences based thereon, supported findings favorable to passengers.

5. Appeal and Error 🔑989

The duty of a reviewing court begins and ends with a determination whether there is any substantial evidence, contradicted or not, which will support trial court's findings and conclusions.

6. Automobiles 🔑244(36)

In action by automobile passengers for injuries received when automobile collided with defendant's steer, which was lying in highway after having escaped from defendant's pasture, evidence was sufficient to sustain trial court's finding that defendant's negligence was proximate cause of accident.

7. Trial 🔑165

For purpose of ruling on motion for nonsuit, the trial court is required to accept as true all evidence favorable to plaintiff's case, to interpret all evidence most strongly against defendant, and to disregard contradictory evidence.

8. Trial 🔑29(2)

In action by automobile passengers for injuries received when automobile collided with defendant's steer, which was lying in highway after having escaped from defendant's pasture, fact that trial judge, as trier of fact and upon motion for nonsuit, expressed doubt, based upon his own observations, whether 700-pound steer could go through 17¼-inch opening between two posts in pasture fence was not sufficient to establish existence of prejudice in trial judge's mind.

George L. Hampton, Van Nuys, for appellant.

Robert E. Friedrich, Santa Paula, Margaret Keller, Ventura, for respondents.

SCOTT, Justice pro tem.

Defendant appeals from an adverse judgment in a personal injury action.

At about 7:30 o'clock on a Sunday evening in April, 1951, plaintiffs were riding in an automobile driven by their son, going west on California State Highway No. 118, toward the town of Santa Susana in Ventura County. Their car collided with a steer lying in the highway, causing injuries to plaintiff, Mrs. Summers. The steer was the property of defendant and had escaped from defendant's ranch where it had been placed for pasturage, and it had reached the highway. This ranch had a frontage of one-half mile on the south side of the highway.

In their complaint plantiffs alleged, and the trial court found, that it was defendant's negligence that allowed the steer to get out onto the highway. The court further found that defendant's negligence was the sole proximate cause of the collision and of the injuries to plaintiff.

On this appeal two questions are presented which require consideration: (1) Whether the evidence was sufficient to support a finding of negligence which was the proximate cause of plaintiff's injury; (2) Whether, as charged by defendant, the judge of the trial court "failed to keep an open mind until all of the evidence was in, but on the contrary prejudged the case upon hearing only respondents' (plaintiffs') evidence."

[1] Both sides agree that the doctrine of res ipsa loquitur is excluded in a case such as this by reason of the provisions of section 423, Agricultural Code. But a cattle owner who *negligently* fails to keep his cattle from straying upon a highway may be held liable in a civil action for damages arising from a collision with his livestock even at a point where the highway is unfenced, in open range country. Jackson v. Hardy, 70 Cal.App.2d 6, 14, 160 P.2d 161; Sec. 1714, Civil Code.

Defendant's land was fenced next to the highway. Wires were loose and hanging free from the poles and some posts were rotted and partly burned through; four or five posts rested on the surface of the ground and were not imbedded therein; the fence was about three feet high in some places. It had a gate which had been left open during the afternoon prior to the accident. Defendant had a "tenant" on the land who apparently looked after defendant's cattle at least to the extent of keeping the gate closed, and of notifying defendant when the cattle got out.

In determining whether the fence was adequate the trial court may have considered the definition of a "good and substantial" wire fence in Sec. 412 of the Agricultural Code, and of a "lawful fence" described in Sec. 403, Agricultural Code (added by Stat. 1947). One witness for defendant testified concerning defendant's fence:

"Q. You have in your own experience seen cattle jump or leap over a fence of that type, haven't you? A. Oh, yes, any cattle will do that sometimes. They won't make a habit of it."

Another witness had seen cattle coming through the fence at a place where it was later repaired.

It is defendant's contention that any cattle on the highway got there not through or over any portion of the fence which was inherently inadequate or through the open gate, but through a narrow open space between two posts which were 17¼ inches apart and that this space was open because the wire which defendant had placed there to close the opening, had been cut by some stranger. He testified that when he left the property at 3:30 P.M. on the day of the accident the wires were intact but that early the next morning he found them lying on the ground near the posts on which the gate swung; that they looked as if they had been cut with a sharp pair of pliers and that he saw hoof prints of several head of cattle leading to and between the posts.

The steer struck by plaintiffs' automobile weighed 650 to 700 pounds. The court found "that it is not true that said steer escaped from defendant Harry C. Parker's property and control to the said highway through an opening cut in the wires in said defendant's fence between two posts approximately 17¼ inches apart near the gate into and on said property." It was a question of fact for decision by the trial court whether there was negligence on the part of defendant in having a defective fence or an open gate over or through which the steer found its way onto the highway.

[2, 3] Defendant disclaims responsibility for the open gate because he closed it when he left at 3:30 on the afternoon of the accident. He did not padlock the gate but fastened it with a wooden slide which fitted into a slot cut into the post at the opening end of the gate. Whether he was free from negligence in not providing a more secure fastening for a gate which was so necessary to keep the cattle off the highway was a question for the trier of fact. If the steer left defendant's land over the inadequate fence or through the open gate, if it got out onto the highway due to negligence of defendant and was on the highway because of that negligence when the plaintiffs reached the point of the accident, the latter are entitled to recover without pointing to the exact spot at which the steer escaped from defendant's property.

Supplementing testimony in the case we learn that the trial judge viewed the premises. It was stipulated that he might do so and that he need not state in writing or verbally what he discovered. Defendant's counsel stated:

"Mr. Hampton: So far as we are concerned I don't care about having you write down everything that you saw if you go out and look at it. We have no objection to your looking at it and I don't suppose it even necessary to suggest that it has been a couple of years since it happened.

"The Court: That is right.

"Mr. Hampton: A year and three months, and there has been no stock in there since the latter part of August or the first of September of 1951 and those trees have dropped limbs down on the fence and it hasn't been repaired since then because there was no necessity, there being no stock in there."

The stipulation was then announced as follows:

"Mr. Friedrich: That the Plaintiff and the Defendant both consent to the inspection of the premises by the Court without the presence of either party or their counsel and further that the Court shall not be required to state in writing or verbally, for that matter, what was discovered by the Court during the inspection of the premises."

[4–6] On appeal we must assume that the conditions seen at the time of the inspection and the inferences based thereon support the findings. We cannot say that there is no substantial evidence to support the finding that defendant's negligence was the proximate cause of the accident. "It is well established that the duty of a reviewing court 'begins and ends with a determination as to whether there is any *substantial* evidence, contradicted or uncontradicted, which will support * * *' the findings and conclusions of the trial court. Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689". Martin v. Martin, 79 Cal.App.2d 409, 411, 179 P.2d 655, 657; Balasco v. Chick, 84 Cal.App.2d 802, 807, 192 P.2d 76.

Defendant professes to discover prejudice in the mind of the trial judge because on the motion for nonsuit the latter expressed doubt, based on his own observations, as to whether a 700-pound steer could go through a 17¼-inch opening between two posts.

The record discloses that after defendant's motion for a nonsuit counsel for both parties and the trial judge discussed the facts and the law. The latter then observed:

"* * * I don't think the Court is required to take the testimony as you indicate that it has to be taken, namely, that the cattle went through that aperture of * * * seventeen and a quarter inches, * * *. * * * the Court is permitted to take into consideration his own factual information with reference to the approximate size of an animal the weight of approximately seven hundred pounds. I lived over in Wyoming several years and I have some idea of what a seven hundred pound steer can do.

"* * * for the purpose of a nonsuit it doesn't seem to me that the motion should be granted under these circumstances, * * *."

[7, 8] The court had in mind the principle stated in Singleton v. Singleton, 68 Cal.App.2d 681, 699, 157 P.2d 886, 896: "The trial court, for the purpose of ruling on the motion for nonsuit was required to accept as true all evidence favorable to plaintiff's case (Mastro v. Kennedy, 57 Cal. App.2d 499, 500, 134 P.2d 865), to interpret all evidence most strongly against defendant, and to disregard contradictory evidence. Mitchell Camera Corp. v. Fox Film Corp., 8 Cal.2d 192, 197, 64 P.2d 946; Dempsey v. Star House Movers, Inc., 2 Cal. App.2d 720, 722, 38 P.2d 825."

Defendant's counsel made no comment or objection at the time. Nothing was said that indicated to the trial judge that to rule impartially on a motion for a nonsuit he must lay aside any knowledge he might have of Wyoming steers or that the dimensions of the one in California which caused the accident were so unique that comparison would result in error.

Cases cited by defendant do not indicate that a trial judge must be devoid of factual information in order to escape a charge of prejudice or disqualification. Neither do they suggest any such disability as a necessary sequence of the exercise of the judicial function in deciding whether there is enough evidence to require denial of motion for a nonsuit.

Steel v. Wardwell, 57 Cal.App.2d 642, 651, 135 P.2d 628, 633, disapproved remarks by the judge in the presence of the jury, and stated: "These remarks were not merely comments upon the evidence which had been received but the court went farther and after an implied criticism of the knowledge of the witness who had testified, stated that he knew something of his own knowledge about this situation [stating it] * *. Not only would such statements coming from the trial judge probably have a great influence upon the jury * * * but in practical effect the trial judge testified on this point, as well as clearly intimating to the jury that he did not consider the testimony given by the experts as entitled to much weight."

No similarity to that situation appears in the instant case. It might be added that the language of defense counsel above quoted concerning inspection of the premises by the trial judge would suggest that the impression of prejudice was entirely absent at the close of the case, when all testimony, argument and remarks by the judge were fresh in the minds of the parties and their counsel.

Judgment affirmed.

WHITE, P. J., and DORAN, J., concur.

119 Cal.App.2d 198

GIOLDI v. SARTORIO et al.

Civ. 15471.

District Court of Appeal, First District,
Division 2, California.
July 13, 1953.

Rehearing Denied Aug. 12, 1953.

Hearing Denied Sept. 10, 1953.

Action by pedestrian who was struck by defendants' automobile as she walked on right side of street which had no sidewalks and which was located in area which was neither a business nor a residence district. The Superior Court in and for the City and County of San Francisco, Preston Devine, J., entered judgment on verdict in favor of plaintiff, and defendants appealed. The District Court of Appeal, Dooling, J., held that under circumstances revealed, the giving of instruction to effect that presumption of exercise of due care would arise in favor of pedestrian if it were found that as result of accident, pedestrian was deprived of her memory of events leading up to such accident, was not error.

Judgment affirmed.

Nourse, P. J., dissented.

1. Automobiles 🔑218

A pedestrian may walk on either side of highway outside limits of roadway as defined in Vehicle Code, without violating provision of such Code which, in effect, requires pedestrian to walk on his left-hand edge of any roadway outside of business or residence district. Vehicle Code, §§ 83, 564.

2. Automobiles ⚷246(31)
Trial ⚷193(3)

In action by pedestrian struck by defendants' automobile while walking on her right side of street which had no sidewalks and was located outside business or residence district, where trial court gave jury definitions of highway and roadway patterned on terms of Vehicle Code, instruction that provision of such Code requiring pedestrian to walk on left side of roadway outside business or residence district does not prescribe on which side of highway pedestrian may walk, correctly stated the law and indicated no opinion on the facts. Vehicle Code, §§ 83, 564.

3. Trial ⚷256(1)

Where trial court's instruction upon subject at issue constituted a correct statement of the law, it was incumbent upon parties, if they desired a more specific or elaborate instruction on the subject, to request it.

4. Negligence ⚷122(1)

One who by reason of loss of memory is unable to testify concerning his conduct at and immediately before time of accident is entitled to invoke presumption of exercise of due care to same extent and subject to same conditions as apply where conduct of a decedent is in question.

5. Evidence ⚷591

Testimony by defendant motorist upon his examination by adverse party as if under cross-examination, did not affect operation of presumption of exercise of due care which would arise in favor of plaintiff-pedestrian if it were found that as a result of accident she was deprived of her memory of events leading up to accident. Code Civ. Proc. § 2055.

6. Negligence ⚷138(4)

An instruction to effect that presumption of exercise of due care arises in favor of plaintiff if it is found that as result of accident, the plaintiff was deprived of memory of events leading up to accident, should not be given where evidence introduced by plaintiff discloses the acts and conduct of the injured party immediately prior to or at time in question.

7. Automobiles ⚷246(60)

In action by pedestrian who was struck by defendants' automobile, neither testimony of pedestrian's witness who was 100 feet from point of impact and who did not see pedestrian before impact or see automobile strike pedestrian, nor testimony of police officers who arrived after accident and who did not observe pedestrian's precedent conduct, disclosed anything about acts of pedestrian immediately prior to or at time of accident which would preclude giving of instruction allowing presumption of exercise of due care on part of pedestrian if accident deprived pedestrian of her memory.

8. Trial ⚷296(8)

In action for injuries sustained by pedestrian who asserted that accident occurring when she was struck by defendants' automobile while she was walking on right side of street deprived her of memory of events leading up to accident, instruction that presumption of exercise of due care would arise in favor of pedestrian if accident deprived her of memory was not improper even though there was evidence of admission on part of pedestrian that she had been walking as close to edge of street as possible, where jury was expressly instructed that as preliminary to application of such presumption, jury would have to decide whether plaintiff had been deprived of memory of events leading up to accident.

9. Automobiles ⚷246(60)

In automobile negligence action, where jury had been instructed as to presumption of exercise of due care which might arise in favor of plaintiff as result of her alleged loss of memory, instruction that jury should weigh such presumption against any conflicting evidence was not improper in form.

◆

Dana, Bledsoe & Smith, San Francisco, Fred K. Howell, Jr., San Francisco, of counsel, for appellants.

Hoberg & Finger, San Francisco, John E. Castagnetto, Daly City, for respondent.

DOOLING, Justice.

Defendants appeal from a judgment for plaintiff following a jury verdict. Plaintiff, who was walking on her right side of Market Street in Daly City, was struck from behind by an automobile driven by one of the defendants. In the block where this casualty occurred there are no sidewalks, and a rather steep bank borders the side of the highway on which plaintiff was walking. It is conceded that the area is neither a business nor residence district.

The crucial point in the case bearing upon the defense of contributory negligence was whether plaintiff was violating sec. 564, Vehicle Code, when she was struck. Sec. 564 reads: "No pedestrian shall walk upon any roadway outside of a business or residence district otherwise than close to his left hand edge of the roadway." The roadway by definition of sec. 83, Veh. Code, "is that portion of a highway improved, designed or ordinarily used for vehicular travel."

[1] There was evidence from which the jury could reasonably conclude (some of it educed from the defendant driver) that the highway was wider than the roadway, the roadway consisting of a well paved center strip and the balance of the highway consisting of shoulders on either side covered with a thinner layer of paving material. It is conceded by appellants that a pedestrian may walk on either side of a highway outside the limits of the roadway as defined in the Vehicle Code without violating sec. 564 thereof. Lesser v. McCullough, 90 Cal.App.2d 586, 590, 203 P.2d 832; Summers v. Dominguez, 29 Cal.App.2d 308, 311–312, 84 P.2d 237. However, in their closing brief appellants argued for the first time that whether a portion of the highway is outside the roadway is a question of fact and that the instructions given on the subject by the trial court must have misled the jury into the belief that at the scene of the accident there was a portion of the highway which they must find was outside the roadway. The argument is captious, which probably accounts for the fact that it did not occur to counsel when they were preparing their opening brief. The trial court read sec. 564, Vehicle Code, to the jury, gave definitions of highway and roadway patterned on the terms of that code and further instructed the jury: "The Statute just read to you requires that a pedestrian walk on the lefthand side of the roadway, but does not attempt to prescribe on which side of the highway he may walk."

[2, 3] This is a correct statement of the rule of law taken almost verbatim from Summers v. Dominguez, supra, 29 Cal.App.2d at page 312, 84 P.2d 237, and cannot be construed as indicating any opinion on the facts. If appellants desired a more specific or elaborate instruction on the subject it was incumbent upon them to request it. Ornales v. Wigger, 35 Cal.2d 474, 479, 218 P.2d 531; Townsend v. Butterfield, 168 Cal. 564, 569, 143 P. 760; Ohran v. County of Yolo, 40 Cal.App.2d 298, 307, 104 P.2d 700; Smith v. Pacific Greyhound Corp., 139 Cal.App. 696, 705, 35 P.2d 169.

[4] The point chiefly relied upon by appellants is their claim that the court erred in giving an instruction on the presumption of plaintiff's exercise of due care. Plaintiff testified that she had no recollection of anything which occurred between the night before her injuries and sometime after the accident when she found herself in the hospital. It is settled that: "One who by reason of loss of memory is unable to testify concerning his conduct at and immediately before the time of the accident is entitled to invoke" the presumption to the same extent and subject to the same conditions as apply where the conduct of a decedent is in question. Scott v. Burke, 39 Cal.2d 388, 394, 247 P.2d 313. The court carefully qualified the instruction on the presumption of care by instructing the jury that the presumption would only arise "if * * * you find * * * that as a result of the accident plaintiff was deprived of her memory of events leading up to such accident." Under the circumstances of this case this instruction was properly given.

[5] The only eyewitness to the conduct of plaintiff immediately preceding the accident was the defendant driver. All the cases agree that his testimony given under sec. 2055, Code Civ.Proc., does not affect the operation of the presumption. Smellie v. Southern Pacific Co., 212 Cal. 540, 559, 299 P. 529. Plaintiff called one witness, Williams, who testified that he was about 100 feet away when he heard the impact. He

saw the headlights of the automobile but did not see the automobile strike plaintiff and he did not see plaintiff at any time before the impact. Plaintiff also called three police officers who arrived after the accident and could not testify to any observation of plaintiff's precedent conduct. One of these officers on cross-examination testified to an oral statement made to him by plaintiff two days later in the hospital: "She stated * * * she was walking west on Market Street, on the north side, as she has been for years, as close to the edge of the road as possible, and did not see or hear a car approaching, when all of a sudden she was struck and thrown to the pavement. That is all she remembers."

At the time this statement was made the officer testified: "I could not talk to her for a couple of days. And then, when I did talk to her, she gave me a kind of a hazy statement. She was not in her true senses, I guess, yet."

Appellants take the position "that plaintiff was not entitled to the weight of the presumption of due care because the testimony of the police officers, Mr. Williams and the plaintiff's admissions as to how the accident happened gave a full explanation of the circumstances of the accident."

[6–8] Appellants rely heavily on Speck v. Sarver, 20 Cal.2d 585, 128 P.2d 16. That was neither a death nor loss of memory case and plaintiff testified fully to his conduct. Under those circumstances the court held that it was error, but not prejudicial, to give an instruction on the presumption. The court there laid down the test, 20 Cal.2d at pages 587–588, 128 P.2d at page 18: "Such an instruction, however, should not be given where the evidence introduced by the plaintiff discloses *the acts and conduct of the injured party* immediately prior to or at the time in question." (Emphasis ours.) By this test neither the testimony of Williams nor of the police officers (disregarding for the moment the testimony of plaintiff's alleged admission) disclosed anything about the *acts* or *conduct of plaintiff* immediately prior to or at the time in question. Assuming, without deciding, that the admission if given full weight by the jury would meet this test it was to be weighed by the jury in the light of the witness' testimony that it was "a kind of a hazy statement. She was not in her true senses, I guess, yet;" and also against the plaintiff's own testimony of her complete loss of memory of all events preceding and surrounding the accident. The jury was expressly instructed: "As a preliminary to the application of such presumption, you must decide whether or not the plaintiff was deprived of such memory of events leading up to the accident * * * if she was not so deprived of such memory, the said presumption does not apply." In view of this instruction the nature of appellants' dilemma is obvious. If the jury credited the admission they must to do so find that plaintiff was not deprived of memory of the events leading up to the accident. If they so found they were expressly instructed not to consider the presumption. If the jury did not credit the admission then there was no evidence produced by the plaintiff which it could be claimed with any show of reason disclosed the acts and conduct of the injured party immediately prior to or at the time in question. If that was the case then under the test of Speck v. Sarver, supra, plaintiff was entitled to the benefit of the presumption.

In the above discussion we have adopted the test laid down in Speck v. Sarver, supra, although in the case of loss of memory in Scott v. Burke, supra, 39 Cal.2d at page 394, 247 P.2d at page 316, the Supreme Court makes the test that the evidence produced by the plaintiff "is wholly irreconcilable with the presumption".

[9] Appellants also complain of the form of the instruction which advised the jury that it should weigh the presumption against any conflicting evidence. The court said in Scott v. Burke, supra, 39 Cal.2d at page 398, 247 P.2d at page 319: "When (a presumption is) controverted by other evidence, whether direct or indirect, an issue of fact is raised which it is the duty of the court to determine as in other cases * *." This can only mean that in determining the issue of fact the presumption must be weighed against the conflicting evidence.

Judgment affirmed.

McCOMB, J. (Assigned), concurs.

NOURSE, Presiding Justice.

I dissent. Plaintiff was walking on her right (the wrong) edge of a public street which had no sidewalk set aside for pedestrians. The center portion of the street was paved (with what it does not appear) the two shoulders were covered with a thinner layer of paving material. It was on the right-hand shoulder that plaintiff was walking on a dark rainy morning with no street lights to show her position.

The instruction that the statute relates only to the "roadway" and does not prescribe on which side of a "highway" a pedestrian should walk is facetious. The statute is designed for the protection of the public—the motorist as well as the pedestrian. Here the motorist had every right to assume that no one would be walking on the right shoulder when a perfect place of safety was provided on the left shoulder.

Hearing denied; TRAYNOR, J., dissenting.

LAUBISCH v. ROBERDO et al.*

Civ. 19299.

District Court of Appeal, Second District,
Division 3, California.
July 15, 1953.

Rehearing Granted Aug. 5, 1953.

Quiet title action wherein the Superior Court, Los Angeles County, granted the relief sought, and one of the defendants appealed. The District Court of Appeal, Parker Wood, J., held that the evidence was not sufficient to support a finding that the mechanic's lien foreclosure sale at which plaintiff had purchased the property had been duly, regularly and timely held.

Reversed with directions.

1. Time 🔑10(1)

The term "holiday", as used in Code of Civil Procedure section authorizing extension of legal period for performance of acts by number of holidays occurring during period, does not include holidays established by Legislature under Political Code, but refers only to those based solely upon executive proclamation. Code Civ.Proc. § 12a(b); Political Code, § 10.

See publication Words and Phrases, for other judicial constructions and definitions of "Holiday".

2. Time 🔑10(2)

April 14, 1945 (the day of the funeral of President Franklin Delano Roosevelt), having been proclaimed by President Truman to be merely a day of fast, mourning and prayer, and not expressly declared to be a "holiday", was not a holiday based upon executive proclamation for purpose of statute extending time in which act is to be performed, and hence could not be deemed to have extended time within which sale under mechanic's lien foreclosure decree could have been validly held. Code Civ. Proc. § 12a(b); Political Code, § 10.

3. Mechanics' Liens 🔑294

Where decree foreclosing mechanic's lien ordered sale of property, writ of enforcement was necessary, and in absence of compliance with statute prescribing mode in which judgment may be enforced or carried into execution after lapse of five years from date of its entry, writ of enforcement would have to issue within five years after decree of foreclosure, if sale thereunder were to be valid. Code Civ.Proc. §§ 681, 684, 685.

Ernest W. Pitney, Los Angeles, for appellant.

Glen Behymer, Los Angeles, for respondent.

PARKER WOOD, Justice.

Action to quiet title to real property and to recover damages and rent. Defendant Lily A. Cowan, in her answer to the complaint, denied that plaintiff was the owner of the property, admitted that she claimed an interest in the property adverse to plaintiff; and as an affirmative defense alleged that she had been in possession of the property, under a written contract of purchase, from August 21, 1942 to the date of the answer, had paid all taxes on the property during that time, and that plaintiff had no right, title or interest in said property. The judgment was that plaintiff is the owner of and entitled to possession of the property, and that he recover from defendants rent in the sum of $1,295; that defendants and those claiming under them are restrained from asserting any title to the property adverse to plaintiff. Defendant Lily A. Cowan appeals from the judgment.

---

* Subsequent opinion 260 P.2d 1004.

At the trial the parties stipulated as follows: On January 1, 1939, the Title Insurance and Trust Company was vested with legal title to the property here involved. On that date said company made an executory contract to convey the property to Mora Willison. On September 26, 1939, Mora Willison assigned the contract to Violet E. Bell. Thereafter, Violet E. Bell had improvements made on the property, and, as a result thereof, the Hammond Lumber Company recorded a claim of mechanic's lien on August 16, 1940. In an action to foreclose the lien, the defendants, the Title Insurance and Trust Company and Violet E. Bell, defaulted. A decree of foreclosure, which ordered the sale of the property, was entered January 27, 1941. The value of the property at the time of said decree was about $1,500. On August 21, 1942, Violet E. Bell assigned her interest under the contract to defendant Lily A. Cowan and her husband, S. B. Cowan, as joint tenants. S. B. Cowan died on August 19, 1947. The Title Insurance and Trust Company made a deed, dated April 27, 1944, which recited that the property was conveyed to Mabel Roberdo. On January 16, 1946, Hammond Lumber Company instructed the commissioner, who had been appointed in the decree of foreclosure, to proceed with the sale. On February 7 or 8, 1946, a writ of enforcement was issued. On March 5, 1946, the commissioner sold the property to plaintiff (for $201), and issued his certificate of sale. On March 7, 1947, a deed to the property, executed by the commissioner, was recorded. On May 18, 1949, Mabel Roberdo conveyed the property by a deed to Jennie Wentworth, which deed was recorded June 24, 1949. On July 29, 1949, Jennie Wentworth made a conveyance to Lily A. Cowan, which was recorded on November 23, 1949. The payments provided for under the (above-mentioned) agreement of sale between the Title Insurance and Trust Company and Mora Willison were made by Mr. and Mrs. Cowan from August 21, 1942 to and including September 1, 1949, at which time the balance of the contract price was paid by Mrs. Cowan. The taxes on the property for the years 1940–41 and 1941–42 were paid by the Title Insurance and Trust Company. The taxes for the years 1943, 1944, 1946, 1948 and 1949 were paid by Mr. and Mrs. Cowan. Plaintiff paid the taxes in April, 1947, which consisted of the first installment, which was then delinquent, the penalty, and the second installment, which would have become delinquent the next day. On November 1, 1949, plaintiff delivered a check to the tax collector, and received a bill (plaintiff's Exhibit 8) which was stamped paid on November 25, 1949. One George Hath was in possession of the property as a purchaser under a contract with the Cowans, and he later became a tenant of the Cowans. Since October 13, 1947, someone connected with the "defense" has been in possession of said property.

Plaintiff, who was the only witness, testified: that on March 8, 1947 (the day after the commissioner's deed was recorded), he went upon the premises and found George Hath and his family in possession of the premises; Hath told plaintiff he had purchased the property from Mr. and Mrs. Cowan on a conditional sales contract; that he was behind in his payments and the Cowans "cancelled out" on him and he lost everything he had paid; Hath stated he finally made an arrangement with the Cowans to remain on the premises and pay rent,—paying the rent by making repairs on the premises; plaintiff notified Hath that he had purchased the property and Hath said that he was going to move the following week-end "as there was an action pending" (municipal court file, entitled Cowan v. Hath, was received in evidence by reference); about a week later Hath, who had not moved from the property, told plaintiff that he was going to move the following week-end; on April 3, 1947, plaintiff rented the property to William Hamilton for a period of one year from April 17, 1947; Hath moved from the property on April 5th; Hamilton and his family went into possession on April 5th and remained there until October 13, 1947; on October 14, 1947, plaintiff went to the premises and found the house vacant and the doors and windows open; while he was locking the house, appellant (Mrs. Cowan) appeared and demanded possession; a Mr. Sullivan, who lived next door, appellant and another woman lunged against the front door and tried to break in, and plaintiff then called the police; after the officers arrived, they called a city attorney, and arranged for a meeting of the parties at 4 o'clock on that day (with the city attorney); plaintiff, appellant and her attorney attended the meeting; each party told the city attorney what his interest was; the city attorney then said it was a question of title about which nothing could be done at the moment and told the parties there should be no violence; plaintiff then returned to the premises and found that Mr. Sullivan had broken into the premises and taken possession; after plaintiff purchased the property he did not communicate with the Cowans and tell them he had purchased it; the first time he met Mrs. Cowan was on the property in October, 1947; he paid $201 for the property; he entered into a written lease with the Hamiltons and received $420 from them at the time of the execution of said lease; no part of that sum has been repaid.

The court found, among other things, that plaintiff has been the owner of the property involved herein since March 7, 1947; that about October 14, 1947, while plaintiff was the absolute owner and entitled to possession of the premises, defendant Lily A. Cowan entered into possession of the premises without license from plaintiff and wrongfully withheld possession of the premises and still continues to withhold possession thereof from plaintiff; it is not true that defendant Lily A. Cowan paid all taxes upon said real property during the period elapsing between the date of plaintiff's acquisition of title and the date of the trial of the action herein, but that it is true that plaintiff paid part of the taxes during said period; it is not true that defendants or either of them acquired any interest or title in said premises by adverse possession; plaintiff acquired title to said property by purchasing it at a mechanic's lien foreclosure sale, conducted under a writ of enforcement of the foreclosure decree which directed the sale of the property by the commissioner; the commissioner duly and regularly conducted the sale and issued the commissioner's certificate of sale to plaintiff; the sale under the writ of enforcement held on March 5, 1946 was duly, regularly and timely held; no redemption was made "from said sale," and the commissioner's deed, pursuant to said certificate of purchase, was duly and regularly made and was recorded March 7, 1947.

Respondent's (plaintiff's) claim of title is based upon the commissioner's deed which he received as purchaser of the property at the foreclosure sale.

[1, 2] Appellant (defendant) contends that the finding that it is true that the sale under the writ of enforcement was duly, regularly and timely held is not supported by the evidence. She argues that the sale was not held timely because the writ of enforcement was not issued within five years after the date of entry of judgment on January 27, 1941. The writ of enforcement bears the stamped date of February 7, 1946 but above the stamped figure "7" is the pen-and-ink figure "8." It is therefore not clear whether the writ was issued on February 7th or 8th. It appears that the judge and the attorneys proceeded upon the basis that the writ was issued on February 8th. Assuming that the writ was issued on February 8, 1946, it appears that it was issued 12 days after the expiration of five years from the entry of the judgment on January 27, 1941. Respondent (plaintiff) asserts, however, that the five years had not expired for the reason the five year period was extended under the provisions of section 12a(b) of the Code of Civil Procedure, in that, the President or Governor appointed 12 such holidays as those which are referred to in that section.[1]

---

[1] Section 12a of the Code of Civil Procedure (in effect during the period involved here) provided in part: "As to any act provided or required by law to be

According to a memorandum opinion of the trial judge, those 12 days extended the said five year period. If said period was extended by those 12 days, the five year period as extended would have expired on February 8, 1946, and therefore the writ of enforcement would have been issued on the last day of the five years as extended. Appellant asserts that 3 of said 12 days were not holidays appointed by the President or Governor as referred to in said section. The 3 days so referred to by appellant are April 14, 1945, which was the day of the funeral of President Franklin D. Roosevelt, and August 15 and 16, 1945, known as V–J Days. Before discussing those 3 days, reference should be made to another of the 12 days, which is not discussed in the briefs. One of the other alleged holidays included in said 12 days was July 5, 1941. Since July 4th of that year was on Sunday (which was a holiday), July 5th was a statutory holiday, according to the provisions of sections 10 and 11 of the Political Code,[2] and was not a holiday appointed by the President or the Governor, as provided in said section 12a(b). In Millsap v. Hooper, 34 Cal.2d 192, it was said on page 195 (in the footnote), 208 P.2d 982: "Section 12a extends time only when holidays appointed by the President or the Governor (i. e., irregular holidays whose date cannot be precisely foretold) intervene during the period in question. Holidays established by the Legislature under section 10 of the Political Code do not extend time under section 12a." If said day, July 5th, is eliminated from said 12 days, and if it is assumed the five year period can be extended under the provisions of said section 12a(b), then it would appear that the last day of said five year period would have been February 7, 1946. If the writ of enforcement was issued on February 8th, then it was not issued within five years as so extended after the entry of the judgment. With reference to April 14, 1945, which was the day of the funeral of President Roosevelt, the proclamation of President Truman was that said day was a day of fast, mourning and prayer. The proclamation did not declare that said day was a holiday. Section 10 of the Political Code provides that holidays within the meaning of that code include "Every day appointed by the President of the United States or by the Governor of this State for a public fast, thanksgiving or holiday". Said April 14th was not a holiday. If said day April 14th is also eliminated from said 12 days, and if it is assumed said five year period can be extended, then it would appear that the time was extended 10 days (instead of 12 days) and the last day of the five year period would have been February 6, 1946. Assuming, but not deciding, that the five year period could be extended under said section 12a(b) (to February 6, 1946), the writ of enforcement (which was issued on February 8th) was not issued within five years after the entry of the judgment on January 27, 1941. By reason of said conclusion, eliminating two days from said 12 days, it is not necessary to determine whether August 15 and 16, 1945, should also be eliminated from said 12 days which the trial court concluded extended the five year period.

[3] Respondent (plaintiff) also contends that it was not necessary to have a writ of enforcement issued for the reason that the decree of foreclosure in the mechanic's lien case created the lien against the property and directed that the property be sold to satisfy the amount of the lien. He argues that there was no limit as to the time when the sale could be made. Section 684 of the Code of Civil Procedure provides: "When the judgment is for money,

---

performed within a specified period of time, such period of time is hereby extended—

"(a) * * *

"(b) By such number of days as equals the number of holidays (other than special holidays) appointed by the President or by the Governor and which occur within or during such period; and

"(c) * * *."

[2] Section 10 of the Political Code provides in part (second paragraph): "If * * * the fourth day of July * * * falls upon a Sunday, the Monday following is a holiday."

Section 11 of the Political Code provides in part: "If * * * the fourth day of July * * * falls upon a Sunday, the Monday following is a holiday."

or the possession of real or personal property, the same may be enforced by a writ of execution; and * * * when the judgment requires the sale of property, the same may be enforced by a writ reciting such judgment, or the material parts thereof, and directing the proper officer to execute the judgment, by making the sale and applying the proceeds in conformity therewith; * * *." In Knapp v. Rose, 32 Cal. 2d 530, 197 P.2d 7, 9, the judgment debtors contended that only a writ of execution could issue properly and that because a document entitled "writ of enforcement" was obtained the certificate of sale and deed were void. The writ therein recited that a second judgment had been entered which ordered certain property to be sold, and a copy of the judgment was attached to the writ. The court therein said, 32 Cal.2d at page 534, 197 P.2d at page 9: "It is therefore, immaterial whether the writ was entitled a 'writ of enforcement,' 'writ of execution,' or 'order of sale,' as long as the substance of it was sufficient and in conformance with the statute. The writ obtained by Rose [judgment creditor] fulfilled these requirements." A writ of enforcement was necessary herein. According to statutory provisions, a writ of enforcement should be issued within five years after the entry of judgment. Section 681 of the Code of Civil Procedure provides: "The party in whose favor judgment is given may, at any time within five years after the entry thereof, have a writ of execution issued for its enforcement. * * *" It was stated in Dorland v. Hanson, 81 Cal. 202, at page 204, 22 P. 552, at page 553, that: "Section 681 must be held to apply to a judgment the object, purpose, and effect of which is to enforce the payment of money, whether the same be a personal judgment against the party indebted, or a decree foreclosing a lien for an amount due." Section 674 of said code provides that a judgment lien, resulting from the recording of an abstract of the judgment, "continues for five years from the date of the entry of the judgment or decree unless the enforcement of the judgment or decree is stayed on appeal * * *." Section 685 of said code provides: "In all cases the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, and after due notice to the judgment debtor accompanied by an affidavit or affidavits setting forth the reasons for failure to proceed in compliance with the provisions of section 681 of this code." There was no motion herein to obtain an order of court for enforcement of the judgment after the lapse of five years. As above stated, the writ of enforcement herein was not issued within five years after the entry of judgment even if it be assumed that said five year period could be extended under the provisions of said section 12a(b).

The evidence was not sufficient to support the finding that the sale under the writ of enforcement was duly, regularly and timely held.

By reason of the above conclusions, it is not necessary to consider other contentions upon appeal.

The judgment is reversed; and the superior court is directed to enter a judgment that plaintiff has no right, title or interest in said property, and has no claim or lien thereon.

SHINN, P. J., and VALLÉE, J., concur.

119 Cal.App.2d 125

HARDWARE MUT. INS. CO. OF MINNESOTA v. VALENTINE et al.

Civ. 4522.

District Court of Appeal, Fourth District, California.

July 8, 1953.

Suit by fire insurer of owners of building, as subrogee because of payments made for fire loss, to recover from tenant on theory that fire had been result of tenant's negligence. The Superior Court of San Diego County, Dean Sherry, J., entered judgment from which the defendants appealed. The District Court of Appeal, Mussell, J., held that where tenants had procured continuance, and had brought independent action against electrical firm and owners of building for fire loss, and court found that fire was result of tenants' negligence, fire insurer's motion for judgment on ground that all issues in present case had been determined in tenants' independent action, as disclosed by accompanying records, files and pleadings and affidavit of plaintiff's counsel, was properly granted, in absence of opposing affidavits of tenants showing a triable issue of fact.

Judgment affirmed.

1. Judgment 🔑185

Where tenants had procured continuance of suit brought by fire insurer of owners of building, to recover from tenant on theory that fire had been result of tenants' negligence, and had thereafter brought independent action against owners and an electrical firm for fire loss, and court found that fire was result of tenant's negligence, judgment in insurer's favor because all issues in present case had been determined in tenant's independent action, was properly granted, when tenant did not file affidavits in opposition to motion for judgment to show facts sufficient to present triable issue of fact.

2. Judgment 🔑632

Set-off and Counterclaim 🔑60

Where tenants against whom owners' fire insurer had brought suit, as subrogee, for fire loss payments to owners, thereafter brought an independent action against owners and an electrical firm for fire loss, and owners affirmatively charged and court found that fire was result of tenants' negligence, failure of fire insurer, which was not party to tenants' action, to file a counterclaim in tenants' action did not preclude insurer from thereafter proceeding with its action, but tenants were bound by judgment finding them guilty of negligence. Code Civ.Proc. §§ 338, 439.

3. Set-Off and Counterclaim 🔑60

Provision of Code of Civil Procedure precluding a defendant who omits to set up a counterclaim upon a cause arising out of transaction set forth in complaint, from thereafter maintaining an action against plaintiff therefor, refers to a situation in which a defendant omits to set up a counterclaim in an action theretofore filed, and did not apply to a subsequent action brought by the defendant in the first action against parties other than plaintiffs. Code Civ. Proc. §§ 338, 439.

4. Estoppel 🔑68(1)

Where tenants against whom owners' fire insurer had brought suit, as subrogee, for fire loss payments made to owners, procured continuance and filed an independent action against electrical firm and owners of building for fire loss, and owners affirmatively charged and court found that fire was result of tenants' negligence, tenants were estopped from denying that doctrine of res judicata should apply against them on fire insurer's claim for fire loss paid to owners.

5. Judgment 🔑670

Where a party, though appearing in two suits in different capacities, is in fact litigating the same right, the judgment in one suit estops him in the other.

◆

Vernon F. Bennett, San Diego, for appellants.

Hensley & Bledsoe and Huntington P. Bledsoe, San Diego, for respondent.

MUSSELL, Justice.

This is an appeal by defendants from a judgment rendered upon a motion made by plaintiff upon the grounds that all the material issues in the case had been finally and conclusively determined in another action and that there were no issue undetermined or left to be tried.

There is no dispute as to the facts, which are substantially as follows: Plaintiff is an insurance carrier and had a policy of fire insurance on a building known as the Knickerbocker Hotel in San Diego. Defendant Valentine was a tenant occupying a portion of said building and conducting a photographic studio therein. On June 6, 1944, a fire occurred in the studio and damaged the building and property therein belonging to Valentine. The plaintiff paid the sum of $2,878.56 to Schulman and others, owners, for the damage to the building and then, as subrogee of the policy holders, commenced this action on September 28, 1946, to recover the loss alleged to have been caused by the negligence of Valentine. Defendant Robert Valentine answered with a general denial and the cause was set for trial on April 1, 1947. A continuance was had due to the illness of counsel for plaintiff, and on June 4, 1947, defendants' present counsel filed a separate action on behalf of Valentine against an electrical firm and its agents, alleging that the fire in question was caused by their negligence in repairing the electrical system of the building damaged by the fire. Damages allegedly caused to Valentine's own personal property by the fire were sought in that action. Summons was not served upon any defendant until after the three-year limitation set forth in Section 338 of the Code of Civil Procedure had run. No attempt to file a cross-complaint or bring in new parties to the previous action filed by the insurance company was made by Valentine. Answers denying the allegations of Valentine's complaint were filed by the defendant repairmen who were named and served with summons and the case was set for trial on March 17, 1949. A month or so before the trial date Valentine served his complaint upon his landlord, Schulman, and one other owner of the building as fictitious and unknown John Doe defendants. The owners answered, denying negligence on their part and affirmatively alleged that the fire in question was caused solely by Valentine's own negligence. Issue was joined concerning the cause of the fire, trial was had and judgment was rendered against Valentine on April 8, 1949.

The trial court in that action found that there was no negligence upon the part of any of the defendants; that Schulman and the other owners of the building were not the principals or employers of the electrical repair firm and that the fire was caused by Valentine's own negligence in leaving an electrical hot plate unattended. Valentine appealed from the judgment rendered against him and it was affirmed by this court on July 11, 1951. Valentine v. Ratner, 105 Cal.App.2d 358, 233 P.2d 667.

On October 11, 1949, Valentine, after obtaining leave of court, filed a supplemental answer in the instant case in which he alleged that he was a tenant in possession of the real property damaged on the day of the fire; that plaintiff (respondent herein) had insured the owners of the real property against loss caused by said fire and that under the terms of plaintiff's policy of insurance with the owners, the plaintiff "was subrogated to whatever rights, claims or demands" the owners might have against plaintiff to the extent of any payment made by it to the owners for damage resulting from said fire; that plaintiff "paid to said owners of said Knickerbocker Hotel building the sum of $2,878.56 for the damage to said Knickerbocker Hotel premises"; that on July 7, 1944, the said owners for and in consideration of the payment to them of the "amount of the loss hereinbefore mentioned" assigned the claims to plaintiff. It was then alleged that on June 4, 1947, Valentine brought an action against the electrical repair firm and others to recover damages for losses sustained by him in said fire; that the owners of the building failed in that action to ask for any affirmative relief by way of set-off, counterclaim or cross-complaint; that said action was tried and decided adversely to Valentine and that a copy of the findings and judgment were attached to the answer. It was then alleged that plaintiff insurance company had knowledge of the bringing of said action and purposely awaited the outcome of the trial therein and neglected to have the two actions consolidated. (It should be here noted that the insurance company was not named in the suit brought by Valentine and was not served with summons in said action.) It was further alleged that by reason of the neglect of the owners to ask for affirmative relief in the Valentine action, to intervene therein, or to consolidate it with the insurance company action, plaintiff is estopped and barred from proceeding further with its action.

On October 18, 1949, Valentine filed and served upon plaintiff insurance company a document entitled "Notice of motion for continuance pending appeal of case involving similar issues." The notice stated that Valentine would move for a continuance of the instant action until the final determination of his suit on the ground that the issues presented in his action "are identical" with those presented in the instant case and as to those issues the judgment in his action "when the same shall become final, if affirmed, will be res judicata in the above entitled cause." It was stated in Valentine's affidavit filed therewith "that if the judgment in action No. 140586 (Valentine v. Ratner) in the above entitled court is affirmed upon said appeal, that said judgment will be res judicata of the issues involved in the action brought by plaintiff against affiant." It was further stated in the affidavit that the continuance was sought "to avoid a multiplicity of actions". The trial court granted a continuance and by reason thereof the instant action remained off calendar awaiting a decision of Valentine's appeal. The remittitur therein was filed on September 13, 1951.

[1] On September 25, 1951, plaintiff insurance company filed a motion in the instant action for judgment in favor of plaintiff and against Valentine, as prayed for in the complaint. The motion was made on the ground that all the issues in the instant case had been determined in the Valentine v. Ratner action and that the judgment therein is final and conclusive. The motion was based upon all of the records, files and pleadings in the action and on the affidavit of counsel for plaintiff. This affidavit sets forth the proceedings had in both cases and refers to the various pleadings, affidavits and motions filed and the judgment entered in the Valentine case. It is stated therein that there are no issues undetermined in the instant action or left to be tried. Valentine did not file an affidavit or affidavits in opposition to this motion to show such facts as might be deemed by the trial court hearing the motion sufficient to present a triable issue of fact. Under these circumstances, the judgment on plaintiff's motion for summary judgment was properly granted. Coyne v. Krempels, 36 Cal.2d 257, 261, 223 P.2d 244.

On November 28, 1951, Valentine filed a motion for dismissal of the instant action on the grounds that plaintiff and its assignees failed to set up their claim in the Valentine-Ratner action; that plaintiff is now barred from proceeding further with its action and that it should be dismissed. Both motions were fully argued. The trial court denied Valentine's motion for dismissal and granted plaintiff's motion for judgment and this appeal followed.

[2] Appellant first argues that because respondent insurance company failed to set up its cause of action in the Valentine suit it is barred and estopped from maintaining its action against Valentine. In this connection appellant cites Section 439 of the Code of Civil Procedure, which is as follows:

> "If the defendant omits to set up a counterclaim upon a cause arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, neither he nor his assignee can afterwards maintain an action against the plaintiff therefor."

This contention is without merit. The instant action was filed long before the Valentine case and the principal issues in the instant action were whether the fire and damage were caused by Valentine's own negligence, the amount of damage caused to the property of plaintiff's assignors and the amount paid by plaintiff therefor.

[3] Defendant's answer contained a general denial and the cause was at issue. Defendant then, in an effort to collect damages against the electrical repairmen and the owners of the property, filed an independent action against them. He did not file a cross-complaint in the instant action or seek to have the two actions consolidated for trial. Furthermore, he did not name plaintiff herein as a defendant in that action or serve the owners of the property or any defendant until the three-year limitation provided for in Section 338 of the Code of Civil Procedure had run. Valentine could not by the filing of his action divest the trial court of its jurisdiction to proceed in the instant case. The insurance company's cause of action was fully set forth in the first complaint filed. Summons was served on Valentine and the

court then acquired jurisdiction over the whole litigation with full power to bring in all necessary parties and make a complete adjudication of the entire controversy, and this jurisdiction was retained by the trial court. Gorman v. Superior Court, 23 Cal. App.2d 173, 177, 72 P.2d 774. Section 439 of the Code of Civil Procedure is not applicable where, as here, respondent's claim was fully set forth in the first complaint filed. The section plainly refers to a situation when a defendant omits to set up a counterclaim in an action theretofore filed and in that event he cannot *afterwards* maintain an action against the plaintiff therefor.

After Valentine's action had been determined adversely to his contentions and the trial court on April 8, 1949, had found and determined that the damage caused by said fire was the result of Valentine's own negligence, he then obtained permission to file a supplemental answer in the instant action, setting forth the findings and judgment against him and claimed therein that plaintiff was barred from proceeding further in the instant action. In this connection Valentine alleged that the insurance company had paid the owners of the building the sum of $2,878.56 for damage to the hotel building; that the "amount of loss" had been paid to them.

It is apparent that Valentine was bound by the judgment rendered against him in his independent suit. The question of his negligence in connection with the fire and damage resulting therefrom was adjudicated as shown by his supplemental answer. He admitted the amount of plaintiff's loss. When plaintiff herein filed its motion for judgment there were no issues undetermined in the action and the motion was properly granted.

Valentine argues that plaintiff insurance company split its cause of action by failing to file its claim in the second suit. This argument is without merit. However, it might well be applied to Valentine who was not content to try all issues in the original action and who, in effect, has sought to split his cause of action.

[4, 5] Valentine, having procured a continuance of the instant action until the determination of his subsequently filed suit against the electrical repairmen on the ground that his action would be res judicata in the case at bar is estopped from denying that the doctrine should apply to him. Bank of America, etc., Ass'n v. Mantz, 4 Cal.2d 322, 327, 49 P.2d 279. He appeared as a defendant in the instant action and as plaintiff in the subsequent suit in which the same rights were litigated. As was said in Bernhard v. Bank of America, Nat. Trust & Savings Ass'n, 19 Cal.2d 807, 814, 122 P.2d 892, 896: " 'Where a party though appearing in two suits in different capacities is in fact litigating the same right, the judgment in one estops him in the other.' "

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

119 Cal.App.2d 421

PEOPLE v. SILVA.

Cr. 5000.

District Court of Appeal, Second District,
Division 1, California.
July 28, 1953.

Defendant was convicted of unlawful possession of heroin. The Superior Court, Los Angeles County, John J. Ford, J., entered judgment, and defendant appealed therefrom, and from order denying new trial. The District Court of Appeal, White, P. J., held that evidence sustained conviction.

Judgment and order affirmed.

1. Criminal Law 🔑1144(13)

On appeal from conviction in criminal case, District Court of Appeal must state evidence in manner most favorable to prosecution.

2. Criminal Law 🔑1159(2)

Appellate court will not attempt to determine weight of evidence, but will decide only whether on face of evidence sufficient facts could not be found by jury to warrant inference of guilt.

3. Criminal Law ⚷741(1), 1160

It is function of jury in first instance, and of trial court after verdict, to determine what facts are established by evidence, and before verdict of jury which has been approved by trial court can be set aside on appeal on ground of insufficiency of evidence, it must clearly appear that upon no hypothesis whatever is there sufficient substantial evidence to support conclusion reached in trial court.

4. Criminal Law ⚷562

Determination of charge in criminal case requires proof that offense charged was committed and that offense was perpetrated by person or persons accused thereof.

5. Criminal Law ⚷1144(13)

On appeal in criminal case, appellate court must assume in favor of verdict the existence of every fact which jury could have reasonably deduced from evidence, and then determine whether such facts are sufficient to support verdict.

6. Criminal Law ⚷1159(2)

If circumstances reasonably justify verdict of jury, opinion of reviewing court that those circumstances might also reasonably be reconciled with innocence of defendant will not warrant interference with jury's determination.

7. Criminal Law ⚷1159(2, 4)

Reviewing judges are in no position to determine credit which should be accorded to witnesses, or to weigh their testimony, and hence appellate courts are not authorized to review evidence except where on its face it may justly be held to be insufficient to support ultimate issue involved, in which case it is not a review of question of fact, but purely one of law.

8. Poisons ⚷9

Evidence sustained conviction for unlawful possession of heroin. Health and Safety Code, § 11,500.

Philip S. Schutz, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was charged with the crime of violation of section 11,500 of the Health and Safety Code, in that on or about August 4, 1952 she unlawfully had in her possession a preparation of heroin.

Following the entry of the plea of not guilty and appropriate waiver of jury, the people's case was by stipulation submitted on the transcript of the preliminary examination. At the trial defendant presented testimony in her own behalf. Defendant was adjudged guilty of the offense charged. Her motion for a new trial was denied, as was an application for probation, and she was sentenced to the county jail for a term of six months.

From the judgment and the order denying her motion for a new trial, defendant prosecutes this appeal.

[1] Stating the evidence in a manner most favorable to the prosecution, as we are required to do on an appeal from a conviction in a criminal case, the record reflects that Charles Hille, a police officer of the City of Los Angeles, assigned to the Narcotics Division, was in a police car parked on the southeast corner of First and Beaudry Streets in the City of Los Angeles, with officers Pena and Neale, shortly before 8:45 p.m. on the evening of August 4, 1952. Officer Hille observed a 1949 Buick automobile with a Nevada license plate northbound on Beaudry. The officer drove the police car in behind the Buick which was being operated by the defendant. There were two other women in the automobile, one being Benita Ramirez, who testified at the trial. After crossing First Street, the Buick stopped at the northeast corner of Beaudry and Diamond Streets. Officer Hille parked the police car just behind and about four

feet west of the left side of defendant's vehicle. Officers Pena and Neale both got out and proceeded up the sidewalk to intercept a man who had been standing at the side of a building. As this man approached the Buick and leaned in to talk to the occupants, Officer Pena seized him and "started shaking him down".

At this time Officer Hille got out of the police car on the driver's side, walked up to the left-hand side of the Buick, and standing a little to the rear watched defendant. The latter's head was pointed in the direction of Officers Pena and Neale and the man being searched. Defendant moved her left hand from her lap to the vicinity of the neck of her dress. Officer Hille identified himself and defendant dropped her hand back to her lap. The officer opened the car door and asked defendant to get out. She did so. The officer then took hold of her wrists. She complained of having a sore wrist. The officer told her not to twist and she would not hurt herself. He advised her she was under arrest. She said she did not know what he was talking about. She spun in a "half turn" to her left, pulling her left hand from the officer's grasp. The officer stepped around to his right, the same direction she was going. He observed her put her hand back to the vicinity of the neck of her dress and remove a small white package. He grabbed for her hand as she bent over. To the officer it appeared as if she was intending to swallow the object. According to the officer she did not have an opportunity to take her hand down because he got hold of her left hand again. After this activity defendant and the officer were just adjacent to the front wheel of the police car. The officer called for assistance from his fellow officers. After defendant was handcuffed and a brief search made of the vehicle, Officer Hille looked under the police car with his flashlight. He observed the package.

While he did not actually see the package leave defendant's hand, he had hold of her hands during the entire transaction with the exception of the second or two during which defendant got the one hand free. He noted that it was "a glassy white object that appeared about the size of a marshmallow".

Officer Hille rolled the police car back four or five feet and picked up the package. From the place of the tussle, "it was immediately underfoot and approximately ten inches east or under the police car." He walked to the side of the police car and showed it to defendant. He said: "I found it." Defendant made no comment. The street was newly paved. It was swept clean. There was no debris under the police car. There was a street light and lights from a grocery store which was open on the corner.

The package (People's Exhibit "A") was transmitted to William G. Penprase, qualified forensic chemist with the Los Angeles Police Department, who examined the contents August 5, 1952. There were ten capsules each containing a powderlike material, and a piece of paper. Mr. Penprase tested the capsules. In his opinion each contained heroin.

At the trial, Mrs. Benita Ramirez, one of the occupants of the car, testified for the defendant. She stated, among other things, that to her knowledge defendant had no narcotics in her possession that night nor did the witness; that the officers did not show her or defendant any object when they were in the police car; that she did hear the officers say they found the "stuff".

Defendant testified, among other things, that she did not have any heroin in her possession nor any white package, that the first time she saw People's Exhibit "A" at close range was at the trial, that she heard the officer at the scene say: "I got it"; but that no object was shown her.

The sole contention made on this appeal is that the evidence is insufficient as a matter of law to sustain the judgment of conviction. In that regard, it is urged that there is no evidence that appellant had possession of the heroin found in the street under the police car, or that she threw it or dropped it into the street.

In considering a claim of "insufficiency of the evidence" the rules governing an appellate tribunal are thus stated in People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 779:

[2–6] "The rule applicable where there is evidence, circumstantial or otherwise, that a crime has been committed and that the defendant was the perpetrator thereof, has been many times reiterated by the reviewing courts of this state as follows: The court on appeal 'will not attempt to determine the weight of the evidence, but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt. For it is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground' of insufficiency of the evidence, 'it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. The determination of a charge in a criminal case involves proof of two distinct propositions: First, that the offense charged was committed; and, second, that it was perpetrated by the person or persons accused thereof. * * * We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.' If the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury. (Citing cases.)"

With the foregoing rules in mind we are here confronted with testimony given by Officer Hille as follows:

"I observed her (appellant) put her hand back to her clothing up near the neck on the left side, remove a small white package * * * In looking under the police car with my flashlight I observed a small package (identified at the trial as containing heroin) which I had seen in her hand previously.

"Q. Did you notice under the police car any quantity of debris whatsoever? A. No, it was swept clean. As I mentioned, it was a new portion of pavement there."

After describing the position of appellant and himself, during which time the former made a "half turn", the officer testified:

"Q. I take it that during that half turn you had ahold of some part of her body? A. I had ahold of both of her hands and when she spun around, she pulled her left hand out of my grasp.

"Q. What became of that left hand? Did you have it under your observation? A. At that time I stepped around to my right, which would be to her left, the same direction she was going, and I observed her hand go back to her dress and then she bent over in this manner and I saw her take something from her dress.

* * * * * *

"Q. And during this time, within a matter of a foot or two from you, she reached up to the top of her dress and took something out and then took her hand down again, is that correct? A. Well, no, she didn't get a chance to take her hand down. When she reached for her dress, I grabbed for her hand at the same time.

"Q. What did she do then? A. Removed a small white object from her dress.

"Q. What did she do with it? A. I couldn't see what she did with it. I thought she was going to swallow it.

* * * * * *

"Q. As a matter of fact, you don't know if anything was actually in her hand, then, do you? A. Yes, sir, I do.

"Q. You were within about a foot of her during this entire fracas, weren't you? A. Yes, sir."

[7, 8] Reviewing judges are, obviously, in no position to determine the credit which should be accorded to witnesses or to weigh their testimony. As has often been repeated, it is for this reason that the appellate courts are not authorized to review evidence, except where, on its face, it may justly be held that it is insufficient to support the ultimate issue involved, in which case it is not a review of a question of fact,

but purely one of law. We are persuaded that from the foregoing testimony, the trial judge could *reasonably* draw the inference that appellant was in possession of the heroin in question, threw it under the police car, and that such possession was immediate and exclusive. Code Civ.Proc. §§ 1958, 1960; People v. Coleman, 100 Cal. App.2d 797, 800, 801, 224 P.2d 837; People v. Monge, 109 Cal.App.2d 141, 143, 240 P.2d 432.

The case of People v. Foster, 115 Cal. App.2d 866, 253 P.2d 50, strongly relied upon by appellant, is readily distinguishable from the case now engaging our attention. The conviction in the case at bar is not dependent upon any such "tenuous theory" as characterized the evidentiary features of the cited case.

For the foregoing reasons, the judgment and the order denying defendant's motion for a new trial are, and each is affirmed.

DORAN, J., and SCOTT, J. pro tem., concur.

---

119 Cal.App.2d 112

RUTLEDGE v. RUTLEDGE.

Civ. 19531.

District Court of Appeal, Second District, Division 2, California.

July 8, 1953.

Action for partition of certain real and personal property which husband and wife owned in joint tenancy. The Superior Court, Los Angeles County, Leon T. David, J., rendered interlocutory decree, husband filed notice of appeal, wife filed notice of intention to move for new trial and to amend findings of fact, conclusions of law and interlocutory decree and trial court denied motion for new trial but amended findings of facts, conclusions of law and entered amended interlocutory decree. The District Court of Appeal, McComb, J., held that where amended judgment was material departure from judgment first entered, only amended judgment was appealable.

Appeal dismissed.

Appeal and Error 🔑113(5)

Where amended judgment, after proceedings on motion for new trial under statute, was material departure from judgment first entered, only amended judgment was appealable. Code Civ.Proc. § 662.

Tudor Gairdner, Los Angeles, for appellant.

Walter H. Young, Los Angeles, for respondent.

McCOMB, Justice.

This is a purported appeal by defendant from an interlocutory decree entered in an action for partition of certain real and personal properties which the parties owned in joint tenancy.

Chronology

i. June 30, 1952, the trial judge signed and caused to be filed an interlocutory judgment (decree) in a partition action involving certain real and personal property owned by the parties jointly.

ii. July 15, 1952, defendant filed a notice of appeal from the decree.

iii. July 16, 1952, plaintiff filed a notice of intention to move for a new trial and to amend the findings of fact, conclusions of law and interlocutory decree.

iv. September 3, 1952, the motion for a new trial was denied.

v. September 4, 1952, amended findings of fact, conclusions of law and an amended interlocutory judgment (decree) of partition were filed. These documents made material changes in the original findings of fact, conclusions of law and decree, which had been entered July 2, 1952.

This is the sole question necessary for us to determine:

Was the interlocutory decree entered July 2, 1952, from which defendant atttempts to appeal an appealable order?

No. The rule is established that where an amended judgment is entered after proceedings on a motion for a new trial and pursuant to the provisions of section 662 of the Code of Civil Procedure, which second judgment is a material departure from the first one entered, an appeal lies *solely* from the second judgment, the first judgment thus being nonappealable. (California Machinery, etc., Co. v. University City Syndicate, 3 Cal.App.2d 425, 428[3], 39 P.2d 853; Robinson v. Fidelity & Deposit Co., 5 Cal. App.2d 241, 242[1], 42 P.2d 653; Replogle v. Ray, 48 Cal.App.2d 291, 293 et seq., 119 P.2d 980; George v. Bekins Van & Storage Co., 83 Cal.App.2d 478, 480[1], 189 P.2d 301.)

Since in the present case the amended findings of fact, conclusions of law and decree entered upon the denying of the motion for a new trial and pursuant to the provisions of section 662 of the Code of Civil Procedure, made material changes in the original findings of fact, conclusions of law and interlocutory decree, the purported appeal from the original judgment (decree) was from a nonappealable order.

The appeal is dismissed.

MOORE, P. J., and FOX, J., concur.

---

119 Cal.App.2d 114

RUTLEDGE v. RUTLEDGE.

Civ. 19532.

District Court of Appeal, Second Appellate District, Division 2, California.

July 8, 1953.

Action for accounting and partition of certain real and personal property held jointly by wife and husband. The Superior Court, Los Angeles County, Leon T. David, J., required wife to pay her portion of tax lien deficiency in connection with income tax return on community property which return was filed while parties were husband and wife but deficiency was not assessed until after they were divorced and wife and husband appealed. The District Court of Appeal, McComb, J., held that refusal to credit husband with $3,000 which he had paid to federal Government on account of wife's income tax deficiency arising from inclusion of disallowed deductions on her separate return and which was paid to federal government by husband pursuant to notice of levy served by Collector of Internal Revenue upon him was error.

Cause remanded with instructions.

1. Partition 🔑83

In action by wife against former husband for accounting and partition of certain real and personal property held jointly by them, charging wife with unpaid assessment on her separate income tax return in which one-half of community income was listed was proper in view of fact that had proper income tax been paid at time when return was made community property would have been reduced by amount so paid and wife would have received proportionately less as her share of community property in divorce proceeding.

2. Appeal and Error 🔑449

Taking of appeal from original interlocutory judgment did not deprive trial court of power, upon denying motion for new trial, to amend findings of fact and conclusions and enter a new and different judgment. Code Civ.Proc. § 662.

3. Husband and Wife 🔑272(4)

Where automobile business owned as community property during marriage could not be partitioned, award to divorced wife of money judgment representing one-half of net worth of automobile business owned as community property during marriage was improper and parties had right to have it sold and proceeds divided among themselves. Code Civ.Proc. §§ 752, 752a.

4. Lis Pendens 🔑13

Partition 🔑51

In action by wife against former husband for accounting and partition of certain real and personal property held jointly by them, court could have ordered partition of automobile business, which had formed part of community during marriage, even though wife had not recorded lis pendens immediately after filing complaint pursuant to statute and even though summons did not, in accordance with statute, contain description of property and was directed only to husband since such provisions are merely directory and there was no showing of prejudice. Code Civ. Proc. §§ 755, 756.

5. Tenancy in Common ⚷28(7)

One tenant may not maintain an action against his cotenant who is in sole possession of real property to recover rent for cotenant's occupancy of property, but tenant may maintain action requiring his cotenant to account for rents collected for use of property by third persons.

6. Husband and Wife ⚷272(4)

In wife's action against former husband for accounting and partition of certain real and personal property, charging husband sum equal to one-half rentals from automobile business, which was owned by community, was erroneous.

7. Partition ⚷83

In wife's action against former husband for accounting and partition of certain real and personal property held jointly by them, directing that husband pay wife all interest, penalties and costs arising by reason of assessment of federal and state income tax deficiencies on wife's separate returns was improper.

8. Partition ⚷87

In action by wife against former husband for accounting and partition of certain real and personal property held jointly by them, refusal to credit husband with $3,000 which he had paid to federal government on account of wife's income tax deficiency arising from inclusion of certain disallowed deductions on her separate return and which was paid to federal government by husband pursuant to notice of levy served by Collector of Internal Revenue upon him was error.

Walter H. Young, Los Angeles, for appellant.

Tudor Gairdner, Los Angeles, for respondent.

McCOMB, Justice.

In an action for an accounting and partition of certain real and personal property held jointly by plaintiff and defendant, plaintiff appeals from that part of an amended decree (judgment) requiring her to pay her portion of a tax lien deficiency in connection with an income tax return on community property, which return was filed while the parties were husband and wife but the deficiency was not assessed until after they had been divorced.

Defendant also appeals from the same decree.

Plaintiff's Appeal

Facts: Plaintiff and defendant were married in 1914, and divorced in 1949. In 1947, defendant filed two separate income tax returns, one on behalf of himself, in which he listed one half of the community income, and another on behalf of his wife, in which he listed the other one half of the community income.

Thereafter, and subsequent to the divorce of the parties, the government disallowed certain deductions and assessed a deficiency on both of the income tax returns. Defendant paid the deficiency assessed against his return but did not pay that assessed against his former wife's return.

[1] In the instant action, involving an accounting and partition of joint property between the parties, the trial court directed that defendant be credited with payments which he had made or might make on behalf of the deficiency assessment levied by the government on plaintiff's income tax return.

Plaintiff claims that the trial court erred in not requiring defendant to pay the entire deficiency assessment including that assessed against her.

The trial court's ruling was correct in providing that plaintiff should be charged with the unpaid assessment on her income tax return. It only requires her to pay that which she of necessity would have paid on her separate return had the disallowed deductions not been included in the return. It is true the parties were husband and wife and lived together for approximately one and one-half years after the return was filed. However, the divorce dissolved her vested community interest, making all of her property interests "separate" in nature. Had the proper income tax been paid at the time the return was made the community property would have been reduced by the amount so paid and plaintiff would have received proportionately less as her share of the community property.

It is thus fair and equitable that she at this time pay her proportion of the assessment and not be allowed to unjustly enrich herself by the device of obtaining a divorce from her husband.

It is to be noted that the record is devoid of any evidence that defendant made any false or fraudulent returns. On the contrary it discloses that the returns were prepared by his auditor, his return being signed by him, there being a dispute as to who signed plaintiff's name to the return filed on her behalf. This is immaterial in any event for the reason that the husband, having charge of the community interest, if he signed the return on behalf of his wife, did so as her agent.

Defendant's Appeal

[2] Preliminarily defendant contends that the trial court was without jurisdiction to file amended findings of fact, conclusions of law and interlocutory decree of partition, for the reason that after the original findings of fact, conclusions of law and interlocutory decree were entered July 2, 1952, he appealed on July 15, 1952 from the interlocutory decree.

He urges, since the notice of intention to move for a new trial and amend the findings, conclusions and decree were not filed until after the notice of appeal had been filed, the trial court was without jurisdiction to order an amendment to the findings of fact, conclusions of law and enter the decree from which the present appeal is taken.

This contention is devoid of merit. Since the adoption of section 662 of the Code of Civil Procedure in 1929,[1] the trial court has been authorized upon the denying of a motion for a new trial to amend its findings of fact, conclusions of law and enter a new and different judgment. (California Machinery, etc., Company v. University City Syndicate, 3 Cal.App.2d 425, 426[1], 428[3], 39 P.2d 853; Spier v. Lang, 4 Cal.2d 711, 714, 53 P.2d 138.)

The taking of an appeal from the original judgment does not deprive the trial court of the power thus conferred. Since the original judgment is nonappealable, the amended judgment is the one from which an appeal may be taken. (See Rutledge v. Rutledge, Cal.App., 259 P.2d 78.)

Takahashi v. Fish and Game Comm., 30 Cal.2d 719, 185 P.2d 805, Linstead v. Superior Court, 17 Cal.App.2d 9, 61 P.2d 355, and Kinard v. Jordan, 175 Cal. 13, 164 P. 894, relied on by defendant, are not here applicable because the attempt to amend the judgments in such cases were not made pursuant to the provisions of section 662 of the Code of Civil Procedure.

[3] *Questions:* First: *Did the trial court err in awarding plaintiff a money judgment against defendant in the sum of $69,487.00?*

Yes. Plaintiff filed an amended complaint seeking an accounting and partition. The complaint alleged that plaintiff and defendant had been husband and wife but were divorced in 1949; that at the date of the divorce there were certain real and personal properties belonging to the parties which were community property, the principal personal property so far as necessary to the determination of this cause being an automobile business, together with the land and buildings located at 5101–11 Whittier Boulevard, Los Angeles.

---

[1] Section 662, Code of Civil Procedure, reads:

"In ruling on such motion, in a cause tried without a jury, the court may, on such terms as may be just, change or add to the findings, modify the judgment in whole or in part, vacate the judgment, in whole or in part, and grant a new trial on all or part of the issues, or, in lieu of granting a new trial, may vacate and set aside the findings and judgment and reopen the case for further proceedings and the introduction of additional evidence with the same effect as if the case had been reopened after the submission thereof and before findings had been filed or judgment rendered. Any judgment thereafter entered shall be subject to the provisions of sections 657 and 659 of this code."

After trial the court, among other things, decreed that defendant should pay to plaintiff $69,487.00 representing one half of the net worth of the automobile business. The court found, supported by substantial evidence, that the parties were cotenants of this business. This being true the court was without power to make such an order.

When several persons are co-owners of real or personal property any one or more of the co-owners may file an action for partition. It then becomes the duty of the court to partition the same and if this cannot be done without great prejudice to such owners, it is the duty of the court to cause the property to be sold and to partition the proceeds among them according to their respective interests. (Code of Civil Procedure, sections 752, 752a) [2].

In the present case this rule was not followed. It is obvious that prejudice resulted to one or both parties for the reason that since the business could not be partitioned between the parties, without detriment to one of them, plaintiff was entitled to have it sold and it is possible that upon a sale thereof her share of the proceeds of the sale would have amounted to more than the $69,487. On the other hand, upon the sale of the property it might have sold for less, in which event defendant could have purchased plaintiff's interest for less than the amount the court directed that he should pay for plaintiff's half interest.

As to this portion of the decree it must be reversed with directions to the trial court to cause the property to be sold in accordance with the applicable code provisions and to take a full and complete accounting.

In the accounting between the parties the court will determine the proper amounts to charge defendant and to credit plaintiff on account of the net income earned by the business from the date of the divorce of the parties to the date of the filing of the present action, in the absence of any supplemental and/or amended pleadings. For example, if the evidence discloses that defendant has paid the deficiency tax assessed against him from the income of the business, he shall be charged with this amount in determining the net income of the business.

[4] Second: *Would it have been error for the trial court to order a partition since (a) plaintiff had not recorded a lis pendens immediately after filing the complaint pursuant to the provisions of section 755 of the Code of Civil Procedure, and (b) the summons did not, in accordance with the provisions of section 756 of the Code of Civil Procedure, contain a description of the property and was directed only to the defendant?*

No. These provisions are merely directory and in the absence of a showing of prejudice will not vitiate a decree. (Cf. Lee v. Silva, 197 Cal. 364, 373, 240 P. 1015;

---

[2] Code of Civil Procedure, sections 752 and 752a read:

"752. When several cotenants own real property as joint tenants, or tenants in common, in which one or more of them have an estate of inheritance, or for life or lives, or for years, or when real property is subject to a life estate with remainder over, an action may be brought by one or more of such persons, or, where property is subject to a life estate with remainder over, by the life tenant, or where real property is subject to a lien on a parity with that on which the owner's title is based, by the owner or by the holder of such lien, for a partition thereof according to the respective rights of the persons interested therein, and for a sale of such property, or a part thereof, if it appears that a partition can not be made without great prejudice to the parties.

"752a. Where several persons are co-owners of any personal property, an action may be brought by any one or more such co-owners for a partition thereof; or in case partition cannot be had without great prejudice to the owners, for the sale thereof, and partition of the proceeds according to the respective interests of the parties. In all such actions the provisions of this chapter shall govern whenever applicable. Real and personal property may be partitioned in the same action."

Broome v. Broome, 179 Cal. 638, 645 et seq., 178 P. 525; Balkins v. County of Los Angeles, 81 Cal.App.2d 42, 47, 183 P.2d 137.)

[5, 6] Third: *Did the trial court err in making a finding in support of its accounting that there was due plaintiff for rentals collected by defendant the sum of $8,249.27?*

Yes. One tenant may not maintain an action against his cotenant who is in sole possession of real property to recover rent for the cotenant's occupancy of the property, but a tenant may maintain an action requiring his cotenant to account for rents collected for the use of the property by third persons. (McWhorter v. McWhorter, 99 Cal.App. 293, 296[4] and [5], 278 P. 454.)

In the instant case the automobile business of the parties occupied the ground floor of a building located on the real property owned by them. The second floor contained apartments which were rented to third parties. Defendant had maintained a separate rental account from that of the automobile business in which he deposited $750 per month for the rental of the ground floor by the automobile business and the balance of approximately $1,000 per month was rent collected from tenants on the second floor, the net rentals over the period in question being $16,498.53. The trial court found that plaintiff was not entitled to rentals from the property used by defendant in his business, but in crediting plaintiff with the amount of rentals due her actually charged defendant with one half of the amount of the rental he had paid into the account for the use of the ground floor. This was erroneous.

Since it was stipulated by the parties that after deducting from the rentals money expended for community obligations, there was a balance of $2,265.69, it is obvious that it was prejudicial error for the trial court to charge defendant with $8,249.27 as plaintiff's share of rentals from the property held in common.

In the accounting which must ensue, the money placed in the special account as rental of the premises occupied by the business and the rentals from the apartments should be taken into consideration.

[7] Fourth: *Did the court err in directing that defendant pay plaintiff all interest, penalties and costs arising by reason of the federal and state income tax deficiency assessments for the year 1947?*

Yes. For the reasons hereinabove set forth under plaintiff's appeal, it is clear that defendant was not liable for these sums.

[8] Fifth: *Did the trial court err in not crediting defendant with $3,000 which he had paid to the federal government on account of plaintiff's income tax deficiency and which was paid to the federal government by defendant pursuant to a notice of levy served by the collector of internal revenue upon him?*

Yes. Defendant made five monthly payments of $600 each to the internal revenue department, which sums he would have otherwise paid to plaintiff. Since it was in part payment of her obligation to the government it is evident that defendant should have been given credit therefor.

Defendant questions the sufficiency of the evidence to sustain certain findings of the trial court. It is unnecessary for us to pass upon this question for the reason that it would not affect the conclusions which we have reached.

The cause is remanded to the trial court with instructions to proceed in accordance with the views hereinabove expressed.

MOORE, P. J., and FOX, J., concur.

118 Cal.App.2d 830

MARINO et al. v. VALENTI et al.

No. 15470.

District Court of Appeal, First District,
Division 1, California.

July 1, 1953.

Hearing Denied Aug. 28, 1953.

Action for injuries received by plaintiff minors as result of explosion of dynamite caps with which plaintiffs were playing and which had been found in a building on defendants' premises, and for death of a companion of such plaintiffs from such explosion. The Superior Court, County of Santa Clara, entered a minute order granting a nonsuit and entered a judgment of dismissal and plaintiffs appealed. The District Court of Appeal, Wood, J., held that evidence showed prima facie case of violation by defendants of a duty of care to warn children which was proximate cause of injuries.

Minute order reversed and appeal from judgment dismissed.

1. Appeal and Error ⚿927(3), 989

On appeal from order of nonsuit conflicting evidence will be disregarded and plaintiff's evidence will be given all value to which it is entitled, and court will indulge in every legitimate inference which might be drawn from plaintiff's evidence, and view most favorable to plaintiff will be taken if more than one inference reasonably may be drawn.

2. Negligence ⚿2

A man must so use his property as to cause no unreasonable harm to another.

3. Negligence ⚿136(14)

It is function of jury, under proper instructions, to determine ultimate fact of negligence.

4. Negligence ⚿33(1, 3)

Generally a landowner owes no duty to trespassers upon his land to put or keep it in a reasonably safe condition for them, or to conduct his activities in manner not to endanger them, but an exception runs in favor of trespassing children if their trespass is foreseeable, if condition of premises involves unreasonable risk of harm to them in view of their immaturity, and if burden of rectifying condition is slight in comparison with its usefulness and magnitude of risk.

5. Negligence ⚿33(3)

A possessor of land is liable for bodily harm to young children trespassing thereon caused by artificial condition he maintains on land if place where condition is maintained is one upon which possessor knows or should know that such children are likely to trespass, and condition is one which possessor knows or should know and realizes or should realize as involving unreasonable risk of death or serious bodily harm to such children, and children because of their youth do not discover condition or realize risk involved in intermeddling in it or in coming within area made dangerous by it, and utility of maintaining condition is slight as compared to risk to young children involved therein.

6. Explosives ⚿8

In action for injuries and a death resulting when dynamite caps exploded when one child was attempting to remove a cap from a box of dynamite caps which one child had found in an old building near street intersection, which a child had entered by lifting a loose board at rear of building and crawling under board, evidence showed prima facie case of violation by building owners of a duty of care to warn children which was proximate cause of injuries and death.

7. Appeal and Error ⚿133

Minute order granting a nonsuit, rather than formal judgment of dismissal entered thereon and filed later than minute order, was appealable order. Code Civ.Proc. § 581d; Rules on Appeal, rule 2(b).

◆

DeMarco & DeMattei, San Jose, T. G. Fitzgerald, San Rafael, for appellants.

J. E. Longinotti, Rankin, Oneal, Luckhardt, Center & Hall, San Jose, for respondents.

FRED B. WOOD, Justice.

This is an appeal by the plaintiffs from a minute order granting a nonsuit and from a formal judgment of dismissal entered thereon, in an action by Arthur Marino, Nellie Marino and Rudolph Zuniga, minors, for personal injuries sustained by them, and by Juan Marino for the death of his minor son George Marino, caused by the explosion of dynamite caps with which the children were playing. George Marino had found the caps in a building on the premises of the defendants.

In support of their appeal the plaintiffs claim (1) that Nellie Marino and Juan Marino are prima facie entitled to recover under the attractive nuisance doctrine, (2) that the non-trespassing children, Arthur Marino and Rudolph Zuniga present prima facie cases against the defendant landowners on general principles of negligence, and (3) that the defendants were negligent per se, and hence prima facie liable to all of the plaintiffs by reason of their storage of these dynamite caps in asserted violation of certain requirements of the Health and Safety Code.

The Facts.

It happened about 4:00 o'clock in the afternoon of the 15th of November, 1946. The children were on their way home from school. They got off the school bus at the southwest corner of King and Tully Roads in Santa Clara County. King Road runs north and south; Tully, east and west. They walked across Tully and proceeded northerly along the west side of King. George and Nellie Marino left the group and entered a building which stood near the intersection in an orchard owned by the defendants. After entering the building George found two small boxes which contained the dynamite caps. He and Nellie then rejoined the group. On the way George discarded one of the boxes but kept the other and showed it to the children. While they were viewing it, the caps exploded. George was killed and the others were rendered permanently blind.

George was eleven years old and in the fourth grade in school; Nellie was twelve, in the fifth grade; Arthur was thirteen, in the sixth grade; Rudy was eleven, in the fourth grade. Each could read and write the English language.

The building was an old three-room wooden structure, twelve by thirty-eight feet in size. Its outside walls consisted of one by twelve inch boards, with battens, laid vertically. Witnesses and counsel frequently referred to it as a "shack." It lay parallel to King Road, about 15 feet west of the west shoulder of the pavement; set in about 60 feet from Tully Road. There was no fence or other barrier between it and either road. A tree and a telephone pole (of a line of trees and poles) stood between it and King Road. It had an outside door, which was padlocked, and a window that was boarded up, on the west or orchard side; and a window on the east side, facing King Road; on its front, facing Tully Road, there were several large posters; among them, posters advertising a circus and the County Fair.

Nellie Marino testified: "The shack was real close to the road, pretty close; closer to King than to Tully Road. There was a house about a block and a half away from it, in one direction, and another about the same distance in another direction. I had passed by the shack before as I went to school. Before this day, I had gone on the orchard side of it just once; the other children had done so also; we had circled around it to get to the bus.

"There were posters on the side of the shack which faced Tully Road, 3 or 4 by 5 feet in size, about four of them. They were about a race track and things like the circus. There was a window on the orchard side of it, all boarded up. I don't think you could see in from that window. I don't recall seeing any other window. I don't remember any door leading to the outside; I think I just remember seeing a padlock.

"That day after getting off the bus and crossing a road [Tully Road] we walked along King Road. We walked in a group past the shack. Then George left the group and I followed him. He went in back of the shack, to the rear part of it [the north end], sort of in the middle of that end. He sort of walked fast to it. When he got there he saw this board and kind of lifted it up and told me to hold it. While I was holding it he went in. It was a long up and down board about 14 inches wide. It reached from the bottom of the shack up to the top; loose on the bottom where the nails used to be. The bottom was loose, the nails were sticking out. The board was not broken. It was sticking out a quarter of an inch at the bottom. George grabbed it from the bottom. We pulled the bottom part away from the building; did not have to pull it all off the wall to get in; the top of it was still fastened to the building. We looked in just before we went in. We pulled the bottom part out about as much as the board was wide. Neither of us kicked or broke any board. It was not necessary for George to struggle with the board. He did not use any tools in moving it. I do not think the wood was broken. It was around half a minute from the time George first touched the board until there was a hole wide enough for him to enter. While I was holding it he went in. Then I followed him. When we came out, the rear of the shack looked the same except the board was sort of to the side; I think it was pushed to the outside.

"I saw nothing on the rear of the shack, when I was with the group [walking past that day], that George might have been attracted to. This was not the first time I went by the shack. On other occasions when we have passed by the shack George had not run to it. The only reason I went over to the shack was because George went over and I followed him.

"After we went into the shack I noticed newspapers all over the floor. Not in piles, they were lying all crumpled up. There was dust all over the floor, and there were spider webs. It did not look like somebody was living there. There was no order at all about anything in there.

"There were three rooms. It was a long shack with two partitions dividing it into three rooms. There were no doors in the partitions; just door openings without doors. There was nothing at all in the first room except some crumpled newspapers. I went into the second room. I observed the same thing about the condition of that room, except there was a table against the rear partition near the right rear corner; that's all there was different from the first room. Yes, there were newspapers there, crumpled up, around ten or eleven of them. There was a sort of shelf up above the table. You could not approach the shelf without getting on the table. There were no chairs around the table and no pictures in that room. I think there was a window near the table.

"I went into the third [the front] room and George stayed in the second room. He was standing in front of the table; his hands were on the top of it; he was preparing to climb up on the table. In the third room I was looking at pictures hanging in frames on the wall, pictures of old fashioned people in old fashioned clothes. There were two old chairs; no table. I recall no other furniture in this room, nor any door leading to the outside. I stayed in the third room a minute or a minute and a half. When I came back into the second room George was getting off the table. He did not say anything to me at that time. He had in his hand two little round boxes. I thought they were just little boxes of face powder or something. They looked exactly like a woman's powder box.

"When we got outside, George showed me one of the boxes and threw it away. Then with the other box he and I ran to catch up with Arthur and Rudy to show them what George had found. Then we were all in a circle looking at it. George had the box in his hand and opened it and that is all I remembered. What I saw in the box was that I thought they were empty cartridges; they were copper color. (I know now they were dynamite caps.) There were around two or three layers of them, all piled up. I think Arthur just put his finger on them to see. That is the last thing that I noticed. I do not remember if any of the caps dropped on the pavement.

"I knew at the time it was wrong to enter someone else's property but I didn't think of it then. I know what is right and wrong. At that time I didn't realize. I knew it was wrong to take things from other people's property. When George picked those boxes up or took them off the shelf and came out with them, I never thought about it being not right to do so. I did not think of it, although I did know it was wrong to take things away from other people's property. The reason I didn't think it was wrong taking those boxes, was that everything happened so quick I never thought of it.

"I was in the fifth grade of school at the time. I had been going to this school about two weeks. Prior to that, all my schooling had been in Los Angeles. I could read and write the English language. I never had any particular trouble in passing my grades at school."

Arthur Marino testified: "From the outside, the shack just looked like real old—the wood you could tell it was old and worn out, and all that. This was a kind of an old worn out building. I recall a front door on the south side. It had a lock on it. I am not sure if it was a padlock, I was just passing through there and would just glance at the thing. It had one window on it, on the orchard side. I am not sure if there was a window on the King Road side. I don't remember whether the window on the orchard side was boarded or not. I never tried to look into the building through that window. There used to be posters there about the races and the fair and some other things. I do not remember if I took any short cuts across that orchard. The only time I remember getting on that property was just on the edges of it. On that day I did not walk on the property. I never went inside the shack. I never saw anybody working in the orchard near the shack as I walked by on that day, nor any other time. I remember, before that time, seeing some people picking walnuts in the orchard across the road from the shack. I had been going to this school about two weeks. I was thirteen and in the sixth grade. I could read and write English.

"We had passed about two telephone poles, I don't know how many feet, when Nellie and George left us. I really don't know when they left. I was looking at a funny book. Then George and Nellie came running up to Rudy and me. By that time we had crossed to the east side of the road. When they came up George yelled at us and told us 'look what I found' and he came up to us with a box in his hand; a round box, three inches across the top, brown colored cardboard, no writing on it, a plain box. I think George opened it, he was showing it to us. We were all looking at the contents. I thought they were empty shells, round like a bullet shell but copper colored from the inside and kind of shiny. I didn't know what they were, that's why I thought they were empty bullet shells. I do not remember any of them dropping to the pavement. I was trying to take one out, trying to pinch it to pull it out with my finger nails, that is when they exploded.

"I was familiar with the shells from a .22 rifle. I knew that hammering the little cap on a .22 rifle shell would cause explosion and the bullet part of it to go out through the rifle. I knew that at that time."

Rudolph Zuniga testified: "I did not notice anything about the shack, only that it was very old. I had seen this shack every day. As I recall it, it had one door and it was facing the orchard, and there was a window there, too, on the same side of the house. I think the door had just a regular lock, with a doorknob and a keyhole. I do not recall if it had a padlock. The window had boards nailed across it. I never tried to look into the window. I never knew what was inside the shack. I never actually played around it.

"When Nellie and George returned to us that day Arthur and I had crossed to the right side of King Road. They had found something, George had. When I looked at the box it was already open. I was looking at it when the explosion occurred. That box was about two inches by one inch, looked like a women's powder box. There was no writing on the box.

"When I saw these things in this round box, they looked like shells from a .22 rifle. They were all fitted in there in orderly fashion. They were not just scrambled in the box loose. They were fairly compact. I am familiar with a .22 rifle bullet. I was at that time. I had fired a .22 rifle. At that time I did not know what dynamite caps were."

Juan Marino, father of George, Nellie and Arthur, testified: "The land where the shack is and the surrounding lands are all in the country. The other properties are fenced but this one is not. There was an old barn on that property, where they stored something. It was about 200 feet from the shack, on the orchard side; no other buildings on that property. There were buildings to the north, about half a mile. On several occasions as I passed by I saw persons working there. I saw Mr. Valenti working there, out toward the middle of the orchard.

"I believe George was below the mentality usual for children of his age. By that I mean I moved about a bit, going to work back and forth, to Los Angeles and back, and so the children did not attend school as regularly as they might have. I worked from place to place and took my family with me and sometimes that interrupted their schooling. They had the same understanding that other children of that age have."

Michael Converse, a press photographer, took a picture of the north end of the shack. He testified: "I took this picture on November 15, 1946, after the accident. It was an old shed and the lumber rather rotting away; the planks that made up this building were old and rotting away. (The picture, which is in evidence, shows a vertical board split lengthwise, with a horizontal break near the bottom, still fastened at the top, and tipping inward at an angle just above the horizontal break.)

"The up and down crack in this board was an old crack. All the break that is around this board was old. The wood along the line of the horizontal break was a very dark color, just as wood appears when it is deteriorating. The face of that break was a darker color than the boards that faced the weather. It had a slight tint of green as wood deteriorates from rain and weather. I observed something on it similar to moss growing."

Douglas Daly, a traffic officer of the California Highway Patrol, present when the picture was taken that day, testified: "Referring to that break in the board, the edges where the wood had been parted indicated that they were weathered and that the break had been there for some time. I would say it was an old break in the wood, the hole was there, the hole in the shed.

"I found some of the dynamite caps; picked them up so traffic would not run over them. They were long in shape, about an inch long."

Robert Wiedner testified: "I have been acquainted with this property since about 1928. At one time my mother lived there in the house alone for a short space of time, in 1927 or 1928. I acquired it by inheritance in 1943. From 1943–1945 I was generally familiar with the contents of the shack. I did not know of the existence of dynamite or of any such caps as these on the premises. I sold this property to the defendants in September or October, 1945, on the agreement that I was to have the crop then on the trees and should deliver possession after harvesting, not later than February 1, 1946.

"Christmas week, 1945, I cleaned out the shack and did not notice any boxes such as those here described. The next time I returned to this area from my home in Oakland was right after Christmas, 1945, or early January, 1946, at which time I turned the keys of the premises over to defendant Valenti. There were three keys; two to the house and one to the barn. One of the locks on the shack when I gave up possession was a brass padlock, which was not there when I inspected it during this trial. Before delivering possession I cleaned the place out, disposing of bottles, medicines, oil and general refuse, and removing furniture. I believe I left some furniture there and told the men who had been taking care of the place for me, they could have any of it they wanted. They may have taken a bed before I delivered up possession."

Lowell W. Bradford, who qualified as an expert, testified: "A dynamite cap ordinarily has a compound known as fulminate of mercury or lead azide. They are equivalent in their ability to detonate with percussion or with fire. If the word "fulminate" were used, a dynamite cap that has fulminate of mercury would come within that category. Both fulminate of mercury and lead azide have explosive power greater than blasting powder. These substances are high explosives. I would classify dynamite caps as high explosives.

"A dynamite cap is used to initiate or start an explosion and other explosive materials, and is known as a detonator. It would not propel a missile but it would render other substances. It would come within the classification of rending other substances. The caps can be started by a blow, or by a fuse which burns into the cap and sets it off. They become even more sensitive, highly sensitive, when they decompose, as when exposed to dampness. They should be kept in a dry place of storage, with a range of temperature of but five to ten degrees Fahrenheit, with a mid range of about 70 degrees, and subject to inspection at all times. When there is deterioration it is possible that a dynamite cap will go off on the mere handling of it. The explosion of one cap in close proximity to other caps could cause the others to go off."

Defendant Sam Valenti, called by the plaintiffs under section 2055 of the Code of Civil Procedure, testified: "We bought this 20 acres about September, 1945, from Mr. Wiedner. The house was in good shape. No one was living in it. It had some things stored in it. Mr. Wiedner wanted time to find a place for them. He kept the keys to it and gave us only one key, the key to the barn. About 40 days after we bought he came here and opened the door to the house but I did not go in. At that time I had dug out trees all over the ranch with a tractor. Some man did it for me; used no dynamite caps to get the trees out. I never saw dynamite in my life. I never saw Wiedner again after that time. He never sent or gave me a key to that house. Neither I nor my partner has a key to it. I never put a lock on that door. I have never been inside that house.

"Prior to November, 1946, I never saw children coming on my property. I knew the school bus stopped there, it stopped on the other side of the street."

Defendant Luigi Travaglina, also called by the plaintiffs under section 2055, testified to much the same effect as did Valenti.

Summary of the Facts.

[1] In appraising this evidence, as in the case of any appeal from an order of nonsuit, we must disregard conflicting evidence, give to plaintiffs' evidence all the value to which it is entitled, indulge in every legitimate inference which may be drawn from that evidence, and, if more than one inference reasonably may be drawn, take the view most favorable to the plaintiffs. Stockwell v. Board of Trustees, 64 Cal.App.2d 197, 200–201, 148 P.2d 405, and cases there cited. The testimony of the defendants, given under § 2055 of the Code of Civil Procedure, should be considered but those portions of it which are unfavorable to the plaintiffs should be disregarded. Jeppi v. Brockman Holding Co., 34 Cal.2d 11, 18, 206 P.2d 847, 9 A.L.R.2d 1297; Young v. Bank of America, 95 Cal.App.2d 725, 729, 214 P.2d 106, 16 A.L.R.2d 1155.

This shack in its dilapidated and uninhabited condition, clearly visible and readily accessible to children passing by, with a broken board furnishing easy entrance, the jury reasonably might conclude was a lure to children; accented by the fact that George made straight for that broken board at a rapid pace and did enter and explore. They might also reasonably conclude that defendants as owners and operators of this property were aware of these facts and that they, especially Valenti who personally farmed this land and knew that the school bus regularly stopped nearby, knew or should have known that children frequently were in the vicinity of the shack and were likely to be attracted to and into it.

The jury could have no doubt that these dynamite caps were highly explosive, not alone from the testimony of the expert but also from the very fact that one or more exploded, not from percussion or fire, but by the mere attempt of Arthur to remove one from the little box with his finger nails. They could find that defendants knew or should have known of the presence of caps on the shelf in little, unlabeled cardboard boxes exposed to the view of any child who might enter, and in surroundings suggestive of abandonment, tending to make George and Nellie less conscious than they otherwise might have been that it would be wrong to take these little boxes that looked like women's powder boxes.

Would these facts support a finding that these defendants owed these children a duty which defendants violated and that such violation was the proximate cause of the injuries?[1]

Discussion of Issues of Law.

[2] In our search for the answer, we start with the principle that a man must so use his property as to cause no unreasonable harm to another. He thus owes certain duties to the owner or occupier of neighboring land and to persons who come upon his land, such as licensees and invitees.

[3, 4] It has been said that he owes no duty to trespassers upon his land, to put or keep it in a reasonably safe condition for them, or to conduct his activities in a manner not to endanger them. Yet, a number of exceptions to this rule concerning trespassers have developed. It is mitigated to some extent if the landowner discovers a trespasser on his premises or knows that they frequently enter upon or cross over a portion of his property, especially if they may there encounter extremely hazardous conditions.

Another exception runs in favor of trespassing children if their trespass is foreseeable, if the condition of the premises involves an unreasonable risk of harm to them in view of their immaturity, and if the burden of rectifying the condition is slight in comparison with its usefulness and the magnitude of the risk.

This exception in favor of trespassing children had its beginning in the so-called "turn-table" cases, characterized at the time as "attractive nuisances," an unfortunate term to have used, evidenced by the difficulties later encountered in applying the term. See Prosser on Torts, 1941, pages 617–620. More descriptive and less confusing, we think, would be the expression "injuries to trespassing children."

[5] We derive the applicable principles and standards from the decisions of the courts of this state. Some of the cases are a bit difficult to reconcile, one with another. See 41 Cal.Law Rev. 138; Hastings L.J., 1951, p. 91; 24 So.Cal.L.Rev. 504. Our review of the decisions in this state convinces us that the rule today in California is substantially as expressed in § 339 of the Restatement of the Law of Torts: "A possessor of land is subject to liability for bodily harm to young children trespassing thereon caused by a structure or other artificial condition which he maintains upon the land, if (a) the place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass, and (b) the condition is one of which the possessor knows or should know and which he realizes or should realize as involving an unreasonable risk of death or serious bodily harm to such children, and (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling in it or in coming within the area made dangerous by it, and (d) the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein."

Chief Justice Beatty in 1896 gave voice to the basic ideas in these words: "The owner of a thing dangerous and attractive to children is not always and universally liable for an injury to a child tempted by the attraction. His liability bears a relation to the character of the thing, whether natural and common, or artificial and uncommon; to the comparative ease or difficulty of preventing the danger without destroying or impairing the usefulness of the thing; and, in short, to the reasonableness and propriety of his own conduct, in view of all surrounding circumstances and conditions. As to common dangers, existing in the order of nature, it is the duty of parents to guard and warn their children, and, failing to do so, they should not expect to hold others responsible for their own want of care. But, with respect to dangers specially created by the act of the owner, novel in character, attractive and dangerous to children, easily guarded and rendered safe, the rule is, as it ought to be, different; and such is the rule of the turntable cases, of the lumber-pile cases, and others of a similar character. But the owner of a thing dangerous and attractive to children is not always culpable, and therefore is not always liable for an injury to a child drawn into danger by the attraction. It is necessary to discriminate between the cases in which culpability does and does not exist. In the Illinois case [City of Pekin v. McMahon, 154 Ill. 141, 39 N.E. 484], cited by counsel the city of Pekin was held to have been culpable in excavating a deep pit within the city limits, which afterwards filled up with water. It might be granted that that case was well decided, and the principle of the Turntable Cases properly applied, without holding that this defendant is similarly liable. There the existence of a pond in a thickly-peopled quarter was due to the act of the party charged. Here, the existence of the pond was due to the exercise by the city of San Francisco of a power and authority which the defendant could not lawfully resist. By the act of the city, and without any fault on his part, his lot was converted into a pond. He might, it is true, have filled it up; but he was no more bound to do so than if it had been a natural pond, because it was in no respect more of a nuisance than it would have been if it had been there before the city was laid out." Peters v. Bowman, 115 Cal. 345, 356–357, 47 P. 113, 598, 599.

---

[1] In separating these questions, for convenience of discussion, from those which preceded, we must not lose sight of the principle that it is the function of the trier of the facts to determine both; i.e., it is the function of the jury, under proper instructions, to determine the ultimate fact of negligence. Stockwell v. Board of Trustees, supra, 64 Cal.App.2d 197, 203, 148 P.2d 405.

In 1919, we had the case of an intelligent boy eleven years old who, with his brother and another lad, entered a mine to play. It was on a Sunday. No work was being done in or about the mine. After entry, this boy entered an old tunnel and fell to his death in a stope which was 500 feet deep and filled with water below the 140-foot level. At the time of the accident and for some months prior thereto the stope was open and unprotected. The reviewing court affirmed a judgment against the mine owner or operator in an action for the death of the boy. Faylor v. Great Eastern Q. Min. Co., 45 Cal.App. 194, 187 P. 101; opinion by Justice Beasly, pro tempore, Justices Richards and Kerrigan concurring. The Supreme Court denied a petition for a hearing by that court.

The court recorded its extensive review of the authorities, 45 Cal.App. at pages 200–204, 187 P. at page 103, and declared the applicable rule in this state as follows: "Those who place an attractive but dangerous, contrivance in a place frequented by children, and knowing, or having reason to believe, that children will be attracted to it and subjected to injury thereby, owe the duty of exercising ordinary care to prevent such injury to them, because such persons are charged with knowledge of the fact that children are likely to be attracted thereto, and are usually unable to foresee, comprehend, and avoid the danger into which they are thus knowingly allured. [Citations.]" At pages 199–200 of 45 Cal. App., at page 103 of 187 P. Some of the earlier California cases were considered and distinguished at pages 202 to 204 of 45 Cal.App., at page 101 of 187 P. The court especially emphasized as a distinguishing element in the case before it, the fact that there "the danger was distinctly a concealed danger," 45 Cal.App. at page 203, 187 P. at page 105, noting also the element of lure to children and the foreseeability of their coming to play. The artificiality of the dangerous condition (a man-made condition, not one created by nature) was, of course, obvious.

Other similar cases are Sanchez v. East Contra Costa Irr. Co., 205 Cal. 515, 516, 271 P. 1060, a man-created deep hole in the bottom of an irrigation ditch; Blaylock v. Jensen, 44 Cal.App.2d 850, 113 P.2d 256, a concealed oil sump into which the landowner knows or has reason to believe a trespasser will probably fall; Long v. Standard Oil Co., 92 Cal.App.2d 455, 207 P.2d 837, an artificial hole in the ground partly filled with water the surface of which bore a considerable resemblance to the surrounding soil.

In 1933, there was the case of a twelve year old boy who, the complaint alleged, found some apparently abandoned dynamite caps on a railroad right of way which was commonly used by the general public. He was injured by the explosion of one or more of these caps. All of the elements required by § 339 of the Restatement apparently were pleaded. The reviewing court reversed a judgment based upon an order sustaining a demurrer to the complaint. Lambert v. Western Pac. R. R. Co., 135 Cal. App. 81, at page 90, 26 P.2d 824; petition for hearing by the Supreme Court was denied.

In ascertaining the applicable rule, the court seemingly placed considerable reliance upon the principles enunciated by Chief Justice Beatty in Peters v. Bowman, supra, 115 Cal. 345 at page 356, 47 P. 113, 598. In distinguishing some of the seemingly inconsistent decisions which had intervened, the court in the Lambert case put undue emphasis, we think, upon the element of "mere technical trespass," found present in that case. It would be extremely hazardous to determine as a matter of law, the degree of moral turpitude of a trespassing child. Let the trier of the facts pass upon it, in the absence of clear and positive proof that the child in question possessed maturity of judgment and inhibiting faculties of such degree and quality that reasonable minds would not differ in drawing the inference that he did not need and was not within the scope of the protection of the rule under discussion.

A few early cases of seemingly adverse import merit consideration. In Nicolosi v. Clark, 1915, 169 Cal. 746, 147 P. 971, L.R.A. 1917F, 638, the Supreme Court affirmed a judgment which had been entered upon the sustaining of a demurrer to the complaint in an action by a ten year old boy who was injured by the explosion of a dynamite cap which he had taken from a street-work contractor's tool and implement box. The caps were in a small box which was inside the tool box. The latter was in the street, three feet from the sidewalk. The boy was simply passing along and the large box engaged his attention. The court found the boy negligent as a matter of law, saying that a child that age, unless mentally deficient, is chargeable with knowledge that he has "no right to make free with the contents of a box placed such as this, manifestly a box belonging to other people and containing their goods". 169 Cal. at page 748, 147 P. at page 971. It is difficult to reconcile this case with the later case of Katz v. Helbing, 205 Cal. 629, 271 P. 1062, 62 A.L.R. 825, discussed later on in this opinion.

The Nicolosi case was followed in Hale v. Pacific Tel. & Tel. Co., 1919, 42 Cal.App. 55, 183 P. 280. The defendant was using an unenclosed cottage for the storage of materials needed on a nearby construction job. A box was left on the porch over the week-end. The top of the box was nailed down flush on one end, the other being lightly tacked. Within, was a small tin box containing dynamite caps, covered with excelsior. The boy entered the porch, pried open the top of the large box, removed the excelsior, found the tin box, opened it, and took out 20 of the caps. He gave some to a playmate who was injured while playing with them. A judgment for the playmate was reversed. The wrongful act of the eight year old was an intervening cause which broke the chain of connection, if any, between the plaintiff and the defendant. The significant factor was that the eight year old testified "that he knew that it was both morally and legally wrong to take the caps from the box." 42 Cal.App. at page 59, 183 P. at page 281. Accordingly, "his connection with the matter, in so far as it affects plaintiff, must be deemed that of an adult and *sui juris*." 42 Cal.App. at page 58, 183 P. at page 280. It could not be said under those circumstances, that defendant was bound to anticipate the act committed and guard against its consequences. Upon that basis, the decision in the Hale case was consistent with the rule as declared in § 339 of the Restatement.

Bradley v. Thompson, 1924, 65 Cal.App. 226, 223 P. 572, was another dynamite cap case. It came up on the sustaining of a demurrer to the complaint in an action by an eleven year old boy who found the caps in a tin box which defendant had placed on a cross-beam, three feet from the ground, which supported a shed situate a few feet from a public road. The boy, passing by, delivering newspapers, was attracted to the box. The court said that this case was ruled by the decision in the Nicolosi case. Accordingly, the complaint in the Bradley case was deemed insufficient for failing to allege that the plaintiff was deficient in understanding and did not realize the culpability of his conduct. Consequently, there was "nothing in the complaint to justify the inference that defendant knew, or had reason to believe, that a boy of 11 years, of average intelligence and possessing the moral sense usual in a lad of that age, would enter defendant's close and purloin these dynamite caps." 65 Cal.App. at page 233, 223 P. at page 575. It would appear, therefore, that the courts in the Nicolosi and Bradley cases did not necessarily disallow any portion of the rule under discussion. In applying it they simply looked upon a ten or an eleven year boy of average intelligence as if he were an adult, and did so as a matter of law. That concept was later modified by making the question of the capacity and accountability of a child of such an age a question of fact, not of law.

In 1928 the Supreme Court had for consideration a complaint which alleged that the defendants negligently maintained a supply of lime or mortar upon the sidewalk in front of a building they were constructing; that defendants knew that small boys were taking wet lime and mortar and throwing it at passing street cars; that a small and irresponsible boy of ten years picked up some of this lime or mortar and threw it at a street car on which plaintiff was a passenger, a portion of which hit plaintiff, to his injury. The court reversed the judgment which had been entered upon sustaining a demurrer to this complaint. Katz v. Helbing, supra, 205 Cal. 629, 271 P. 1062. The court took cognizance of the custom of leaving such materials in boxes in front of a building under construction, but held that if experience had demonstrated that incidents such as this were likely to occur it would be wrongful to so leave them if "a reasonably prudent man would have foreseen that injury would probably result". 205 Cal. at page 634, 271 P. at page 1064. Intervening wrongful acts of third persons ordinarily break the chain of causation, but "this is not always the case, especially where the acts of children of a nonresponsible age are involved." 205 Cal. at page 634, 271 P. at page 1064. The allegations of this complaint would permit proof "showing that the frequency, extent and character * * * of the small boys were such as to create liability on the part of defendants * * *." 205 Cal. at page 635, 271 P. at page 1064. Evidence would be admissible to show whether defendants had warned the boys of the dangerous character of their acts, and whether the defendants could have moved these materials to some less accessible place. It could not be said as a matter of law that an eleven year old boy, presumed to possess average intelligence for his age, is a responsible agent. The age at which a child attains the capacity of being held responsible for his conduct is one of fact for determination by the trier of the facts. Each case must be determined by its particular facts. "Negligence is relative to time, place, and circumstances. There is no fixed rule which may be universally applied. The question here is: What was the duty of the respondents, knowing what they are charged with knowing and seeing what the complaint alleges they saw? If reasonably prudent persons would, under the allegations of the complaint, have adopted or taken steps to adopt some measure to protect the public against the repetition of the acts which recurred during five successive days, and we are of the view that they would have taken such steps, then it became the duty of defendants to act in a simlar manner. It would then become a demonstrable proposition that the lime in its semisolid state was attracting the immature and thoughtless as a substance for childlike amusement. That it was a dangerous substance to scatter about in thickly populated districts must be known to adult persons.

"Call the lime in its mixed form an attractive nuisance, or what you may, the basic fact remains that if the allegations of the complaint be taken as true, the defendants owed to the general public protection from annoyance and injury arising from a condition which they had caused to exist and which they knew was tempting and impelling youthful minds to deeds that were likely to bring damage to innocent persons lawfully using the public sidewalks and streets. Every person in his intercourse with his fellows owes to them certain natural inherent duties, of which all normal persons are conscious, among which is the duty of protecting life and limb against peril when it is in his power to reasonably do so." 205 Cal. at page 638, 271 P. at page 1065.

This landmark decision should settle all doubt concerning the applicable rule when a trespassing child is injured.

One case of opposite import should be mentioned. In Puchta v. Rothman, 99 Cal.App.2d 285, 221 P.2d 744, the majority opinion reviews the authorities and concludes that § 339 of the Restatement substantially expresses the rule in this state, subject to certain limitations, saying in part, "A building under construction, being immobile for one thing, is readily distinguishable from an attractive, moving vehicle * * *." 99 Cal.App.2d at page 289, 221 P.2d at page 747, and in effect holding that a trap created by covering a hole with tarpaper could not have been obviated without undue burden to the owner or the builder of the structure. We find Justice Dooling's dissent, 99 Cal.App.2d at pages 291–293, 221 P.2d at pages 748–749, the more persuasive of the two opinions in that case, and refer to his opinion for a clear and incisive analysis. (Apparently none of the parties petitioned for a hearing by the Supreme Court.)

Especially significant in our case are the highly explosive character of the materials which constituted the dangerous condition, and their attractive form, shiny copper-colored objects which resembled .22 caliber cartridges. The trend of decision in this country is that the possessor of explosives owes a high degree of care to avoid injury to children who might have access to them. That appears to be so even in states that do not adhere to the "attractive nuisance" doctrine; also, in situations where that doctrine might not apply. See the comprehensive note on this subject in 10 A.L.R.2d 22–186.

Then, too, we have a statute which prescribed minimum standards for the care and storage of "explosives," defining them as including "Gunpowder, blasting powder, dynamite, guncotton, * * * nitroglycerine compound, *fulminate*, * * * or *an explosive substance having an explosive power equal to or greater than black blasting powder*", also including "*A substance to be exploded or ignited to produce a force for* propelling missiles or *rending other substances.*" H. & S. Code, § 12000, as it read in November, 1946 (Emphasis added.) The testimony of the expert in this case indicated that the dynamite caps here involved came within the scope of this definition.

Except at an explosive manufacturing plant, "no person shall possess, keep, or store any explosive which is not completely inclosed * * * in a tight metal, wooden, or fiber container." H. & S.Code, § 12150. Except while being transported or while in the custody of a common carrier, "every explosive shall be kept or stored in one of the two classes of magazines specified in this chapter [Ch. 3, Pt. 1, Div. 11, comprising sections 12150–12220.]." H. & S.Code, § 12151. A magazine of the second class here applies, "a stout box in which not more than one hundred pounds of explosives are stored or kept." § 12210. "A sign on which are printed legibly the words, 'magazine,' 'explosives,' 'dangerous,' shall be kept posted in a conspicuous place on the magazine." § 12211. "Except when * * * opened for use by authorized persons, the magazine shall at all times be kept securely locked." § 12212. Violation of any of these provisions is punishable by a fine of $25 to $1,000 or by imprisonment not more than six months, or both. § 12220.

These provisions of the code prescribed minimum standards of care for the custody and storage of the dynamite caps here involved. They emphasize, lend force, and give concrete expression to the high degree of care which the law, even without the aid of the statute, would impose upon the possessor of highly explosive substances, especially toward children who may have access to them, including children who gain access by trespassing. We need not be presently concerned with the question of possible negligence per se in the event of a violation of this statute. The minimum standard of care which the statute imposes and the requisite high degree of care which that denotes are the factors of special significance in the present inquiry.

[6] We conclude that the facts in evidence show a prima facie case of violation of a duty of care owed by these defendants toward these children, a violation which was the proximate cause of the injuries, bearing in mind the rules applicable upon a motion for nonsuit, differing as they do from those which govern the trial court upon a motion for new trial or a reviewing court on appeal from a judgment entered upon the verdict of a jury or upon the findings of a trial judge.

In view of this conclusion, we need not consider defendants' contention of no liability toward Arthur and Rudolph, predicated upon the claim that George's was an intervening act of a responsible person presumed to know the nature of his trespass and asportation. The nature of George's conduct, as we have indicated, was under the circumstances of this case, a question for the jury. True, Nellie said she observed nothing which might have attracted George. Yet, he was attracted. That and other facts bearing on that question were in evidence for appraisal by the jury.

Defendants also suggest that even if the shack was an "attractive nuisance" there can be no recovery because it was a dynamite cap within the shack, not the shack, which caused the injury. That is not the law, whether we look upon the caps as an attraction within an attraction or as a concealed highly dangerous condition, a "trap," on the premises. We consider that this is more appropriately viewed as a prima facie case of liability measured by the tests indicated in § 339 of the Restatement of the Law of Torts, which our review of the case law convinces us expresses the California rule concerning injuries to trespassing children.

[7] We have two appeals: One from a minute order which did not direct that a written order be prepared, signed and filed; the other, from a written order which in fact was later filed. Both appeals, taken March 27, 1952, were timely. Under these circumstances, the minute order was the appealable order. C.C.P., § 581d; Rule 2(b) of Rules on Appeal; Costa v. Regents of the University of Cal., 103 Cal.App.2d 491, 229 P.2d 867.

The minute order appealed from is reversed and the appeal from the written order is dismissed. Appellants will recover costs.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; SHENK and TRAYNOR, JJ., dissenting.

---

119 Cal.App.2d 546

GARDNER et al. v. SNOW et al.

Civ. 4594.

District Court of Appeal, Fourth District, California.

Aug. 5, 1953.

Rehearing Denied Aug. 31, 1953.

Hearing Denied Oct. 1, 1953.

Action for accounting of monies claimed to have been converted to the personal use of legatee of a note against the terms of will. The Superior Court of San Diego, C. M. Monroe, J., entered judgment for those claiming though legatee and plaintiffs appealed. The District Court of Appeal, Barnard, P. J., held there was a clear and distinct bequest to legatee of the note that could not be limited by bequest over to others.

Affirmed.

1. Wills 🔑440

It was not what testator wanted to do, but what he actually did, as expressed in the words used, which govern, in the absence of other evidence with respect to his intentions.

2. Wills 🔑612(1)

Where bequest of a note was to testator's sister, to receive all payments of principal and interest during her lifetime with remainder, if any, upon her death to his nieces, the note was given absolutely to sister, so that on death of sister who received entire principal and died before due date of note, which did not contain provision giving debtor right to make payment before due, nieces had no rights in prepaid principal. Probate Code, § 104.

◆

Wing, Wing & Brown, Banning, for appellants.

Levenson, Levenson & Block, San Diego, for respondent Snow.

Price, MacDonald & Knox, Oakland, Luce, Forward, Kunzel & Scripps, San Diego, Robert W. MacDonald, Orlando J. Bowman, Oakland, for respondent Oakland Title Ins. & Guaranty Co.

BARNARD, Presiding Justice.

This is an appeal from a judgment based upon the construction of one provision of the will of James L. Ingram. The will was executed on December 4, 1946, and the disputed provision reads:

> *"Fourth:* That certain Promissory Note representing the balance due from the sale of the Annestone Apartments, which said note is secured by a Deed of Trust, I give, devise and bequeath unto my said sister, Ivy Ingram Snow she to receive all of the payments of principal and interest thereon during her lifetime.
>
> "Upon the death of my said sister, I give, devise and bequeath the remainder, if any, of said Note and Deed of Trust, in equal shares, to my two (2) nieces, Marguerite Gardner and Anna Davidson, or to the survivor of them."

This was a note for $70,000 dated June 26, 1946. It was secured by a deed of trust on the apartment house, in which the defendant title company was named as trustee. The note provided that interest at 6% should be paid monthly until $10,000 was paid on the principal; that such a payment should be made after January 15, 1947, and before July 1, 1947, whereupon the monthly interest payments should be reduced to 4%; that another $10,000 should be paid after January 1, 1948, and before July 1, 1948; and that beginning August 1, 1948, the principal and interest should be paid in monthly installments of $500 until July 1, 1951, at which time the entire balance should be paid. The note contained no provision giving the maker the right to make additional payments in advance of the due dates, but it contained a provision that if any installment was not paid when due the entire amount should become immediately due at the option of the holder.

Mr. Ingram died in 1947. During the probate of his will, on an application for partial distribution, that court found that this note was to be distributed to the sister, Mrs. Snow, and ordered it distributed to her "in accordance with the Last Will and Testament of said decedent and with the findings hereinbefore set forth." Pursuant to that decree the note was delivered to Mrs. Snow on August 12, 1948, and her receipt recited that she was "to receive and hold the said note in conformity with the provisions of" the will. Mrs. Snow received the $500 monthly payments on the note until October, 1950. During that month she received $41,535 in full payment of the note, including three months advance interest. This full payment resulted from the fact that the makers of the note had resold the apartment house, and had requested a reconveyance under the trust deed in order to clear their title. The title company reconveyed the property at the request of Mrs. Snow. She died on March 7, 1951, a few months before final payment would have been due, under the terms of the note.

The plaintiffs, who are the nieces mentioned in the will, brought this action for an accounting of the monies claimed to have been thus converted to the personal use of Mrs. Snow or her husband; to impress a trust on certain property claimed to be the proceeds thereof; and for damages in the amount that would otherwise have remained unpaid when Mrs. Snow died. There is no dispute as to the material facts, and there is no evidence of the testator's meaning and intent except as disclosed by the language of the will. The court found that the disputed provision did not create a life estate in Mrs. Snow, with a contingent remainder to the nieces; that the decree of partial distribution purported to distribute the note pursuant to the terms of the will; that under the will and under that decree Mrs. Snow was entitled to retain and take clear title to any money collected on the note during her lifetime; and that no unpaid balance remained at the time of her death. It was also found that the final payment in October, 1950, was made voluntarily by the debtors for the purpose of clearing their title, and without any solicitation on the part of Mrs. Snow; that there was no fraud, connivance or conspiracy on the part of Mrs. Snow in receiving that payment and in requesting the title company to reconvey the property; that the receipt of the money by Mrs. Snow, and the discharge and release of the note and trust deed, were made without the knowledge of the plaintiffs; and that it was the intention of the decedent, as expressed in the will, that Mrs. Snow should receive and retain any and all payments made during her lifetime, whether paid in advance or not, and regardless of any remainder. Judgment was entered accordingly, and the plaintiffs have appealed.

It is contended that the partial decree of distribution incorporated the provisions of the will and does not affect the situation; that the court erred in finding that the disputed provision did not create a life estate; that it is manifest that the testator did not want his sister to have the secured note absolutely, as otherwise this provision would have been unnecessary; that the testator had in mind the possibility of the death of his sister prior to the note's maturity; that since "the ordinary life estate would not suffice as the sister would then be entitled to the income only, to wit, the interest and not the principal", he desired to give the sister the power of consumption with respect to that part of the principal which was paid in her lifetime; that he inserted the phrase "she to receive all of the payments of principal and interest thereon" as an expression of the "consumptive power of a life tenant"; and that he thus created a life estate which could not be destroyed by any act of the life tenant.

[1] It is well settled that it is not what a testator wanted to do but what he actually did, as expressed in the words used, which governs in the absence of other evidence with respect to his intention. It clearly appears that this will did not give to Mrs. Snow a mere life estate in this note with the power of consuming part of the principal, giving the remainder, including the unused portion of the payments already made, to the nieces. She was to receive all payments made in her lifetime, and it cannot be questioned that any such payments, if due when made, would become her absolute property. If the entire note had come due and been paid in her lifetime, the nieces would have had no possible interest therein. As it happened, the entire amount would have been due had she lived some four months more. This was merely a bequest by which certain payments on the note were given absolutely to the sister and, in a certain contingency, the remaining payments were given to the nieces. There was no life estate with respect to any part of the note.

[2] The controlling question is as to the construction to be given to this language of the will; whether it should be construed as giving to the sister all payments actually made in her lifetime, or only such portion thereof as would have been due under the terms of the note. Section 104 of the Probate Code provides that a clear and distinct bequest cannot be affected by any other words not equally clear. The first part of the disputed provision gives this note to the sister. The only limitation is that she is to receive all payments of principal and interest during her lifetime, and that the remainder "if any" is given to the nieces. If the testator intended a further limitation, restricting her to that part of such payments which would have been due under the exact terms of the note, that intention is neither expressly stated nor indicated with equal clarity by any of the language used. The will was drawn by a lawyer, and the note may not have been before the parties at that time. Whether or not the testator and his attorney had in mind the fact that the note contained no provision giving the maker the right to make payments before they were due, the language used indicates that they were concerned with the times when the payments should be

made, and not the times when they would become due under the strict terms of the note. It would have been very simple to have provided otherwise had they so desired.

The will specifically provides that the sister is to receive all payments during her lifetime and contains no language expressly limiting the right to receive such payments, if offered, in advance of the due dates. It clearly appears that the testator contemplated the possibility that there might be no unpaid balance left after her death. The bequest to the nieces is expressly limited to the remainder of the payments "if any", and the note contained the usual acceleration clause whereby the entire amount might become due at any time. In view of the language used, it would seem unreasonable to infer that the testator intended to differentiate between payments voluntarily paid in advance and those which had been thus accelerated. It is the true intent of the testator, as expressed in the language employed, which governs in such a case. The trial court's construction of the language used is a reasonable one and, under familiar rules, it cannot be disturbed.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

Hearing denied; TRAYNOR and SCHAUER, JJ., dissenting.

41 Cal.2d 193

BROWN v. JENSEN et al.

L. A. 22671.

Supreme Court of California, in Bank.
July 3, 1953.

Rehearing Denied July 28, 1953.

Action on promissory note. From judgment of Superior Court, Los Angeles County, Thurmond Clarke, J., for plaintiff, defendant appealed. The Supreme Court, Carter, J., held that under statute providing that no deficiency judgment shall lie after sale under purchase money deed of trust, plaintiff, whose note was secured by purchase money second deed of trust could not bring action on note after security had become valueless because of sale of security by holder of purchase money first deed of trust.

Judgment affirmed.

Spence, J., dissented.

Prior opinion, 250 P.2d 626.

1. Mortgages 🔑375

Under statute providing that no deficiency judgment shall lie after sale under purchase-money deed of trust, character of transaction is determined at time trust deed is executed, and its nature is then fixed for all time, and as so fixed no deficiency judgment may be obtained, regardless of whether security later becomes valueless. Code Civ.Proc. § 580b.

2. Mortgages 🔑375

Security alone may be looked to for payment of debt secured by purchase-money trust deed, and one taking such deed knows value of his security and assumes risk that it may become inadequate. Code Civ.Proc. § 580b.

3. Mortgages 🔑375

Under statute providing that no deficiency judgment shall lie after sale under purchase-money deed of trust, the deficiency judgment which cannot be obtained may consist of whole debt, since deficiency is nothing more than difference between security and debt. Code Civ.Proc. § 580b.

4. Mortgages 🔑218.1

Under statute providing that no deficiency judgment shall lie after sale under purchase-money deed of trust, holder of note secured by purchase-money second deed of trust could not bring action on note after security had become valueless because of sale of security by holder of purchase-money first deed of trust. Code Civ.Proc. § 580b.

◆

Ned P. Eads, Sherman Oaks, and Don D. Bercu, Alhambra, for appellant.

Bertram S. Harris, Los Angeles, for respondent.

CARTER, Justice.

Defendants appeal from a judgment for plaintiff on a promissory note.

Plaintiff was the owner of real property which, on April 26, 1950, she sold to defendants, Rose Jensen and Leota Triplett. As a part of the purchase price and on the same day, defendants executed in favor of Glendale Federal Savings & Loan Association (hereafter called Federal) a note for $11,300, secured by a first trust deed on the property. At the same time, and also as a part of the purchase price, a second note was executed by them in favor of plaintiff for $7,200, secured by a second trust deed on the property. Hence both trust deeds were purchase money trust deeds.

It does not appear from the pleadings or findings how the first trust deed was "foreclosed," that is, whether by court action or by the exercise of the power of sale thereunder. While it is stated simply that the property was "sold under foreclosure," it appears from the affidavits on motion for a summary judgment that the sale was under the power of sale in the trust deed. Neither of the notes had been paid and Federal had the property sold pursuant to the power of sale and bid it in for $11,896.63, and a trustees' deed was thereupon delivered to Federal. Plaintiff made no attempt to buy the property at the sale so as to protect her second trust deed.

Plaintiff's complaint stated a cause of action on her note, and to meet the claim that but one action could be brought on a debt secured by a trust deed, namely, one for foreclosure, Code Civ.Proc. § 726, alleged that her security (her second trust deed) had become valueless because it had become exhausted by the sale under the first trust deed. Under section 726 of the Code of Civil Procedure, there may be only one action for the recovery of a debt secured by a trust deed, which action is one of foreclosure. In addition compliance must be had with the conditions of the chapter in which section 726 appears. One of these conditions is that any deficiency judgment is limited to the difference between the fair market value of the property and the amount for which the property was sold. It has been held under that section that where the security has been exhausted or rendered valueless through no fault of the mortgagee, or beneficiary under a trust deed, an action may be brought on the debt on the theory that the limitation to the single action of foreclosure refers to the time the action is brought rather than when the trust deed was made, and that if the security is lost or has become valueless at the time the action is commenced, the debt is no longer secured. Security-First Nat. Bank v. Chapman, 31 Cal.App.2d 182, 87 P.2d 724; Hellman Com. T. & S. Bank v. Maurice, 105 Cal.App. 653, 288 P. 683; Ferry v. Fisk, 54 Cal.App. 763, 202 P. 964; Crescent Lumber Co. v. Larson, 166 Cal. 168, 135 P. 502; Otto v. Long, 127 Cal. 471, 59 P. 895; Savings Bank v. Central Market Co., 122 Cal. 28, 54 P. 273; Commercial Bank v. Kershner, 120 Cal. 495, 52 P. 848; Merced Security v. Casaccia, 103 Cal. 641, 37 P. 648; Salter v. Ulrich, 22 Cal.2d 263, 138 P.2d 7, 146 A.L.R. 1344; Republic Truck Sales Corp. v. Peak, 194 Cal. 492, 229 P. 331. That rule has been applied in favor of a second mortgagee, the security being considered lost or valueless as to him, where a first mortgagee forecloses his mortgage and the property is sold for no more than the senior debt and a deed has been given. Savings Bank v. Central Market Co., supra, 122 Cal. 28, 54 P. 273; Giandeini v. Ramirez, 11 Cal.App.2d 469, 54 P.2d 91.

It would appear from the facts here presented that plaintiff has brought herself within those rules and hence section 726 is not an obstacle to her action on the promissory note. There are, however, additional restrictions on deficiency judgments on secured debts. Defendants pleaded section 580b of the Code of Civil Procedure,[1] and as seen the facts here show that plaintiff's second trust deed is clearly a purchase money trust deed. It is urged, however, that inasmuch as there has not been a sale by plaintiff under her trust deed within the wording of section 580b, supra, it does not apply. It is further urged that it does not apply because the security has become valueless by reason of the sale under Federal's first trust deed, and the case is not one involving a "deficiency" as there cannot be a deficiency if there is no security to sell because it presupposes a partial satisfaction of the debt by a sale which exhausts the security.

[1] In order to solve this question there must be a further examination of the Code sections. There are other restrictions besides section 726, supra, and 580b, supra. Section 580a applies the fair market value test of section 726 to sales made without court assistance under a power of sale contained in a trust deed. Section 580d goes further and provides that no judgment shall be rendered for any deficiency on a note secured by a trust deed where the property has been sold under the power of sale (as distinguished from a sale in a foreclosure action) contained in the trust deed. These provisions indicate a considered course on the part of the Legislature to limit strictly the right to recover deficiency judgments, that is, to recover on the debt more than the value of the security. Next comes section 580b, supra, here involved, which deals with a special type of security transaction, a trust deed, given to secure to the vendor of

---

1. "No deficiency judgment shall lie in any event after any sale of real property for failure of the purchaser to complete his contract of sale, or under a deed of trust, or mortgage, given to secure payment of the balance of the purchase price of real property.

"Where both a chattel mortgage and a deed or trust or mortgage have been given to secure payment of the balance of the combined purchase price of both real and personal property, no deficiency judgment shall lie at any time under any one thereof." Code Civ.Proc. § 580b.

property the purchase price agreed to be paid by the vendee. That section is necessarily intended to provide a protection for the trustor because if it were intended to cover only the situation where there has been an actual sale of the security under the power of sale in the trust deed, it would be superfluous. Section 580d covers precisely that situation in *all* trust deeds, whether purchase money or otherwise. The broad protection provision, Code Civ. Proc. § 580b, for purchase money trust deeds stands on a reasonable footing. A purchase money trust deed is not like an ordinary trust deed and note upon which only one action may be brought under section 726. Under section 726, as above stated, it is held that whether there is a security is determined as of the time the action is commenced and if the security is lost or has become valueless, an action on the note will lie because the events which caused it to become valueless were beyond the control of the trustor and were not contemplated at the time the money was loaned and the trust deed given. With purchase money trust deeds, however, the character of the transaction must necessarily be determined at the time the trust deed is executed. Its nature is then fixed for all time and as so fixed no deficiency judgment may be obtained regardless of whether the security later becomes valueless.

[2–4] The question is, therefore, did plaintiff take a purchase money trust deed on the property when it was purchased? If she did, then section 580b is applicable and she may look only to the security. That is the clear import of the wording of section 580b. The one taking such a trust deed knows the value of his security and assumes the risk that it may become inadequate. Especially does he know the risk where he takes, as was done here, a second trust deed. It is true that the section speaks of a deficiency judgment after sale of the security but that means after an actual sale or a situation where a sale would be an idle act, where, as here, the security has been exhausted. The deficiency judgment which cannot be obtained is still a deficiency judgment even though it may consist of the whole debt because a deficiency is nothing more than the difference between the security and the debt, or, as was said in Carr v. Cleveland Trust Co., Ohio App., 74 N.E.2d 124, 128 (in dealing with a case where the sale under the first mortgage produced only enough to pay it and the effect of a two-year limitation period for obtaining a deficiency judgment on a mortgage secured debt against the holder of a note secured by a second mortgage): "But in whatever light we view the proceedings which took place, either by way of foreclosure or by separate personal judgment on the note, one fact stands out in bold relief and that is that a deficiency judgment resulted from the entire proceedings by reason whereof the plaintiffs are entitled to whatever benefits accrue from the provisions of the deficiency judgment act so-called." Indeed the purpose of section 580b is that "* * * for a purchase money mortgage or deed of trust the security alone can be looked to for recovery of the debt." Mortgage Guarantee Co. v. Sampsell, 51 Cal.App.2d 180, 185, 124 P.2d 353, 355. The section states that in *no event* shall there be a deficiency judgment, that is, whether there is a sale under the power of sale or sale under foreclosure, or no sale because the security has become valueless or is exhausted. The purpose of the "after sale" reference in the section is that the security be exhausted and that result follows after a sale under the first trust deed.

The foregoing construction of section 580b is further fortified by the last paragraph thereof, supra, for it provides that where a chattel and real property mortgage are given to secure the purchase price of real and personal property, no deficiency judgment shall be given at *any time* under either of them.

Plaintiff relies on Hillen v. Soule, 7 Cal.App.2d 45, 45 P.2d 349, involving an action on a promissory note secured by a purchase money trust deed which was inferior to a first trust deed which was foreclosed and the security thereby exhausted. It was held that section 580b was not applicable because plaintiff's action was not for a deficiency judgment as the security was exhausted and plaintiff had not sold under his trust deed. That conclusion is out of harmony with the foregoing discussion. Evidently the factors above discussed were not called to the court's attention. In the later case of Mortgage Guarantee Co. v. Sampsell, supra, 51 Cal.App.2d 180, 185, 124 P.2d 353, the court states that the security alone may be looked to for payment of a debt secured by a purchase money trust deed. However, the result reached in the Hillen case was correct because the trust deeds there were given in 1927 before the adoption of section 580b (section 580b was added to the Code of Civil Procedure in 1933, Stats.1933, p. 1673) and hence that section could not have been applicable there.

The judgment is reversed and the court directed to enter judgment for defendants.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR and SCHAUER, JJ., concur.

SPENCE, Justice.

I dissent.

The majority opinion declares that "section 726 is not an obstacle" to plaintiff's action on her promissory note, but it holds that plaintiff's action is one for a "deficiency judgment" within the meaning of section 580b of the Code of Civil Procedure and is therefore barred by the terms of that section. I cannot agree with this last mentioned conclusion. The security afforded by plaintiff's *second* deed of trust was extinguished by the sale held under the power of sale in the first deed of trust. Therefore there never had been a sale under the power of sale contained in plaintiff's second deed of trust.

A reading of sections 580a, 580b, 580c and 580d of the Code of Civil Procedure makes it entirely clear that the words "deficiency judgment" are consistently used therein in their ordinary meaning. They refer to a judgment sought for the balance allegedly due upon the personal obligation imposed by a written instrument secured by a deed of trust or mortgage "following the exercise of the power of sale in *such* deed of trust or mortgage * * *." Code Civ.Proc. § 580a; emphasis added, and where "the real property has been sold by the mortgagee or trustee under power of sale contained in *such* a mortgage or deed of trust", Code Civ.Proc. § 580d; emphasis added.

The decisions in this state show that this is the meaning which has been heretofore given to the words "deficiency judgment," as used in section 580a. Hatch v. Security-First Nat. Bank, 19 Cal.2d 254, 258, 120 P.2d 869; Bank of America etc. Ass'n v. Gillett, 36 Cal.App.2d 453, 456, 97 P.2d 875; see Bank of America etc. Ass'n v. Hunter, 8 Cal.2d 592, 597–598, 67 P.2d 99; Everts v. Matteson, 21 Cal.2d 437, 448, 132 P.2d 476. It is also the common meaning attached to the term in other jurisdictions. Phillips v. Union Central Life Ins. Co., 8 Cir., 88 F.2d 188, 189; Bank of Douglas v. Neel, 30 Ariz. 375, 247 P. 132, 133; Cragin v. Ocean & Lake Realty Co., 101 Fla. 1324, 133 So. 569, 135 So. 795, 797; Harrow v. Metropolitan Life Ins. Co., 285 Mich. 349, 280 N.W. 785, 788; Tiedeman v. Dorn, 137 Misc. 136, 241 N.Y.S. 490, 492–493; Stretch v. Murphy, 166 Or. 439, 112 P.2d 1018, 1021; Bailey v. Block, 104 Tex. 101, 134 S.W. 323, 325; 59 C.J.S., Mortgages, § 777, p. 1474.

Section 580b was originally enacted with section 580a in 1933, Stats. 1933, pp. 1672, 1673, and the meaning of "deficiency judgment" was undoubtedly intended to be the same for both sections. When section 580d was added in 1940, Stats. 1st Ex.Sess.1940, ch. 29, § 2, it was again made clear that "deficiency judgment" referred to a judgment sought for the balance allegedly due a person whose obligation had been secured by a deed of trust or mortgage and where the real property had been sold "under power of sale contained in *such* a mortgage or deed of trust." While sections 580b and 580d do overlap to some extent, section 580b cannot be properly characterized as "superfluous."

In 1935 and shortly after the enactment of section 580b, it was construed with relation to similar facts in Hillen v. Soule, 7 Cal.App.2d 45, 45 P.2d 349. It was there said: "Appellant first contends that this is an action for a deficiency judgment after a sale under a deed of trust given to secure the balance of the purchase price of real property, and that such action cannot be maintained by reason of the provisions of section 580b of the Code of Civil Procedure. It is a sufficient answer to state that this is not an action for a deficiency judgment. The security was exhausted by the sale under the first deed of trust and no sale was had under respondent's deed of trust. We are therefore of the opinion that the provisions of said section are inapplicable." 7 Cal.App.2d at page 47, 45 P.2d at page 349.

The Legislature has twice amended section 580b since this construction was placed upon the words "deficiency judgment." Stats.1935, pp. 1806, 1869; Stats.1949, ch. 1599, § 1. As no change was made by these amendments in the phrase "deficiency judgment," it may be assumed that the Legislature approved the construction placed on that term in Hillen v. Soule, 7 Cal.App.2d 45, 45 P.2d 349, supra. Furthermore, the wording of section 580d as enacted in 1940 also indicates such legislative approval.

The evil motivating the Legislature in enacting these sections was that "creditors were frequently able to bid in the debtor's real property at a nominal figure and also to hold the debtor personally liable for a large proportion of the original debt." Hatch v. Security-First Nat. Bank, supra, 19 Cal.2d 254, 259, 120 P.2d 869, 872; see 22 Cal.L.Rev. 170, 180. The purpose was not to prevent any recovery where the security had become completely valueless or a senior mortgagee had foreclosed, leaving no security for the junior debt.

Thus, it appears to me that the majority opinion has stretched the meaning of section 580b far beyond its terms. Both sections 580b and 580d prevent the holder of a purchase money deed of trust from having a "deficiency judgment" after a sale under *such* a deed of trust. They do not cover the situation where no sale has been held under *such* deed of trust and no "deficiency judgment" is sought. To so construe these sections results in placing the holder of a purchase money note secured by a second deed of trust in a less favorable position than the holder of an unsecured note given for such purchase money. The Legislature has not so declared. Until it does so, the courts should not enter the legislative field by broadening the terms of statutes beyond their common meaning and contrary to the judicial interpretation which had been placed thereon prior to the time that the parties entered into their contractual relations.

The majority opinion relies on Mortgage Guarantee Co. v. Sampsell, 51 Cal.App.2d 180, 124 P.2d 353. It is sufficient to state that that case did not present the question here involved. The broad language quoted by the majority opinion is mere dictum, unnecessary to the decision of that case.

I would affirm the judgment.

Rehearing denied; SPENCE, J., dissents.

---

41 Cal.2d 219

HERZOG et al. v. GROSSO et al.

L. A. 22313.

Supreme Court of California, in Bank.

July 7, 1953.

Action to quiet title to easement for road purposes over defendants' land from highway to plaintiffs' residence on adjoining land, to recover damages caused by acts of one defendant in increasing down grade of roadway, and to enjoin defendants from asserting any claim in easement. The Superior Court, Los Angeles County, Philbrick McCoy, J., entered judgment for plaintiffs, and defendants appealed. The Supreme Court, Traynor, J., held that defendants could not be properly ordered to pave part of road after altering it to conform with private street map in view of fact that, when defendants purchased their property, plaintiffs had dirt surfaced road on the easement.

Judgment modified, and, as modified, affirmed.

Prior opinion 249 P.2d 869.

1. Easements 🔑**61(10)**

In action to quiet title to easement for road purposes over defendants' land from highway to plaintiffs' residence on adjoining land and to enjoin defendants from asserting any claim therein, judgment, which provided that defendants did not have any estate, right, title, or interest in easement and were forever joined in and restrained from asserting any claim therein, but which also provided that defendants owned servient estate in fee simple, did not unreasonably restrain defendants from use of such estate.

2. Easements ⚷38

Owner of servient tenement may make any use of land that does not interfere unreasonably with the easement.

3. Easements ⚷61(9)

In action to quiet title to easements for road purposes over defendants' land from highway to plaintiffs' residence on adjoining land and to enjoin defendants from asserting any claim therein, evidence was sufficient to sustain order requiring defendants to remove fence and gate maintained by defendants at juncture of easement and public road.

4. Easements ⚷44(1)

By grant of easement for road purposes over defendants' land from highway to plaintiffs' residence on adjoining land, plaintiffs acquired right to do such things as were reasonably necessary to their use of easement, and placing of wooden guard rail along edge of road was reasonably necessary and would not unduly burden servient tenement in view of fact that road adjoined a steep embankment.

5. Nuisance ⚷50(1)
Trespass ⚷47

Once cause of action for trespass or nuisance is established, an occupant of land may recover damages for annoyance and discomfort that naturally ensue therefrom.

6. Damages ⚷53

In action to quiet title to easement for road purposes over defendants' land from highway to plaintiffs' residence on adjoining land and to recover damages for interference with easement, suffering caused by fear for safety of plaintiffs' daughter and visitors was natural consequence of defendants' conduct, whereby road over easement had been rendered dangerous to travel, and therefore plaintiffs were entitled to recover therefor.

7. Easements ⚷70

In action to quiet title to easement for road purposes over defendants land from highway to plaintiffs' residence on adjoining land and to recover damages for interference with easement, evidence was sufficient to sustain $7,000 award for permanent depreciation in value of plaintiffs' property due to increased grade of road caused by defendants.

8. Easements ⚷70

In action to quiet title to easement for road purposes over defendants' land from highway to plaintiffs' residence on adjoining land and to recover damages for interference with easement, mandatory injunction, which required defendants to make road conform with private street map and award of damages for permanent depreciation of plaintiffs' property, did not constitute a double recovery in view of fact that compliance with injunction would not correct all defects created in road by defendants.

9. Easements ⚷61(10)

In action to quiet title to easement for road purposes over defendants' land from highway to plaintiffs' residence on adjoining land and to enjoin defendants from asserting claim therein, defendants could not be properly ordered to pave part of road after altering it to conform with private street map in view of fact that, when defendants purchased their property plaintiffs had dirt surfaced road on the easement.

10. Easements ⚷53

Ordinarily, owner of servient tenement is under no duty to maintain or repair easement.

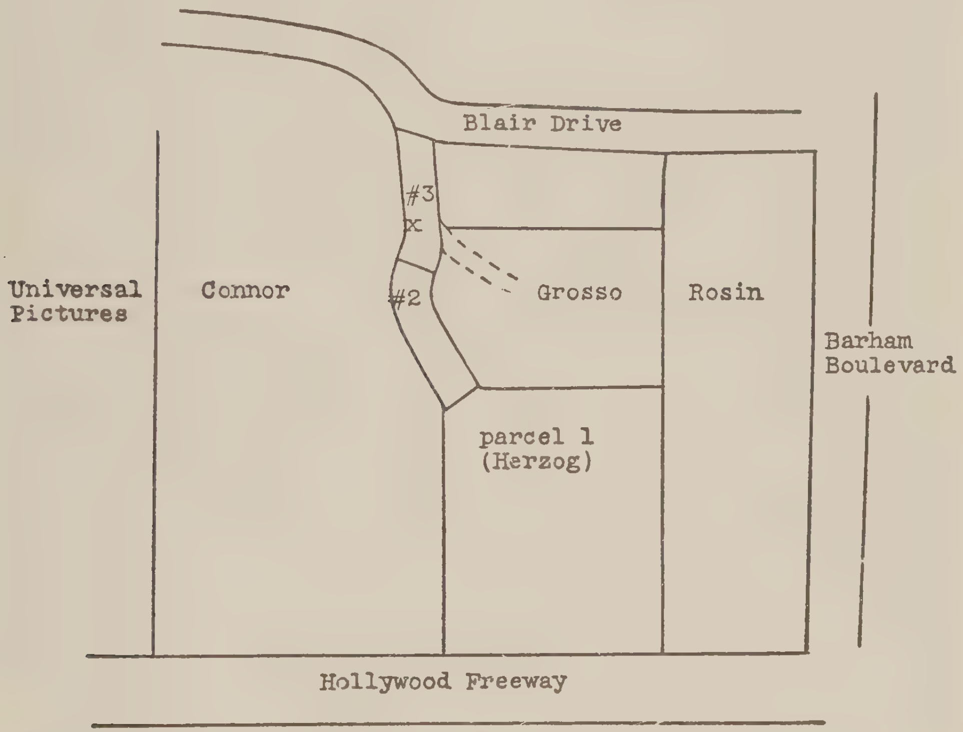
◆

W. P. Smith and Henry F. Walker, Los Angeles, for appellants.

Nathan E. Gillin and Button & Herzog, Hollywood, for respondents.

TRAYNOR, Justice.

This action presents a controversy between owners of a private road and easement and the owners of the servient tenement. The following diagram, not drawn to scale, shows the relationship of the road and easement to the parcels of land involved.



Mrs. Mildred Schneider originally owned the land bounded by Blair Drive, Hollywood Freeway, the Rosin property, and the Universal Pictures property. The land is hilly with the crest of the hill at the center. Plaintiffs Leonard and Alma Herzog purchased parcel 1 in 1944 and built a home thereon. At that time the only access to a public road from parcel 1 was a road over the Rosin property to Barham Boulevard. Since Rosin retained the right to revoke permission to use the road, plaintiffs did not buy parcel 1 until Mrs. Schneider deeded to them parcel 2, a strip of land 25 feet wide, and granted them an easement for road and public utility purposes over parcel 3, a strip of land 30 feet wide and 155 feet long. A road was bulldozed around the hill on parcels 2 and 3 from parcel 1 to Blair Drive. A telephone pole was erected on parcel 3 at the point marked "x" on the diagram, about 115 feet from Blair Drive. The road was dirt surfaced, about 14 feet wide, and sloped downhill from Blair Drive to plaintiffs' home. The grade was about 4.5% to the telephone pole and about 8.3% for the next 110 feet. Plaintiffs used both the Rosin road to Barham Boulevard and the new road to Blair Drive.

Mr. and Mrs. Connor bought the property to the west of parcels 2 and 3 in December, 1945. Defendants Paul and Madolyn Grosso acquired parcel 3 and the hilltop property in March, 1949. Difficulties between defendants and plaintiffs soon arose. In November, 1949, Paul Grosso regraded the road from his property to Blair Drive. He dumped large quantities of dirt on parcels 2 and 3 and on the Connor property.[1] The regrading resulted in a fill that blocked all passage from plaintiffs' property to Blair Drive. Plaintiffs protested and were assured that the road would eventually be made passable, but it remained blocked. In March, 1950, defendants erected a fence at the point where parcel 3 joined Blair Drive. The fence extended across 14 feet of the easement and was equipped with gates designed to close the remaining 16 feet.

---

[1] An action by Mrs. Connor against the Grossos for the dumping on the Connor property was consolidated for trial with the present case. See Connor v. Grosso, Cal.Sup., 259 P.2d 435.

On September 2, 1950, plaintiffs received notice that they could no longer use the Rosin road. Thereafter their only access to the public streets was over parcels 2 and 3. After further protests by plaintiffs, Grosso cut a ramp across the fill to parcel 2. The new road ran on the west side of the telephone pole, on the Connor property. The road was narrow, steep, and dangerous. In early October Herzog placed posts and reflectors along the edge of the road to prevent automobiles from going over the bank. Grosso removed the posts and reflectors. In November, 1950, plaintiffs engaged a contractor to pave parcels 2 and 3. Grosso ordered the men to leave and when they did not do so, dumped dirt on the parts of the road that had been fine graded preparatory to final surfacing. Several days later Grosso dug up the road with a plow attached to a tractor. On December 20th, plaintiffs obtained a temporary restraining order, and thereafter Grosso did not interfere with plaintiffs' use of the road. In February, 1951, plaintiffs paved the road and placed it in the condition it was in at the time of the trial, May, 1951. During the period between September, 1950, and February, 1951, it was difficult to use the road. In rainy weather the road was slippery, and plaintiffs were forced to leave their car at the entrance and walk through the mud.

The road was surveyed shortly before the trial. The grade over the fill made by Grosso was level for the first 68 feet from Blair Drive, thence 4.3% uphill to a point near the telephone pole, thence 14.6% downhill for the next 110 feet. One 40-foot part of this 110 feet had a grade of 17.2%. At the telephone pole the fill was 6 feet over the original level. An appraiser, duly qualified as an expert witness, testified that "the steep grade immediately approaching the short turn and a steep incline is sufficient cause for an estimate of damage. This condition creates an extreme fire hazard and safety hazard to all users." He stated that the road was "like driving into the banks of the Grand Canyon." The appraiser testified that in his opinion the increase in grade had depreciated the fair market value of the property by $8,700.

The trial court entered judgment in favor of plaintiffs. The judgment declares plaintiffs' and defendants' respective rights in the easement; orders defendant Paul Grosso to alter the first 120 feet of parcel 3 to conform to a map attached to the judgment; orders defendants to remove the fence and gate at the entrance; and enjoins defendants from interfering with plaintiffs' use of the easement. The judgment also awards plaintiffs damages against defendant Paul Grosso as follows: $7,000 to both plaintiffs for permanent depreciation in the value of their property; $521.82 to both plaintiffs as compensation for miscellaneous expenditures; $2,000 to plaintiff husband and $2,000 to plaintiff wife for interference with their comfortable use and enjoyment of their home; $1,500 to plaintiff husband and $1,500 to plaintiff wife for worry and anxiety for the safety of themselves, their daughter, and their guests; $2,000 to plaintiff husband and $2,000 to plaintiff wife as exemplary damages. Defendants appeal from the judgment.

[1] The judgment provides that defendants do not have "any estate, right, title or interest whatsoever in and to said easement" and that defendants "are hereby forever enjoined and restrained from asserting any claim whatsoever in and to plaintiffs' said easement." Defendants contend that the decree unduly restricts their rights in parcel 3, that it is the only means of access to Blair Drive for themselves and their employees, agents, guests, and deliverymen, and that they have to use parcel 3 to obtain water, telephone, electricity, gas and other public utility facilities. Other parts of the judgment provide that defendants are the owners "in fee simple of the thirty foot strip of land in, upon, under and over which plaintiffs' said easement described in said parcel 3 extends"; that defendants

have the right to use parcel 3 for road purposes; and that defendants may use parcel 3 for other purposes "consistent with the employment of said easement by plaintiffs and which does [not] unreasonably interfere with the use of said easement by plaintiffs." It thus appears that the judgment does not unreasonably restrain defendants from the use of parcel 3.

[2, 3] The judgment declares that defendants have no right to maintain the fence and gates at the juncture of the road and Blair Drive and orders their removal forthwith. Defendants contend that the trial court erred, relying on the rule that "the owner of the servient tenement may make any use of the land that does not interfere unreasonably with the easement." City of Pasadena v. California-Michigan, etc., Co., 17 Cal.2d 576, 579, 110 P.2d 983, 985, 133 A.L.R. 1186. The trial court found that the fence and gates interfered with plaintiffs' free use and enjoyment of the easement. Plaintiffs' home is located in a large city and the road should be kept unobstructed for adequate access by the fire department, police department, and other public agencies. Cf. Los Angeles City Ordinance 97940, § 18.09. The trial court did not go beyond the evidence in this case by ordering the removal of the fence and gates. See Smith v. Worn, 93 Cal. 206, 214–215, 28 P. 944. Defendants suggest that they should be allowed to maintain the gates and fence to prevent motorists from mistaking the road for a public road and entering defendants' property. Plaintiffs concede that defendants are "free to put up any sign deemed necessary as would not unreasonably interfere with plaintiffs' use of the easement." It would appear that defendants could thus be adequately protected.

[4] The judgment provides that "plaintiffs have a right to construct and maintain a wooden guard rail on parcel 3 along the northwesterly boundary thereof, said guard rail to be one of the general types usually used along public highways." Defendants contend that the judgment thereby unduly burdened the servient tenement. By the grant of the easement, however, plaintiffs acquired the right to do such things as are reasonably necessary to their use thereof. Ward v. City of Monrovia, 16 Cal.2d 815, 821–822, 108 P.2d 425; North Fork Water Co. v. Edwards, 121 Cal. 662, 666, 54 P. 69, 28 C.J.S., Easements, § 76b. Since the road adjoins a steep embankment, guard rails are reasonably necessary and would not unduly burden the servient tenement.

[5, 6] The trial court found that "as a direct, natural and proximate result and consequence of the acts and conduct of the defendant * * * each of said plaintiffs were caused further to suffer nervousness, worry, and mental distress for the safety of themselves and their daughter and others obliged to use said road on account of the dangerous conditions under which said defendant, Paul J. Grosso, forced them and their family to use said parcels 2 and 3 in going to and from their said home." Damages of $1,500 were awarded to each plaintiff. Defendant contends that the award cannot be sustained insofar as it is predicated upon distress and worry for "the safety of * * * their daughter and others." Once a cause of action for trespass or nuisance is established, an occupant of land may recover damages for annoyance and discomfort that would naturally ensue therefrom. Anderson v. Souza, 38 Cal.2d 825, 833, 243 P.2d 497; Judson v. Los Angeles Suburban Gas Co., 157 Cal. 168, 172, 106 P. 581, 26 L.R.A.,N.S., 183; Thompson v. Simonds, 68 Cal.App.2d 151, 162, 155 P.2d 870; Restatement, Torts, § 929(c), comment g. In Alonso v. Hills, 95 Cal.App.2d 778, 214 P.2d 50, an action for damages resulting from blasting operations, the court sustained an award for discomfort, fright, and shock caused by a blast that occurred at a time when plaintiff was not at home. The court stated: "Plaintiff testified that after the February 3d blast (in which a rock destroyed a bench on the property near which one of his daughters was standing) he could not rest or sleep because of fear for his own security and that of his family. This is a form of discomfort for which plaintiff under the circumstances of this case is entitled to recover, as well as for other discomfort not challenged on appeal." 95 Cal.App.2d at page 788, 214 P.2d at page 57. Similarly,

in the present case the suffering caused by fear for the safety of the daughter and visitors was a natural consequence of defendant's conduct and an invasion of a protectible interest of an occupant of real property. The cases relied upon by defendant did not involve an invasion of a protectible interest in real property and are therefore not controlling here.

[7] The judgment awarded plaintiffs $7,000 against defendant Paul Grosso for the permanent depreciation in the value of their property resulting from the increased grade of the road. Defendant asserts that removal of about 700 cubic yards of dirt would restore parcels 2 and 3 to their original condition. Defendant then contends that the trial court awarded excessive damages, on the ground that when the cost of restoration is less than the depreciation in value, the former is the measure of damages. Cf. Green v. General Petroleum Corp., 205 Cal. 328, 336, 270 P. 952, 60 A.L.R. 475. This contention cannot be sustained. Plaintiffs established their damages by showing the depreciation in value. It was then incumbent upon defendants to come forward with proof that the cost of restoration would be less. Perkins v. Blauth, 163 Cal. 782, 792–793, 127 P. 50. They failed to do so. Defendants point out that in the companion case of Connor v. Grosso, Cal.Sup., 259 P.2d 435, the trial court found that the cost of removal of 3,184 cubic yards of dirt from the Connor property would be $4,362.08, and that the cost of removing 1,570½ cubic yards therefrom would be $2,563.85. Defendants rely on decisions holding that an appellate court will not permit a trial court to reach diametrically opposite conclusions upon similar evidence as to the same occurrence. Ferroni v. Pacific Finance Corp., 21 Cal. 2d 773, 780, 135 P.2d 569; Southern Pacific Co. v. City of Los Angeles, 5 Cal.2d 545, 548, 55 P.2d 847. That rule is inapplicable when the two decisions may be reconciled. Dillard v. McKnight, 34 Cal.2d 209, 224–225, 209 P.2d 387, 11 A.L.R.2d 835. In the companion case the dirt could be removed from the side of a hill; in the present case the dirt would have to be taken from a narrow road where equipment would have difficulty in operating. In addition to the cost of removing the dirt defendant in the present case would have to regrade and resurface the road and provide for drainage. Aside from the evidence in the Connor case, there is no evidence in the record showing the cost of restoring parcels 2 and 3 to their original condition. Thus, we cannot say as a matter of law that the award of $7,000 is excessive.

In addition to the award of $7,000 as damages for permanent depreciation of plaintiffs' property, the judgment orders defendant Paul Grosso to "make alterations in the road over and upon the northerly 120 feet" of the easement "so that same will conform to and be in accordance with the plan shown on the aforesaid Private Street Map, plaintiffs' Exhibit No. 60." Defendant contends that the judgment thereby allows a double recovery to plaintiffs, on the ground that the mandatory injunction requires defendant to correct a condition for which plaintiffs are awarded damages. See Spaulding v. Cameron, 38 Cal.2d 265, 269, 239 P.2d 625.

It is contended that any error in the judgment may be cured by deleting the injunction. If the injunction applies to an encroachment for which a money judgment is awarded, the trial court in effect made conflicting findings, first that the injury to plaintiffs' property was abatable, and then that it was permanent. In that event, unless the evidence established as a matter of law that the injury was or was not permanent, reversal would be necessary, since "it would be inappropriate for this court to determine whether the nuisance is in fact permanent and to modify the judgment by striking the damages for loss of market value on the assumption it is not permanent, or by striking the injunctive provisions on the assumption that it is. Tupman v. Haberkern, 208 Cal. 256, 269–270, 280 P. 970." Spaulding v. Cameron, supra, 38 Cal.2d at page 270, 239 P.2d at page 629. Accordingly, the determinative question here is whether the mandatory injunction applies to a condition for which plaintiffs are also awarded damages.

[8] Before defendant Paul Grosso placed the dirt on parcels 2 and 3, the grade

of the road averaged 4.5% downhill from Blair Drive to a point near the telephone pole, about 115 feet from Blair Drive, and averaged about 8.3% downhill over the next 110 feet. After defendant changed the slope of the road, the grade was level for the first 68 feet from Blair Drive, thence about 4.3% uphill to a point near the telephone pole, and thence downhill for 110 feet at an average grade of 14.6% and of 17.2% for forty of the 110 feet. The fill was six feet deep at the telephone pole. From the testimony of the engineer who prepared the map referred to in the injunction and from an examination of the map itself, it is clear that altering the road to conform to the map will do nothing more than remove the hump in the first part of the road. Compliance with the injunction will not change the steep slope on the remainder of parcel 2 and parcel 3. There is no inconsistency in finding that some of the dirt dumped on plaintiffs' property may be removed and that other dirt dumped in a different place permanently depreciated the property. The award of $7,000 damages is based on the testimony of H. V. Johnson, an appraiser. That witness based his opinion on the steepness of the road, not upon the hump in the first part of the road. The mandatory injunction and the award of damages thus apply to separate results of defendant's conduct.

[9, 10] Defendant Paul Grosso contends that the trial court erred in ordering him to pave the north part of the road after altering it to conform with the map attached to the decree. This contention must be sustained. When defendants purchased their property, plaintiffs had a dirt surfaced road on the easement. Ordinarily, the owner of the servient tenement is under no duty to maintain or repair the easement. Bean v. Stoneman, 104 Cal. 49, 56, 37 P. 777, 38 P. 39; Rose v. Peters, 59 Cal.App.2d 833, 835, 139 P.2d 983. Defendant may be required to alter the north 120 feet of the road to conform with the map, but he may not be required to pave the road for the benefit of plaintiffs.

The judgment is modified by deleting that part of paragraph 19 reading: "and that wherein said map does not specify the details of construction of said road said defendants shall construct said road in accordance with the requirements of Standard Specifications No. 151 for Public Improvement as promulgated by the Department of Public Works of the City of Los Angeles, California, and approved by the Council of said City under date of May 15, 1951, and now in effect." As so modified the judgment is affirmed. Defendant Paul Grosso is to bear the costs of this appeal.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER and SPENCE, JJ., concur.

---

41 Cal.2d 229

CONNOR v. GROSSO et al.

L. A. 22312.

Supreme Court of California, in Bank.

July 7, 1953.

Action for reasonable cost of removing dirt, rocks and other debris dumped on plaintiff's land by defendant adjoining landowners. The Superior Court, Los Angeles County, entered judgment against both defendants, and defendants appealed. The Supreme Court, Traynor, J., held that fact that defendant husband held property as joint tenant with wife did not make wife liable for dirt, rocks, and other debris dumped on plaintiff's land by husband and that evidence was not sufficient to sustain award of compensatory damages in amount of $4,362.08.

Judgment against wife reversed with directions to enter judgment for wife, and judgment against husband reversed with directions to retry issue of compensatory damages only.

Schauer and Carter, JJ., dissented.

Prior opinion 249 P.2d 876.

1. Husband and Wife 🔑214

Fact that husband was wife's joint tenant did not make wife liable for reasonable cost of removing debris allegedly dumped on plaintiff's land by husband in preparing roadway over land of husband and wife. Code Civ.Proc. § 53.

2. Trespass ⚷46(3)

In action for reasonable cost of removing dirt, rocks, and other debris dumped on plaintiff's land by defendants, judgment, which held one defendant responsible for all dirt fill on plaintiff's property, even though other persons, with whom such defendant had not acted in concert, had dumped dirt on such property, was without adequate support in evidence.

3. Trespass ⚷50

Adjoining landowner, who had dumped dirt, rocks, and other debris on plaintiff's land, should be required to pay cost of removing any slippage that might reasonably occur in course of removing such material.

4. Trespass ⚷50

Where adjoining landowner had not acted in concert with other persons in dumping dirt on plaintiff's land, adjoining landowner could not be required to pay for removal of dirt dumped by such other persons.

5. New Trial ⚷9

In action for reasonable cost of removing dirt, rocks, and other debris dumped on plaintiff's land by defendants, where only issue on which judgment against one defendant was not supported by evidence was amount of compensatory damages, separate trial on such issue would expedite administration of justice without denying such defendant a fair trial.

◆

W. P. Smith and Henry F. Walker, Los Angeles, for appellants.

Stanton, Stanton & Welbourn, Los Angeles, for respondents.

TRAYNOR, Justice.

This action was consolidated for trial with Herzog v. Grosso, Cal.Sup., 259 P.2d 429. The trial court found that defendants Paul Grosso and Madolyn Grosso deposited 3,184 cubic yards of material on plaintiff Nan Connor's property and entered judgment against both defendants for $4,362.08.

[1] Defendant Madolyn Grosso contends that the award of damages against her is not supported by the evidence.[1] We agree. The fact that Paul Grosso was her husband and that he held the property with her as a joint tenant does not establish her liability. Goldman v. House, 93 Cal.App.2d 572, 576, 209 P.2d 639; Citizens State Bank v. Hoffman, 44 Cal.App.2d 854, 855, 113 P.2d 221. In Brown v. Oxtoby, 45 Cal.App.2d 702, 709, 114 P.2d 622, and similar cases relied upon by plaintiff, there was evidence that the wife actively participated in the tort, or that the husband acted as her agent, or that she ratified his conduct. Plaintiff pleaded a cause of action against Madolyn Grosso, but no evidence was introduced to support her allegations, although the case was vigorously contested and on trial for seven days. The trial court will therefore be directed to enter judgment for Madolyn Grosso. Code Civ.Proc. § 53; see, Burtis v. Universal Pictures Co., Inc., 40 Cal.2d 823, 835, 256 P.2d 933.

[2] The trial court found that defendants "dumped upon said real property of plaintiff 3,184 cubic yards of dirt, rocks and other debris" and that the "cost of removal of said material so unlawfully dumped upon said real property of plaintiff, including slippage necessarily incidental to such removal, is the sum of $4,362.08." Defendants' contention that this finding is not supported by substantial evidence is sustained by the record. Before defendants acquired their property, a considerable amount of dirt had already been dumped on the Connor property by Herzog and Mrs. Schneider in the course of building the road on parcel 3, filling in the ground near the telephone pole, and leveling land between the road on parcels 2 and 3 and the road to the top of the hill. Defendants acquired the hilltop property in March, 1949. Defendant Paul Grosso dumped dirt on the Connor property in November, 1949, when he regraded his road, and again in September, 1950, when he built the ramp across the fill.

One witness, Bert Willis, testified that to restore the Connor property to its natural condition by removing all of the fill and the dirt that would fall in upon removal thereof, would require excavation of 3,184 cubic yards of dirt at a cost of $4,362.08.[2] Another witness, Kenneth Cook, testified that the last fill, in September, 1950, amounted to 1,570½ yards. According to Willis, removal of 1,570½ yards would cost $2,625.84. Witnesses called by defendants testified that Grosso dumped only 150 yards of dirt on the Connor property but the trier of fact could, of course, resolve the conflict in the evidence in favor of plaintiff. Neither party introduced evidence showing the depreciation in value of plaintiff's property caused by the dumping of the dirt.

---

[1] In the companion case of Herzog v. Grosso, Cal.Sup., 259 P.2d 429, the award of damages was against Paul Grosso only.

[3, 4] Defendant, of course, should be required to pay the cost of removing any slippage that may reasonably occur in the course of removing the material that he dumped on plaintiff's property. The evidence, viewed most favorably to plaintiff, shows that Grosso actually dumped 1,570½ cubic yards of material on plaintiff's property and that to remove all the fill, including material dumped by other persons, plus the dirt that would slide down the hill from parcels 2 and 3 during such removal, it would be necessary to excavate 3,184 cubic yards. There is no evidence that the material previously dumped by other persons, lying under the dirt subsequently dumped by Grosso, would have to be removed in order to remove the dirt dumped by him. Nor is there any evidence to show the amount of dirt that will slide down the hill if only the 1,570½ yards dumped by Grosso were removed. Since Grosso did not act in concert with the other persons dumping dirt on the Connor land, he cannot be required to pay for removal of the dirt dumped by them. Slater v. Pacific American Oil Co., 212 Cal. 648, 654, 300 P. 31; Prosser, Torts, p. 333. The judgment holds Grosso responsible for all the dirt fill on the Connor property and is thus without adequate support in the evidence.

[5] Defendant argues that the error in the award of damages requires a complete new trial. After a lengthy trial, the trial court resolved the question of liability in favor of plaintiff and the question of exemplary damages in favor of defendants. The only issue on which the judgment is not supported by the evidence is the amount of compensatory damages, and we are of the opinion that a separate trial on that issue will expedite the administration of justice and will not deny defendant Paul Grosso a fair trial, for he has already had a fair trial on the issue of liability, and the trial court's findings on that issue are amply supported by the evidence.

The judgment against defendant Madolyn A. Grosso is reversed, and the trial court is directed to enter judgment in her favor. The judgment against defendant Paul A. Grosso is reversed, and the trial court is directed to retry the issue of compensatory damages only. Madolyn Grosso shall recover her costs on appeal. The other parties shall bear their own costs.

GIBSON, C. J., and SHENK, EDMONDS and SPENCE, JJ., concur.

SCHAUER, Justice.

I dissent. I take particular exception to the order directing the trial court to enter judgment in favor of Madolyn Grosso. Even if we can properly conclude that the evidence on this record is insufficient to support the judgment against her we have no right to assume that on a new trial no additional evidence against her could be produced.

---

[2] Willis testified that he based his computation on the amount of filled ground lying between the red line and the dotted line on plaintiff's exhibit C-2. That exhibit is a survey map prepared by witness Cook. He testified that the red line represented the boundary between the Connor property and parcels 2 and 3, and that the dotted line indicated the bottom of the fill on the Connor property. Cook stated that he dug four test holes in the fill and concluded that only part of the dirt in the fill could be attributed to the last dumping on the Connor land.

The trial court asked Willis, "I take it from your testimony so far, Mr. Willis, that what you are conveying is that it would require the removal of 3,184 yards to restore the Connor property to its *original ground level.*" (Emphasis added.) The witness replied, "That is right, sir."

It further appears to me to be inaccurate to state in the opinion that "The only issue on which the judgment is not supported by the evidence is the amount of compensatory damages * * *" and at the same time to order a new trial on the issue of the amount of compensatory damages as against Paul Grosso while directing a judgment in favor of Madolyn.

In my view, on the state of the record, and on the facts and law stated in the majority opinion, there should be a complete new trial on all issues as to all parties.

CARTER, Justice.

I dissent.

I think it is clear that the evidence is sufficient to support the award of damages and a new trial on that issue should not be ordered.

The majority opinion proceeds upon the theory that plaintiff was not entitled to the cost of removing more dirt than was actually dumped on his property even though it would require the removal of the additional amount to effectively remove the amount dumped and that there is no evidence that the removal of the additional amount was necessary to effectively remove the amount dumped.

The first proposition is manifestly untenable. It is the same as saying in a case where plaintiff was entitled to damages for an injury to the motor of his car that he could recover for the damage to the motor but not the expense of repairing it where part of the cost of repair was the removal and replacement of other parts although necessary to repair the motor. The evidence clearly supports the necessity of removing the additional soil.

The majority holds that there was insufficient evidence to support the trial court's finding that defendant Grosso dumped 3,184 yards of soil on plaintiff's property and hence damaged her in the sum of $4,367.08, being arrived at by computing the cost of removal of the dirt at $1.37 per yard. There is enough evidence, on the theory that while the total yardage of soil *dumped* on plaintiff's land may have been 1,570½ instead of 3,184, it would require the removal of the latter amount because to remove effectively the 1,570 yards, an additional amount, up to the 3,184 yards, must be removed because of the sliding of other soil onto plaintiff's land as the result of removing the 1,570 yards.

While Cook testified that 1,570 yards had been *dumped* on plaintiff's land, plaintiff's expert (Willis) on removal of the soil and the cost thereof, testified:

"Q. Now, at my request, Mr. Willis, did you make an estimate of the amount of filled ground represented on this map that I have referred to, Plaintiffs' Exhibit C-2, that lies between the Connor property line or the red line and the mark with the dotted line entitled 'Toe of spill from road?'"

"The Court: What end?

"Mr. Stanton: Well, all the ground enclosed within that curved line and the red line.

"A. Yes, I did, but in *addition to that* I went back to the *natural contour of the land.* You *couldn't excavate it to your property line without sliding back of your property line,* so we went back of the property line to the *original contours* of the hill.

"Q. Why did you do that, Mr. Willis? A. To excavate at a vertical line at the property line, you *couldn't hold the material above it, you would slide down into the property.*

"Q. In other words, in making your estimate of yardage, you had in mind the removal of that dirt. Is that correct? A. That is right.

"Q. Then if you removed right along the property line, it is your best estimate that the other dirt would fall into place and that would have to be removed as well? A. That is right.

"Q. Now, you were asked to estimate the amount of cubic yards of dirt necessary to remove along that property line, were you not? A. That is right.

"Q. What was your estimate of the total number of cubic yards of earth? A. 3184 cubic yards.

"Q. That includes not only the amount of earth in the fill itself, but also the yardage of earth which you estimate would fall into the fill, were the present fill in the Connor property removed? A. Yes. (Emphasis added.)

"The Court: I take it from your testimony so far, Mr. Willis, that what you are conveying is that it would require the removal of 3184 yards to restore the Connor property to its original ground level."

That testimony is at least reasonably susceptible of the construction that in order to remove the soil dumped on the land by Grosso it would be necessary to remove the soil to the original contour of the land because otherwise if you removed only the part dumped, other soil would slide down leaving soil on the property the same as before; that to remove all of the soil necessary to restore plaintiff's land, 3,184 yards must be removed. This is in accord with the finding of the trial court.

This being the state of the record, there is ample evidence to support the finding of the trial court as to the amount of damages suffered by plaintiff and the judgment should, therefore, be affirmed.

---

41 Cal.2d 291

PEOPLE v. LAWRANCE.

Cr. 5422.

Supreme Court of California, in Bank.

July 14, 1953.

Defendant was convicted of murder in the first degree. The Superior Court, Riverside County, John C. Gabbert, J., entered judgment and denied motion for new trial and an automatic appeal brought case to Supreme Court. The Supreme Court, Carter, J., held that evidence sustained conviction of murder in the first degree on theory that defendant killed girl in perpetration of, or attempt to perpetrate, rape.

Judgment and order denying new trial affirmed.

Homicide 🔑253(6)

Evidence sustained conviction of murder in the first degree on theory that defendant killed girl in perpetration of, or attempt to perpetrate, rape. Pen.Code, § 189.

William W. Shaw, Riverside, for appellant.

Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

CARTER, Justice.

This is an automatic appeal, Pen.Code, § 1239, from a judgment of conviction of murder in the first degree and from an order denying a motion for a new trial.

The defendant, John Chauncey Lawrance, was tried by a jury, found guilty of murder of the first degree and was given the death sentence. The defendant was charged with having murdered one Kathryn Wells, also known as Kathryn Knodel, a human being, to which charge he pleaded not guilty and not guilty by reason of insanity. The plea of not guilty by reason of insanity was later withdrawn, and he went to trial on the single plea of not guilty. After having been found guilty by the jury of the crime, as charged, defendant moved for a new trial on all the statutory grounds, Pen.Code, § 1181, which motion was denied.

The victim, Kathryn Knodel, a girl 16 years of age, lived with her mother and stepfather in Redlands. The defendant, Kathryn's mother's brother, had been living two or three miles from the Knodel home, but had stated, about two or three weeks prior to the crime, which occurred on August 19, 1952, that he was driving to Tennessee for a visit. At the time he informed the family that he was going on the trip, he owned an old, dented, dirty-looking Dodge car which had very little paint remaining on it. He offered at that time to give it to Kathryn, but her mother had refused to let her have it. Mrs. Knodel and the defendant maintained a close family relationship and the defendant often visited the Knodel home. On August 19, 1952, Mr. Knodel left for work at 3:30 p. m.; at 5:45 p. m., Mrs. Knodel and the two younger children left for a swimming meet in San Bernardino. Kathryn was, at that time, watching television and was dressed in white twill shorts, a plaid shirt and had her hair tied in a pony tail with a piece of red ribbon. Mrs. Knodel told Kathryn that she would return home about 9:30 that evening. When she returned, a light was burning in the house, the television was turned off, the dishes had been washed and put away and Kathryn was not there. Mrs. Knodel thought she heard her daughter's laugh from the house next door and was not then disturbed about her absence. At midnight, Mrs. Knodel picked her husband up at his place of employment and they returned to their home where they had something to eat and watched television for awhile. At this time, the parents became alarmed at the girl's absence and started searching for her at the homes of some of her friends without success. After Mr. Knodel had gone to the police station and had returned home, they found a note in Kathryn's writing under Mrs. Knodel's purse on the dining room table. The note read "Mom, I will be right back, Kathryn."

Between 1:00 and 1:30 a. m. on August 20th, a Mr. Fred Lacy was driving from Indio to Palm Springs. Before he turned off Highway 99 onto Ramon Road, he noticed a bright light shining out toward the highway. When he turned on Ramon Road, he passed a car with very bright lights coming from the direction of Palm Springs. About 200 yards beyond the point where he had passed the car, he came upon a body lying across the white line of Ramon Road with the head to the north and the feet to the south. He did not stop but continued to Palm Springs where he reported the matter to the police department. The police proceeded to the spot described by the witness and found the body of a girl, identified as Kathryn Knodel, lying across the center line of the highway. The body was clad only in a brassiere and plaid blouse; it was lying on its back with the arms folded underneath. At that time, rigor mortis had begun to set in.

When the body was removed to the mortuary in Palm Springs, it was found to be bloody around the head and neck; the hair was thickly matted with blood and foreign matter. A tube was inserted in the vagina and specimens of the fluid found therein removed; this fluid was slightly reddish in color. When embalming was started about an hour later, it was found that there was very little force of blood within the veins. That afternoon, an autopsy was performed and it was determined that death had resulted from an injury to the head—a depressed fracture of the skull. On August 22nd, another autopsy was performed upon the body. At this time, three groups of wounds were discovered: One group which had obviously occurred prior to death; another at about the time of death and another group which occurred after death. The differentiation as to time when the wounds were inflicted was possible because of the bleeding, or lack of bleeding about the wounds and the lack of tissue destruction due to bacteria. There were six wounds on the top of the girl's head, three of them of major significance. All of these wounds had been made by a blunt object and were straight wounds, all had been produced prior to death and had hemorrhaged into the tissue and around the head. Some of the fragments of the fractured skull had pushed into the brain. It was the opinion of the pathologist that the wounds had been the result of well-directed, rather intense blows. The face was badly cut and scratched; the entire left side of the nose was badly bruised and contused; there were two fractures of the lower jaw; there were teeth marks on the inside of the lips and several teeth were missing; there were fresh wounds in the gums. No hemorrhage was found in the vicinity of the jaw fractures or around the chin cuts, or around the left eyebrow, indicating that these wounds occurred at, or very near to the time of death. It was the opinion of the pathologist that the facial wounds had been made with a much broader object than the wounds on the scalp. The evidence showed that the wound on the right back side of the head was the most severe; that it was the only single wound which could have caused death and that the girl might have survived had she received medical attention. The balance of the body was scratched and bruised.

An examination of the external genitalia showed no signs of violence; the hymenal ring showed a tear ⅝th of an inch long and 3⁄16ths of an inch deep, which extended into the vulva back of the hymenal ring. There was no evidence of hemorrhage in the area in or around the tear and no inflammatory cells such as would show a bacterial invasion. From this evidence, the pathologist determined that the tear occurred at, or near the time of death. The fluid extracted from the vagina was found to contain human spermatozoa.

With respect to defendant's activities on August 19th and thereafter, the evidence showed that on August 19th, at about 8:20 p. m., Olin and Samuel Blackwell left Redlands to drive to Beaumont. They drove out Highway 99 from Redlands, and turned west on the Cherry Valley Road; at approximately 9:15, they saw on their left, a parked car, without lights, facing west. The car was a dirty, rusted and faded 1936 Dodge; a man was sitting on the front seat with his left arm on the steering wheel. When the Blackwell brothers returned from Beaumont, at about 10:45 p. m. the same night, the Dodge car was still parked where they had seen it earlier. They turned their car spotlight on it and saw that the back righthand door of the car was open and that it extended over the shoulder of the road. They saw some object lying on the bank close to the right side of the car; they saw no one in the car; they saw no flat tires on or off the car; they saw no tire jack. They did not stop, but continued on their way.

At about 11:00 or 11:30 p. m. that same night, a 1936 Dodge or Plymouth car, badly in need of paint, was seen at Garnet in Riverside County. It was stuck on the railroad tracks and a signal maintainer and a fireman jacked up the wheels of the car and put blocks under them. The defendant was present, but did not assist. When the wheels were up, the defendant got in the car and moved it backward off the tracks. Defendant turned the car lights off and drove it between the tracks and a siding to a spot in the vicinity of a faucet where he parked. Defendant then got out of the car and walked to the west; when a train came by, defendant got back in the car and sat there until the train had passed. He then got out of the car and opened the rear door. When next seen, he was closing the door after which he again walked to the west; he returned to the car which he drove back to the road, crossing the tracks in a northerly direction turning on the lights as he did so.

Defendant called his sister, Kathryn's mother, in Redlands about August 21st from San Francisco at about 11 o'clock at night. He testified that he had read about the girl's death in the papers; that his wife in San Rafael had told him the police were looking for him. Mrs. Knodel testified that she advised him to give himself up to the police. Defendant told the San Francisco police several different stories as to his whereabouts at the time of the crime. Later, he told the Redlands, Riverside and San Bernardino officers another story. He was taken from San Francisco to San Bernardino county and his car was taken by truck to a Riverside garage. His story was, finally, that he had stopped at his sister's home in Redlands at about 9:15 p. m. on August 19th; that Kathryn was there alone and that they had gone for a drive in his car for the purpose of having sexual intercourse which they had engaged in twice prior to the night in question. He stated that after they had parked, where the car was seen, they had intercourse; that she had then cleansed herself with a handkerchief and some water from a bottle in his car; that he noticed he had a flat tire on his right, rear, wheel and that he got out a jack with which to change the tire. He said that Kathryn was squatting on her heels just behind him and that the car rolled off the jack and that the jack, or jack handle, slipped and hit her on the head. He said he noticed a car approaching and that he put her on the side of the road to get her out of sight but that she slipped over the bank; that he went after her but she was dead when he got to her; that he hit her with a rock a half dozen times to make it look like a hit-run accident; that he had taken off her panties and shorts and thrown them away. In another story, he told officers he had sexual relations twice with the girl—once before her death, and once thereafter in order to make it look like a rape case. He testified that after she had been hit with the jack handle, she fell and when he tried to lift her he found she had blood all over her; that he tried to stop the bleeding with a piece of inner tube around her head; that he didn't know where he got the tube; that as a car approached, he tried to get her out of sight; that she fell over the embankment and he fell, too; that he tried to get her back to the road but that she kept falling down causing him to fall also. He said that he left her in the gully, changed the tire, using a different jack, after blocking the front of the car with a rock he had found in the gully. He testified that when the tire was changed, he put the jack in the back of the car, threw the rock over the hill and went back after the girl whom he believed to be dead; that he did not have sexual relations with her then; that he did not deliberately hit her with any rocks; that it was then he decided to make it look like a case of rape so he removed her clothing. He said he finally succeeded in getting her up the hill and put her in the back of his car so he could move her to a place where she would be found. He picked up the rock which he had used to block the front of the car because he thought it might have blood on it; that he threw it into the back of the car where the girl lay and later took it out of his car and threw it into a field. He stated that later he got stuck on some railroad tracks; that he put on clean clothes which he had in the back seat of the car because the others had blood on them; that he felt a train was coming and took the body out of the car and dragged it about thirty feet from the tracks; that later he went back and got the body and put it back in the car. He said he washed off the blood on his hands and face at the water hydrant there and that he then drove to the spot where the body was later found. He said that he put the girl in the road and crossed her arms over her breast. He testified that he waited until he saw a car going toward Indio from what he thought was the direction of Redlands; that it made a right turn on the road; that he then left and drove westward on Highway 99; that he stopped some place beyond the "vineyard area" and took everything out of the car and washed it out, tires, tools, and car; that he disposed of the jacks and tires in San Francisco before going to the police station. Four days after the body was found, a dark spot (identified as a blood spot) was found where the 1936 Dodge car had been seen parked; there were also stains on the road which could have been caused by water leaking from a car radiator parked with its front end toward the blood spot. There were what appeared to be drag marks from the dark spots down a 21-foot embankment at the side of the road; at the base of the bank were more blood spots and the dirt and debris at the base of a tree at the bottom of the embankment was heavily contaminated with human blood and with hair which matched that of the dead girl. The same kind of hair was found in the dark spot on the road. A 30-pound rock, found three miles from the blood stain on the road, was found to be contaminated with human blood in a number of places and three eyebrow or eyelash hairs were also found there. It was the opinion of the pathologist that the facial wounds could have been caused by such a rock. Blood stains and drag marks were also found at the Garnet railroad crossing where defendant had been seen getting in and out of his car as heretofore related.

Defendant's only contention is that the evidence is insufficient to support the judgment. It is contended that the first doctor who examined the body was unable to find any evidence that the girl had been criminally assaulted. Dr. Stephen's testimony is not susceptible of such an interpretation. His testimony showed that he was an internist, not a pathologist and that he was "working for the Coroner to determine what her cause of death was"; that he did an incomplete post mortem examination;

that he might, or might not, have bisected the uterus; that he made no examination of the vagina or of the hymenal ring; that he did nothing in his examination that could possibly have torn the hymenal ring; that he had taken a "wiping" from the very top of the vagina to see if it contained spermatozoa; that (in answer to the question of criminal assault) "I did not find anything in the examination, I would say it was so unsatisfactory, the examination, I would say because for a specimen being dried out because I would put no emphasis on it one way or the other." Dr. Roos, the pathologist who later did a complete autopsy, testified that the uterus had not been previously opened; that he discovered no evidence of pregnancy or of menstruation. In this regard, it is contended that the reddish condition of the fluid withdrawn from the vagina indicates the presence of blood; that a reasonable inference to be drawn from this evidence is that the hymenal rupture was caused prior to death, or that it might have been caused when the fluid was withdrawn at the mortuary. It is also argued that the few spermatozoa found by Dr. Roos, the clean outer condition of the external genitalia, and the lack of evidence of external injury in that area, all lead to the conclusion that intercourse took place prior to death and was voluntary on the part of the deceased. The vaginal fluid withdrawn prior to either autopsy was found to contain human spermatozoa. Dr. Roos testified that he found one spermatozoa, portions of others and a pubic hair but that this was not surprising inasmuch as spermatozoa disintegrated rapidly in the presence of bacteria; that there was absolutely no hemorrhage in the hymenal tear, and no inflammatory cells; that he could reach "no other conclusion" than that the tear occurred at the time the girl died, or afterwards. He testified that the tear did not occur while she was living and with normal blood pressure because if it had there would have been evidence of bleeding into the surrounding tissue. He explained that a wound which occurred after death might ooze blood into the cut but not into the tissue around the wound; that the presence of blood in the vaginal fluid would have no significance so far as the time when the vaginal tear occurred. There is no merit to defendant's contention that the hymenal tear was caused by the mortician's assistant who inserted the tube to withdraw the fluid from the vagina. Dr. Roos testified that the insertion of a small, blunt tube could not cause the kind of a tear found in the dead girl's body. It was within the jury's province to believe, as it did, the testimony of Dr. Roos and to infer, as it did, that the act of sexual intercourse caused the tear and that the act took place at the time of, or subsequent to, the death of the victim.

Defendant contends that Mr. Blackwell, when he visited the spot where he had seen defendant's car parked on the night of August 19th, had seen the blood spot and had said it was to the rear of the spot where he had seen the car parked on the night in question. This evidence, it is contended, supports the defendant's story that the girl was accidentally struck by the jack, or jack handle, as he was changing the tire. Another fact relied upon by defendant is that the water spots on the highway contained rust, while that which leaked from the radiator of his car while in the Riverside garage was oily with only a small amount of rust. Defendant also makes much of the fact that the testimony of Mr. Pinker, the chemical expert of the Los Angeles Police Department, to the effect that there were no scratches on the underside of the right rear bumper, also showed that in making the test the carbon had not been removed therefrom. In this regard, it is contended that since defendant, after allegedly jacking up the right rear bumper, had driven to San Francisco, the underside of the bumper would be covered with carbon which would obliterate the jack marks. It is noted that the expert testified that there were scratch marks on the outside of the right rear bumper. Mr. Pinker testified that these outer scratch marks were such as might have been made by the bumper of another car striking the bumper of the car in question.

Defendant's contentions with respect to the testimony of the witness Blackwell that the blood spot was approximately two feet from the rear of the car as he remembered seeing it on the night in question, the content of the water spots on the highway as compared to the water content of that which leaked from his car, as well as the carbon covered condition of the underside of the right rear bumper on his car, all appear to be without materiality in view of the evidence. The expert medical testimony was to the effect that the one single blow on the girl's head which could have, of itself, caused death, was the result of a "well directed, rather intense" blow. This statement, together with the fact that she was struck six blows upon the head, which the evidence showed were made by the same instrument, was sufficient evidence from which the jury could have inferred that the killing was not accidental. Except for the intentional, as distinguished from accidental, nature of the blows, the defendant's story and the evidence are corroborative one of the other.

The medical testimony is sufficient to support the jury's implied finding that the act of sexual intercourse took place at the time of, or after, the girl's death. Section 189 of the Penal Code provides that all murder which is committed in the perpetration of, or attempt to perpetrate, rape is murder of the first degree. The record here affords substantial support for the conclusion that the homicide was committed in the perpetration of, or attempt to perpetrate rape, People v. Lindley, 26 Cal. 2d 780, 161 P.2d 227; People v. Gutierrez, 35 Cal.2d 721, 221 P.2d 22.

Defendant makes veiled assertions that the testimony given by the forensic chemist and the pathologist was so positive and assured as to be unreliable. This contention is without merit. Defendant made no objection as to the admissibility of their opinions, and was, furthermore, given ample opportunity to cross-examine both witnesses.

A reading of the record in this case discloses that defendant's rights and interests were fully protected by his counsel and by the court and that he was accorded a fair and impartial trial in all respects.

The judgment and the order denying a new trial are, and each of them is, affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

---

119 Cal.App.2d 271

KIRSCH v. KIRSCH.

Civ. 19597.

District Court of Appeal, Second District, Division 2, California.

July 21, 1953.

Divorce action wherein the Superior Court, Los Angeles County, Joseph M. Maltby, J., granted the wife the relief sought, and the husband appealed. The District Court of Appeal, Moore, P. J., held that the evidence sustained the decree granting the wife a divorce on ground of cruelty.

Affirmed.

1. Appeal and Error 🔑931(1), 989

Judgment appealed from must be given benefit of every favorable inference to be drawn from proof and only evidence most favorable to judgment together with every inference reasonably to be drawn and every presumption which can fairly be deemed to arise therefrom in support of prevailing party can be considered.

2. Appeal and Error 🔑989

Power of appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support conclusion reached by jury.

3. Divorce 🔑12

When a marriage fails, the family thereupon ceases to exist and dissolution should be decreed if statutory requirements therefor are met, since marriage should not be degraded and its purposes frustrated by such decrees as will merely punish parties and rob their progeny of love and contentment while bringing no benefit to state.

4. Divorce ⚷130

Evidence sustained decree granting wife divorce on ground of cruelty.

Charles H. Kent, San Pedro, for appellant.

Woolley & Mewborn, Charlton A. Mewborn, III, Torrance, for respondent.

MOORE, Presiding Justice.

From an interlocutory decree dissolving the marriage, awarding the custody of two minor children, providing for their support and dividing the community property, defendant appeals. He attacks the amended complaint as an insufficient pleading, asserts the findings and judgment are not supported by the evidence and maintains the insufficiency of the evidence. Inasmuch as the amended complaint is attacked in no particular except as to the allegations of cruelty, the validity of the pleading will be made to appear from the discussion of the findings and the evidence.

The parties were married in October, 1939, and separated in August, 1951. Their life together continued over practically eleven years and ten months. Their two children are nine and one-half, and three years respectively. Extreme cruelty is alleged as the reason why the marriage must end. In support of her allegations, respondent testified that from the commencement of their married life she undertook to help others and her community as well as her own home, but appellant made fun of her efforts, embarrassed her before the public and in front of his own family and his children; that he called her "the Little Dictator," and "the Little Communist." In the first year she worked in the Girl Scout movement, and thereby served the public. Because she had trained in youth work, she helped in the Y. W. C. A. To such activities appellant objected. When she attended church he derided it and asked her insinuating questions in the presence of the children. He repeatedly ridiculed her cooking and housekeeping; objected to a cake baked in a round pan and often made jest of her frosting, her manner of handling the children, her study of psychology, and kept her so upset and nervous that she broke out with eczema from which she suffered intensely. He objected to attending any social affair requiring an outlay of money; disliked playing golf or bowling with his wife and worried when he found her not busily occupied. He expressed his displeasure at the birth of their daughter—rather than a son; took her on only two vacations in the years of coverture; objected to their going on camping or hunting trips. He made their home in an apartment; objected to building a home as too expensive; would not "go in debt for anything."

She tried to salvage the marriage by requesting him to join her in consulting a "marriage counselor." He objected with the statement: "There aren't any problems I can't work out myself; you don't need any one to work out those problems." He opposed all the activities that interested respondent.

She was miserable from the eczema; her hands were full of pus and she itched all over until she finally found a dermatologist who relieved her. She could not sleep well, was upset and lost weight.

She was corroborated by her mother, Mrs. Wise, and by Mrs. Morgan. They testified as to the cold and critical attitude of appellant. Mrs. Morgan implored him to "let Sally alone; don't criticize her; give us all a chance to have a good time." She testified that he "had spoiled practically every family party we had ever had just by that very thing." Mrs. Church testified that respondent was a very fine and able worker in the Scout organization but after the birth of the daughter, Janet, respondent's health was not good and the eczema condition beset her. Furthermore, appellant testified that his wife's medical problem started "practically from the time we were married. * * * She went into eczema right after Janet was born. * * * The specialist shocked me right off the chair. * * * It's been $60 to $80 a month for two years. * * * She changed to this brand new doctor * * * and he told me he didn't expect to save her life. And she had this infection * * * this second doctor cured her. * * * And she does have breakouts."

[1, 2] From such evidence the inference of extreme cruelty is fairly deducible. The judgment must be given the benefit of every favorable inference to be drawn from the proof. Hinkle v. Southern Pacific Co., 12 Cal.2d 691, 695, 87 P.2d 349. Only the evidence most favorable to the judgment together with every inference reasonably to be drawn and every presumption which can fairly be deemed to arise therefrom in support of the prevailing party can be considered. Wood v. Samaritan Institution, 26 Cal.2d 847, 849, 161 P.2d 556. The power of the appellate court begins and ends with a determination as to "whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury." Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183.

[3] From the narrative of the unfortunate relationship that developed between the parties it is apparent that the family effected by the union of these parties is at an end. Respondent has come into that state of mind which renders it impracticable for her to attempt to live serenely and in comfort with appellant. His very presence at her fireside would awaken bitter memories of the doleful hours his past conduct aroused in her heart. She has an extremely sociable, service-giving nature. While she can find pleasure in domestic chores and in the care of her children, she requires a contact with the throbbing world. She had training for the girl scout work prior to her marriage and evidently relishes the associations of, and work in, her church. Appellant will have none of these. He scorns her efforts in the field of social service and demands that she give the greater part of her time to the home. While a wife and mother owes it to herself, her family and posterity to take care of her home, if her nature requires a social outlet, her husband owes it to her and to the preservation of his family to regard with patience and charity her aspirations to render such service in study, in religious rites, in social service or in any field of endeavor where she may find wholesome happiness in social merriment to such a reasonable degree as will tend to anchor the family life and cause peace and contentment to abide. These considerations are of equal moment with the wrongs complained of and the rights asserted by the litigants in a divorce action. The public interest in domestic infelicities is always an important factor in such a contest. When a marriage fails, the family thereupon ceases to exist; it is no longer a unit, "the purposes of family life are no longer served" and a dissolution should be decreed if statutory requirements therefor are met. See De Burgh v. De Burgh, 39 Cal.2d 858, 864, 250 P.2d 598. Marriage should not be degraded and its purposes frustrated by such decrees as will merely punish the parties and rob their progeny of love and contentment yet at the same time bring no benefit to the State. (Ibid.)

[4] The court below found that appellant's violent opposition to the wishes and innocent aspirations of respondent was extreme cruelty, and wisely concluded that she should walk alone and unhindered by appellant, Keener v. Keener, 18 Cal.2d 445, 448, 116 P.2d 1, although the latter may not at any time have consciously aimed to be cruel. Conduct that will grieve and pain respondent to an extreme degree might not have disturbed appellant or some women if administered to them under similar circumstances because of their difference in sentiment, education and innate refinement. Speers v. Speers, 105 Cal.App. 254, 255, 287 P. 138. The record of the evidence taken at the trial is sufficient to convince the impartial mind that appellant's behavior to his wife would be extreme cruelty to a woman of the spirit, ambition and refinement of such a person as Mrs. Kirsch appeared to the court below. Speers v. Speers, supra, 105 Cal.App. 256, 287 P. 138.

Judgment affirmed.

McCOMB and FOX, JJ., concur.

119 Cal.App.2d 332

BOSHES v. MILLER et al.

Civ. 19555.

District Court of Appeal, Second District, Division 3, California.

July 23, 1953.

Action for specific performance of contract to convey realty. The Superior Court, Los Angeles County, rendered judgment for plaintiff and defendants appealed. The District Court of Appeal, Shinn, P. J., held that under the circumstance the defendants were estopped from asserting defense of nonperformance by plaintiff in respect to timely deposit in escrow, but that plaintiff was not entitled to interest prior to date of judgment.

Affirmed as modified.

1. Specific Performance ⚷101

Where plaintiff relied on defendants' proposal that plaintiff and defendants meet at defendants' office and then go to escrow office and plaintiff waited at defendants' office while defendants secretly cancelled the escrow for failure of plaintiff to deposit his money, defendants were estopped from asserting nonperformance by plaintiff as defense to plaintiff's suit for specific performance of contract by which plaintiff was to receive house and lot on depositing his money in escrow.

2. Evidence ⚷467

Evidence of oral agreements was not admissible to vary terms of written agreements which plaintiff was suing to specifically enforce but was admissible to show that plaintiff had such trust and confidence in defendants as would estop defendants from asserting defense of nonperformance.

3. Vendor and Purchaser ⚷351(10)

Statute relating to detriment caused by breach of agreement to convey an estate in real property, being a special provision, prevails over general statutes on damages. Civ.Code, §§ 3287, 3300, 3306, 3357.

4. Interest ⚷39(3)

Plaintiff suing on contract for specific performance of contract to convey realty or for damages under statute not allowing interest on special damages could not recover interest prior to date of his judgment for damages on any theory of money had and received. Civ.Code, §§ 3287, 3300, 3306, 3357.

◆

Arthur V. Kaufman and Fleming, Robbins & Tinsman, Los Angeles, for appellants.

Bishop & Hoffmann, Los Angeles, for respondent.

SHINN, Presiding Justice.

[1] This is an appeal by defendants Miller and Fisher from a judgment granting plaintiff damages for failure to convey real property to him. Plaintiff, a contractor, and defendants entered into a joint venture the terms of which were expressed in a writing of August 4, 1947. They were to acquire lots, build houses and sell them, sharing the profits and losses one-third to plaintiff and two-thirds to defendants. Title was to be placed in plaintiff, he was to obtain construction loans upon notes and trust deeds of himself and wife, following which title was to be placed in the names of defendants, who were to provide any additional financing for the purchase of lots and for the construction. Lots 37, 47 and 100 were purchased, loans were obtained and houses built. Plaintiff, however, contributed some $9,600 to the venture although not required by the agreement to contribute anything but his services and the benefit of any trade discounts he might obtain. In May, 1948, the houses being unsold, the joint venture was dissolved. An accounting was had; it was determined that defendants would take lots 37 and 47 and plaintiff lot 100, paying defendants therefor $9,362.52. Plaintiff was given until September 26, 1948, to pay the money. An escrow was arranged with a bank under which September 30th was fixed as the time the money should be paid and defendants were given the right to terminate the escrow if it were not paid. Plaintiff, with knowledge of defendants, made alterations in the house on lot 100 at an expense of $1,380.58 and he also paid a bill for electrical work on the three houses, $374.84 of which was on defendants' houses, which

latter amount they agreed to pay to him by deducting it from the $9,362.52. The crucial question in the case was whether plaintiff was prevented or dissuaded from depositing his money in escrow on September 30th by the conduct of the defendants actuated by willfullness and bad faith.

Among the six causes of action of the complaint was one for specific performance or for damages if specific performance could not be had. It was admitted that plaintiff did not deposit his money in the escrow but alleged that he was ready, able and willing to do so and was dissuaded therefrom by certain conduct of the defendants, because of which, it was pleaded, defendants should be held estopped to claim nonperformance on his part.

Pursuant to the allegations of the complaint there was evidence of the following facts: About September 23rd defendants stated to plaintiff that he must have the money in escrow by September 30th; plaintiff stated that he expected to have all the money by that time; defendants proposed that the three would meet in the office of defendants at 3 p. m. September 30th and go to the escrow office where plaintiff would make the deposit and defendants would give instructions reducing their demand by the amount of their share of the bill for electrical work. Plaintiff agreed to this arrangement. He went to defendants' office at 2:45 and found it locked; he remained there or thereabouts watching for the appearance of defendants; twice he telephoned to Miller's house and was assured by Mrs. Miller that Miller had said he would be at the office and would surely come, and he was urged by Mrs. Miller to wait there, which he did until it was too late to go to the escrow office. He had with him the check of an insurance company for over $10,000 which he intended to place in the escrow. In the evening he called Miller's house twice and was told by Mrs. Miller that Miller was not at home; he left word for Miller to call him, which Miller did not do. The following morning plaintiff went to the escrow office to deposit his check and learned that Miller and Fisher and their wives had gone to the escrow office while he was waiting at their office and had signed a cancellation of the escrow and demand for the return of their deed, dating it October 1st. He called defendants and was told that he was "out cold", that he had better forget he ever had lot 100 and charge the deal up to experience. On October 6th he filed the present action. We may pass over intervening events that preceded the sale of lot 100 by defendants to an innocent purchaser, which prevented a decree for specific performance.

The court found the facts to be as testified to by plaintiff; found that plaintiff had trust and confidence in defendants; was ready, able and willing to deposit his money; believed and relied upon and was deceived by the statements and conduct of the defendant and otherwise would have deposited his money September 30th and would in all respects have performed his agreement. It was found that defendants acted willfully, in bad faith and with an intention to deceive plaintiff; that the reasonable market value of the property exceeded the price to be paid by $7,012.32, for which judgment was given with interest from September 30th.

It is at once apparent that if these findings have support in the evidence plaintiff established a right to the damages which he was awarded. They do have ample support in the evidence. In fact the principal evidence upon which the finding of estoppel was based is stated in defendants' opening brief, namely, the circumstances as to the agreement to meet at defendants' office and plaintiff's waiting there while defendants were secretly cancelling the escrow. Bad faith and an intention to deceive plaintiff would be inferred from the facts in evidence by the most charitable mind. Reasonable inferences were that plaintiff believed defendants, trusted them, was deceived, and otherwise would have deposited his money on time. Defendants' counsel have done the best they could with a difficult case, but they very properly stop short of saying that the facts found do not furnish a sound basis for a finding of estoppel.

[2] Plaintiff complicated his case by pleading six separate causes of action. One of them alleged an oral agreement as to the

terms of the joint venture which were not carried into the written agreement, and another oral agreement that plaintiff need not pay for lot 100 until he had sold it. Evidence of these oral agreements was introduced over objection of defendants and the court found that the agreements were made as alleged. The court made 44 findings. The briefs contain 167 pages. No less than 50 pages are devoted to the discussion of findings which were not at all necessary to establish a basis for the judgment. Since the findings as to the bad faith of the defendants, estoppel and damage support the judgment it is of no consequence whether these other findings have support in the evidence.

It was error to receive evidence of the oral agreements if the purpose was to vary the terms of the written agreements. If the evidence was received merely to show that plaintiff had trust and confidence in defendants, and was more likely than not to believe their intentions were to deal fairly with him, there was no error. But the judgment was based upon findings of prevention of performance of the written agreements and not upon the oral agreements. It would necessarily have been the same if the evidence of the oral agreements had been excluded, or if the finding had been that the alleged agreements had not been made.

[3, 4] The final question is whether interest should have been allowed prior to the date of the judgment. Chapter 2, Part 1, Division 4 of the Civil Code treats of damages. Section 3357 provides: "The damages prescribed by this chapter are exclusive of exemplary damages and interest, except where those are expressly mentioned."

Sections 3287,[1] 3300[2] and 3306[3] read as set out below. Section 3306, being a special provision, prevails over the general sections. Code Civ.Proc., sec. 1859; Woollomes v. Woody, 79 Cal.App.2d 696, 180 P.2d 439. Since interest is mentioned as to some items of damage, but not as to damages allowed for bad faith, the latter do not carry interest prior to the date of judgment. The amount of such damage would be the subject of proof, which was, no doubt, the reason for not allowing interest from the date of the breach.

Plaintiff says he was entitled to interest upon the findings, pursuant to his count for money had and received that defendants were indebted to him in the sum of $7,012.32. He alleged in his fifth cause of action that defendants were indebted to him in the sum of $12,719.98 for money had and received, consisting of money he had advanced and spent upon the properties. He contends that he received judgment for $7,012.32 as for money had and received. He is mistaken. He sued on the contract for specific performance or for damages, and was given a judgment for damages. He could have treated the contract as rescinded because of defendants' breach, and sued for the amount by which defendants had been unjustly enriched, or he could have stood on the contract and sued for damages resulting from the breach. He could not do both, and if he recoverd on one theory he could not recover on the other. He could not take out his money, which was the consideration for the contract, and at the same time enforce the contract. As long as the contract had not been modified, superseded or rescinded his action was on the contract. Lavenson v. Wise, 131 Cal. 369, 63 P. 622. His action and his recovery were on the contract. Having sued for special damages allowed by section 3306, Civil Code, on which interest is not allowed, the award of interest was error.

---

[1] "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor, from paying the debt."

[2] "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."

[3] "The detriment caused by the breach of an agreement to convey an estate in real property, is deemed to be the price paid, and the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon; but adding thereto, in case of bad faith, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed, at the time of the breach, and the expenses properly incurred in preparing to enter upon the land."

The judgment is modified by striking out the provision for interest and as modified is affirmed, without costs on appeal to either party.

PARKER WOOD, J., concurs.

VALLÉE, J., did not participate.

VOGEL v. THRIFTY DRUG CO.*

Civ. 19508.

District Court of Appeal, Second District,
Division 1, California.
July 20, 1953.

Rehearing Denied Aug. 6, 1953.

Hearing Granted Sept. 17, 1953.

Action for damages by customer against store which allegedly was negligent in serving customer ice cream in which there was a piece of glass, wherein on day of trial the customer moved to amend complaint to include second cause of action for breach of implied warranty. The Superior Court, Los Angeles County, denied the motion and entered judgment on verdict for store and customer appealed. The District Court of Appeal held that refusal to permit customer to amend complaint was abuse of discretion in view of fact that facts proved would be substantially the same under amended pleading alleging breach of implied warranty as they were on the original complaint alleging negligence and that store's attorney would have been able, in a minimum of time, to prepare appropriate instructions and to object to any of customer's instructions which were incorrect or inapplicable.

Judgment reversed with direction.

1. Food 🔑25

A cause of action for personal injuries resulting from alleged negligence of restaurateur serving ice cream containing glass did not include a cause of action for damages for injuries resulting from alleged breach of implied warranty. Civ.Code, § 1735.

2. Pleading 🔑236(2)

The amendment of pleading immediately before trial is not a matter of right but is placed within sound discretion of trial judge.

3. Appeal and Error 🔑959(1)

An appellate court will not interfere with action of trial judge in determining whether to allow amendment of pleading unless it clearly appears that there has been an abuse of discretion, and to a certain extent the measure of soundness of discretion used must be found in facts of each case.

4. Trial 🔑251(5)

In action for damages by customer against store which allegedly was negligent in serving customer ice cream in which there was a piece of glass, refusal to give instruction on implied warranty was proper as not covered by pleading.

5. Trial 🔑251(5)

Where breach of warranty is not pleaded, instructions relating thereto are properly refused.

6. Pleading 🔑249(2)

In action for damages by customer against store which allegedly was negligent in serving customer ice cream in which there was a piece of glass, refusal to allow amendment of complaint on day of trial to allege second cause of action for breach of implied warranty was abuse of discretion, where facts proved would be substantially the same under amended pleadings as they were under original complaint, and store's attorney would have been able, in a minimum of time, to prepare appropriate instructions and to object to any of customer's instructions which were incorrect or inapplicable.

---

* Subsequent opinion 272 P.2d 1.

Kenny & Morris and Eleanor V. Jackson, Los Angeles, for appellant.

Moss, Lyon & Dunn, Sidney A. Moss and Henry F. Walker, Los Angeles, for respondent.

PER CURIAM.

Plaintiff appeals from an adverse judgment entered pursuant to verdict in an action brought by her to recover for injuries alleged to have been sustained because of eating a piece of glass in ice cream served by defendant.

As a customer of defendant, plaintiff states that she seated herself at a counter and was served an ice cream soda. After placing some ice cream in her mouth she testified that she chewed on it, broke her dental plate, felt a cutting sensation, spit the contents of her mouth out into a napkin, and found that it was her broken lower dental plate and small pieces of glass. She complained to defendant and later sought and obtained medical care.

Plaintiff fixes the date of her injury as December 15, 1950. She filed her original complaint in this case on May 23, 1951. Pursuant to stipulation, plaintiff filed an amended complaint on August 16, 1951, and the case was tried on the issues framed by that amended complaint and the answer thereto. This amended complaint alleged the purchase at defendant's store of the ice cream; that defendant so negligently served the ice cream to plaintiff that it contained glass; that by virtue of defendant's negligence plaintiff, while eating the ice cream, ate the glass; that she sustained injury therefrom. On May 1, 1952, the day of the trial, plaintiff moved the court to permit her to amend her complaint by adding a second cause of action which would set out a cause of action for implied warranty under section 1735 of the Civil Code, alleging that on December 15, 1950, plaintiff, as a customer of defendant purchased an ice cream soda, and, "That defendants in so serving plaintiff as aforesaid warranted the same to be in all respects proper for the purpose of eating, chewing and swallowing.

"That plaintiff relied upon said implied warranty of fitness in eating said ice cream.

"That by reason of eating said glass and as a proximate result of defendant's permitting said glass to be in said ice cream, plaintiff sustained the following injuries," setting them out.

This appeal is based on plaintiff's view that the trial court erred in refusing permission to file this proposed amendment on the day of trial and its refusal to give the jury certain instructions concerning breach of warranty, which are as follows:

"Special Instruction No. 2.

"The transaction between a restaurant keeper and customer constitutes a sale and that as a necessary incident to such sale there exists an implied warranty which imposes upon the restaurant keeper the obligation to furnish to patrons food 'reasonably fit' for human consumption, and that if a patron suffers injury as a result of eating food which is not reasonably fit for human consumption, the restaurant keeper is liable in damages therefor."

"Special Instruction No. 13.

"You are instructed that if you find that the defendant, Thrifty Drug Co., served to the plaintiff food or ice cream not reasonably fit for human consumption by reason of the presence of a foreign substance such as glass, and if you find that the plaintiff put such food and foreign substance in her mouth and was damaged thereby, you must find the defendant liable."

[1] There is a difference between the theory of negligence contained in the amended complaint and the theory of implied warranty in the second amended complaint which plaintiff sought to file on the day of the trial. In the legal research made by her counsel prior to filing of the original complaint in May of 1951, various cases dealing with the subject should have been considered.

In Mix v. Ingersoll Candy Co., 6 Cal.2d 674, at page 675, 59 P.2d 144, at page 145, decided in 1936, we note in the second paragraph that: "Two causes of action were separately alleged in plaintiff's complaint, one for damages for injuries resulting from an alleged breach of an implied warranty, the other for personal injuries resulting from the alleged negligence of defendants * * * in the preparation and serving of the chicken pie." A reading of the entire case in no way justifies any assumption that these two causes of action are one and the same.

Barrios v. Iwaki, 32 Cal.App.2d 198, 200, 89 P.2d 417, 419, says, "'It is the rule that warranties not pleaded cannot be relied upon either in support of an action or as a defense.'" This case was decided in 1939 and we assume it had been noted by plaintiff's counsel more than one day before the trial in May, 1952.

In Goetten v. Owl Drug Co., 6 Cal.2d 683, 59 P.2d 142, the court granted a new trial because it had limited the jury's consideration to the question of negligence and had excluded the question of implied warranty. This order was affirmed on appeal. Plaintiff has not suggested, and we have not found in the opinion in the cited case any support for a contention that in a complaint a cause of action for negligence includes a cause of action for implied warranty under Sec. 1735 of the Civil Code.

In Klein v. Duchess Sandwich Co., Ltd., 14 Cal.2d 272, at page 275, 93 P.2d 799, at page 800, decided in 1939, we find as a separate paragraph:

"In their complaint herein, plaintiffs pleaded two separate causes of action: In substance, (1) that the defendants were guilty of negligence; and (2) that the defendants had breached an implied warranty that the sandwich was fit for human consumption."

In Wilson v. Ray, 100 Cal.App.2d 299, at page 303, 223 P.2d 313, at page 315, decided in November, 1950, we find, "where a party relies upon an implied warranty he must plead the warranty."

[2, 3] The amendment of a pleading immediately before a trial is not a matter of right but is placed within the sound discretion of the trial judge. An appellate court will not interfere with the action of the trial judge unless it clearly appears that there has been an abuse of discretion. To a certain extent the measure of the soundness of the discretion used must be found in the facts of each case. Dibblee v. Title Ins. & Trust Co., 55 Cal.App.2d 286, 295, 130 P.2d 775; Manha v. Union Fertilizer Co., 151 Cal. 581, 584, 91 P. 393. No sufficient or satisfactory reason has been brought to our attention for the delay of plaintiff in seeking leave to file a second amended complaint. Plaintiff on this appeal does not claim that when she appeared before the presiding judge in charge of the master calendar of the trial court and her case was called on April 30, and again on May 1, the day of trial, that she announced she was *not* ready for trial. We may therefore assume that she announced ready for trial, which meant trial on the issues framed by the pleadings as they then stood. This did not include the second cause of action based upon implied warranty or contained in the proposed second amended complaint.

[4, 5] Refusal of the trial court to give the instructions above quoted was proper because they did not relate to issues before the jury for determination. We deem it unnecessary to consider the defendant's suggestion (based in part on McNeal v. Greenberg, 40 Cal.2d 740, 255 P.2d 810, that they are not legally correct. Where a breach of warranty is not pleaded, instructions relating thereto are properly refused. Alvernaz v. H. P. Garin Co., 127 Cal.App. 681, 688, 16 P.2d 683.

[6] After consideration of the legal aspects of the case and an examination of the testimony at the trial, we have concluded that the conscientious trial judge abused the discretion vested in him when he refused to permit plaintiff to amend her complaint. The interests of justice required that plaintiff, as an individual litigant, should not be penalized because her attorney had not properly prepared the pleadings in her case, if as a condition to her filing the amended complaint she had

consented to such continuance or delay as might be required to enable defendant to plead and thereafter prepare for trial, and further that she pay defendant's costs occasioned by such delay. It is apparent that the facts proved would be substantially the same under the amended pleading as they were under the original complaint. Defendant's attorney would have been able, in a minimum of time, to prepare appropriate instructions and to object to any of plaintiff's instructions which were incorrect or inapplicable.

The judgment is reversed with direction to the trial court to permit plaintiff to file a second amended complaint.

---

119 Cal.App.2d 282

PEOPLE v. LANGLEY.

Cr. 863.

District Court of Appeal, Fourth District, California.
July 21, 1953.

Defendant was convicted of forgery. From an order of the Superior Court of Tulare County, W. G. Machetanz, J., denying a motion to set aside and vacate judgment of conviction, defendant appealed. The District Court of Appeal, Barnard, P. J., held that matters of evidence or procedure which do not affect jurisdiction of trial court cannot be raised in motion to vacate judgment.

Affirmed.

1. Criminal Law ⚷998

A motion to vacate a judgment does not lie to correct errors of law or to redress any irregularity that could have been corrected on motion for new trial or by appeal.

2. Criminal Law ⚷998

Where defendant alleged that he was not informed at preliminary hearing of his right to counsel and none was appointed, that he gave to jailer list of witnesses which jailer did not deliver to trial judge, that he was not properly defended at trial, and that he was improperly questioned during trial concerning prior felony but all matters could have been urged on motion for new trial or on appeal from judgment, question could not be raised by motion to vacate judgment.

◆

Hubert M. Langley, in pro. per.

Edmund G. Brown, Atty. Gen., and Alan R. Woodard, Deputy Atty. Gen., for respondent

BARNARD, Presiding Justice.

Appeal from an order denying a motion to annul, vacate and set aside the judgment.

The defendant was charged with two counts of forgery, and with a prior conviction of felony. He was represented at the trial by the office of the public defender. The jury found him guilty on both counts and he admitted the prior conviction. His application for probation was denied and judgment was pronounced on May 2, 1952, sentencing him to prison. No motion for a new trial was made and no appeal taken.

On November 18, 1952, the defendant made a motion to annul, vacate and set aside the judgment. The defendant was present at the hearing of this motion and was there represented by another attorney, who was appointed by the court at his request. The motion was denied and this appeal followed.

The appellant argues that this was not a coram nobis proceeding, and that it was a motion to set aside the judgment on the ground that the trial court had no jurisdiction over the subject matter or over the person of the defendant. It was then argued that the court was deprived of jurisdiction by the four matters relied upon in this proceeding.

Appellant's petition for an order vacating the judgment alleged that the court had no jurisdiction because he was not informed at the preliminary hearing of his right to counsel, and none was appointed; and that he gave to the jailer a list of witnesses which the jailer did not deliver to the trial judge. In his brief on this appeal he also argues that the public defender did not properly defend him at the trial; and that he was improperly questioned during the trial concerning the prior felony.

[1, 2] Not only are the material facts, with respect to these matters, not disclosed by the record before us but they are all matters of evidence or procedure which do not affect the matter of jurisdiction. A motion to vacate a judgment does not lie to correct errors of law or to redress any irregularity that could have been corrected on a motion for a new trial, or by an appeal. People v. Cook, 97 Cal.App.2d 284, 217 P.2d 498. All of the matters alleged in the petition were known at the time of trial, and no motion to quash or motion for a continuance was made. People v. Smith, 109 Cal.App.2d 76, 239 P.2d 903. The other matters now argued in the briefs could and should have been raised on a motion for a new trial or on an appeal.

The order appealed from is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

119 Cal.App.2d 469

CHAIN v. CHAIN.

Civ. 19717.

District Court of Appeal, Second District, Division 1, California.

July 31, 1953.

Hearing Denied Sept. 24, 1953.

Divorce proceeding. The lower court entered interlocutory judgment of divorce, and defendant appealed from judgment and from order denying new trial and plaintiff filed motion to dismiss appeal. The District Court of Appeal, held that appeal could not be taken from order denying motion for new trial and that time for filing notice of motion to appeal from judgment was not extended by notice of intention to move for new trial which was not filed within sixty-day period and therefore notice of appeal from judgment filed after notice of intention to move for new trial was not timely and appeal was precluded.

Appeal from judgment and attempted appeal from order denying new trial dismissed.

1. Divorce 🔑181

Where interlocutory judgment of divorce was entered September 26th, 1952, notice of intention to move for new trial was filed December 3, 1952 and notice of appeal from judgment was filed thereafter, notice of appeal from judgment was not timely and appeal therefrom was precluded, since 60-day period for filing notice of intention to move for new trial had expired when such notice was filed and time for filing notice of appeal from judgment was not thereby extended beyond 60-day period after entry of judgment. Rules on Appeal, rules 2(a), 3(a).

2. Appeal and Error 🔑110

There can be no appeal from order denying motion for new trial.

◆

Philip Chain, in pro. per.

George D. Sphier, Los Angeles, for respondent.

PER CURIAM.

Respondent moves to dismiss the appeal herein upon the ground that the appeal from the judgment was not filed within the time provided by law and the Rules of Court and upon the further ground that an appeal is attempted to be taken from an order subsequent to entry of judgment (order denying a new trial) which order is not appealable.

The record reflects that an interlocutory judgment of divorce was entered for plaintiff on September 26, 1952. Notice of Intention to Move for New Trial was filed December 3, 1952, and denied on February 2, 1953. Rule 3(a), Rules on Appeal, provides that when a valid notice of intention to move for a new trial is served and filed by any party within 60 days after entry of judgment, if the motion is denied the time for filing the notice of appeal from the judgment is extended for all parties until 30 days after either entry of the order denying the motion or denial thereof by operation of law.

[1, 2] In the instant case the 60-day period expired on November 25, 1952, and the notice of intention to move for a new trial was not filed until December 3, 1952. The notice of intention to move for a new trial having been filed more than 60 days after entry of judgment, the time for filing notice of appeal from the judgment was not extended beyond the 60-day "normal time" within which notice of appeal must be filed after entry of judgment under Rule 2(a), Rules on Appeal. Consequently the notice of appeal from the judgment was filed too late, and as there is no appeal from the order denying the motion for a new trial, it is manifest that the appeal therefrom must be dismissed.

The appeal from the judgment and the attempted appeal from the order denying a new trial are, and each is, dismissed.

119 Cal.App.2d 584

PEOPLE v. CRESWELL.

Cr. 939.

District Court of Appeal, Fourth District, California.
Aug. 7, 1953.

The Superior Court, San Bernardino County, Mitchell, J., found defendant guilty of arson and State appealed from an order granting new trial. The District Court of Appeal, Barnard, P. J., held that where the trial judge considered the evidence with respect to corroboration to be insufficient as a matter of fact it was not abuse of discretion to grant motion for new trial.

Judgment affirmed.

1. Criminal Law 🔑741(5)

In prosecution for arson where aside from testimony of accomplices, there was no direct evidence connecting defendant with setting of fire, whether there was sufficient corroborating evidence was primarily question of fact for trial court.

2. Criminal Law 🔑1159(2)

An appellate court cannot appraise weight of evidence and can only review it for its legal sufficiency.

3. Criminal Law 🔑935(1)

A defendant tried by jury is entitled to two decisions on the evidence, one by jury and another by trial judge in passing upon motion for new trial, and it is his duty to grant new trial if he is not satisfied that evidence is sufficient to sustain verdict, and he has a wide discretion in this regard.

4. Criminal Law 🔑935(1)

An order granting new trial in arson prosecution could not be attacked on ground that trial court made order because of alleged misconception of law where record indicated trial judge had correct rules of law in mind, and that he considered the evidence with respect to corroboration to be insufficient as a matter of fact.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., Lowell E. Lathrop, Dist. Atty., and Robert J. Biersbach, Asst. Dist. Atty., San Bernardino, for appellant.

Julius J. Novack, San Bernardino, for respondent.

BARNARD, Presiding Justice.

The defendant was charged with arson and, in a second count, with burglary. A jury found her guilty of arson and not guilty on the second count. The People have appealed from an order granting her motion for a new trial.

The fire in question occurred in a building in Big Bear, and was reported to the fire department at 12:48 A.M. on June 2, 1952. Two witnesses, who admitted that they set the fire, testified at the trial that they had done so at the request of the defendant, giving the details in that connection and telling where they had all gone and what they had done over a period of several hours, including the time when the fire must have been set. The places mentioned were all within a short distance of where the fire occurred. Aside from the testimony of these admitted accomplices there was no direct evidence connecting the defendant with the setting of the fire. The motion for a new trial was presented and argued solely on the question as to whether the testimony of the accomplices was sufficiently corroborated.

The appellant contends that in passing upon this issue the court applied standards contrary to those used in People v. Trujillo, 32 Cal.2d 105, 194 P.2d 681, and other cases in which the corroborative evidence was held sufficient; that this resulted in an improper holding that the evidence in this case was not sufficient, legally to constitute corroboration; and that the evidence here was stronger than that held to be sufficient in some of the cases cited.

In the cited cases a new trial had been denied, and a factual finding was being reviewed. The evidence which the appellant relies on as legally sufficient to show corroboration is respondent's admission that she was with the accomplices at all times that night except for a few minutes about twelve midnight; her denial that she had told a witness that she arrived home at 1:00 A.M. and her later admission that she had told him this; her statements to an investigator including: "I suppose they are blaming us Indians for setting that place on fire" at a time when no one had been accused of setting the fire, another, that the owner of the burned building was "no good", and a third reflecting on his ancestry; her statement to another witness indicating that she might have hidden an article which the accomplices testified she had taken from the burning building; her statement that she saw one Betterly drive onto the highway as she returned to her home with the accomplices at 1:00 A.M.; and Betterly's testimony that when he heard the alarm he drove onto the highway in front of respondent's home and proceeded to the fire.

[1–3] Whether or not there was sufficient corroborating evidence here was primarily a question of fact for the trial court. An appellate court cannot appraise the weight of the evidence and can only review it for its legal sufficiency. People v. Sarazzawski, 27 Cal.2d 7, 161 P.2d 934, 939. In that case, the court said "An appellate court cannot order a new trial on the ground of insufficiency of the evidence if there is any substantial evidence by which the verdict can be supported. * * * But a trial court can grant a motion for new trial where the evidence is legally sufficient and even where the only evidence is that of the prosecution." A defendant is entitled to two decisions on the evidence, one by the jury and another by the trial judge in passing upon a motion for a new trial; it is the duty of a trial judge to grant a new trial if he is not satisfied that the evidence is sufficient to sustain the verdict; and he has a wide discretion in this regard. People v. Cesena, 18 Cal.App.2d 727, 64 P.2d 732; People v. Mattmueller, 25 Cal.App.2d 418, 77 P.2d 504, 506. In the latter case it was said: "Even though the reader of the cold record might conclude that the evidence was ample to sustain the conviction, reversal of the order granting a retrial is not warranted." It is the duty of a trial judge to grant a new trial when he is of the opinion that one element of the offense has not been established by the evidence. People v. Nelson, 36 Cal.App.2d 515, 97 P.2d 1043.

Appellant's main contention seems to be that the court granted this motion solely because of its erroneous conception of the law. This is based on the fact that during the argument of the motion, and while the rules established by the various cases were being discussed between court and counsel, the judge referred to another requirement of the rule and then said: "They have to show a material connection between the defendant and the offense." A similar contention was made in People v. Espinola, 38 Cal.App.2d 482, 101 P.2d 545, where this court held that the remarks relied on were made in connection with the court's weighing of the evidence, that the record adequately disclosed that the motion was granted because the trial judge considered the evidence insufficient, and that it sufficiently appeared that the order was made because the evidence was considered insufficient to establish guilt beyond a reasonable doubt and not because an erroneous view of law was entertained by the judge.

[4] The record here discloses the same situation. The discussion on the motion takes up 39 pages of the transcript and was confined to the matter of corroboration. Many cases were cited and quoted from by counsel on both sides, some of which were referred to by the court. The testimony of most of the witnesses was discussed, and the court asked many questions as to what the evidence actually was and its relation to other portions of the evidence. While the word "material" should not have been included in the remark relied on by the appellant, the entire record indicates that the trial judge had in mind the correct rules of law, and clearly discloses that he considered the evidence, with respect to corroboration, to be insufficient as a matter of fact. His final remark was to the effect that while the evidence was sufficient to arouse a suspicion "that is as far as it goes", and that such a suspicion on his part was not sufficient to justify him in sending a person to prison. No abuse of discretion appears.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

---

119 Cal.App.2d 450

OPPENHEIMER v. DEUTCHMAN et al.

Civ. 19576.

District Court of Appeal, Second District,
Division 1, California.
July 30, 1953.
Hearing Denied Sept. 24, 1953.

Action for assault and battery. The Superior Court, Los Angeles County, Allen W. Ashburn and Roy L. Herndon, JJ., entered judgment for defendant, and plaintiff appealed. The District Court of Appeal held that evidence sustained finding that defendant did not commit the acts of which complaint was made.

Judgment and order affirmed.

1. Assault and Battery 🔑35

In action for assault and battery, evidence sustained finding that defendant did not commit the acts of which complaint was made.

2. Assault and Battery 🔑24(3)

In action for assault and battery, where defendant, in answer, denied allegation of assault and battery and set out separate affirmative defenses of self-defense and removal of plaintiff in defense of defendant's property and to preserve peace, defendant's testimony that he was not at scene when alleged offense took place was inconsistent with such affirmative defenses, but inconsistency did not serve to impeach defendant or to strengthen plaintiff's case, in view of fact that defense counsel may have reasonably foreseen that plaintiffs might claim that defendant's agent had done the deed although defendant was not personally present.

3. Witnesses 🔑387

In action for assault and battery, cross-examination of plaintiff as to inconsistency between allegations of his original complaint, in which he claimed that one person had assaulted him, and allegation of amended complaint in which he said that another person had committed offense, was not error, where no undue emphasis was placed on the matter and where it was doubtful whether it added anything to effect of other impeaching evidence.

4. Witnesses 🔑390

Where original complaint in assault and battery action charged that one person had assaulted plaintiff, and amended complaint alleged that a different person committed the offense, original complaint was not admissible in evidence as proof of facts stated therein, but was properly offered by defendant and considered for purpose of impeaching plaintiff's testimony as to identity of man who assaulted him, the weight to be given it being a question for jury.

5. Witnesses 🔑275(2)

In action for assault and battery, cross-examination of plaintiff concerning another suit that plaintiff had brought claiming damages for assault and false imprisonment, alleged to have occurred on date prior to occurrence of assault alleged in present action, for limited purpose of throwing light upon question of damages from assault at bar, was proper since, in event of determination favorable to plaintiff on issue of liability, jury would have been entitled to consider how much, if any, of plaintiff's disability was due to injuries received at time of prior assault.

◆

John G. Oppenheimer, in pro. per.

Edward M. Raskin, Los Angeles, for respondent.

PER CURIAM.

Plaintiff appeals from an adverse judgment pursuant to verdict in an action brought by him for alleged assault and battery. The first amended complaint sought to include two other defendants in addition to Julius Deutchman. They were excluded by order of the trial court which was affirmed on a prior appeal of this case, 104 Cal.App.2d 165, 230 P.2d 873, leaving the defendant above named as the only person against whom relief was sought at the trial.

The question for determination by the jury was whether defendant on a date and at a place specified in the amended complaint "violently assaulted, beat and scratched the plaintiff, causing plaintiff to bleed profusely from cuts in and about the mouth, lips and gums, and the said defendant called plaintiff a vile, abusive and profane name."

At the trial plaintiff was the only witness who testified concerning the alleged wrongful acts of defendant Julius Deutchman. He stated that at 2:10 p. m., on November 23, 1949, he went to the office of defendant to serve papers on him, that defendant called him an offensive name, struck him in the face and threw him out. Plaintiff left and went back to his office. His employer sent him to the office of the City Attorney and pursuant to the latter's suggestion, photographs were taken of plaintiff's face. Later that afternoon plaintiff went to the receiving hospital, arriving there at 5:24 p. m. In the meantime he had received no medical attention. At the hospital the record shows: "Diagnosis: Abrasion, right lower lip. Excoriations, right side neck. Treatment: cleanse."

The original complaint in this case was filed on December 12, 1949. Plaintiff and defendant both appeared at the office of the city attorney at 11:00 a. m. the next day, December 13, 1949. At that time plaintiff stated that defendant Julius Deutchman was not the man who had assaulted him. The office record of the city attorney discloses that plaintiff "claims defendant is not, underlined three times, the person who committed assault and battery upon him." The deputy city attorney testified, in response to a question by plaintiff, that at the city attorney's office plaintiff "immediately stated that this prospective defendant was not the right man, that he was not the man who assaulted you." Plaintiff testified at the trial that he told the deputy city attorney, at the latter's office, that defendant Julius Deutchman who was then present in the room, was not the man who had assaulted him.

Defendant, when he was called as a witness, testified that he had been ill and was not at his office at the time the alleged assault was supposed to have occurred. Hospital records confirmed his testimony as to serious illness prior to the date in question.

[1] The jury had before it unsupported testimony of plaintiff that defendant had assaulted him. No corroboration of any kind supported his declaration at the trial that defendant had committed the acts of which complaint was made. As against plaintiff's testimony at the trial was evidence, above outlined, that completely impeached and discredited plaintiff. The latter had appeared in the office of the city attorney, a public official charged with enforcement of the law. Plaintiff had instigated the hearing which had required the presence of defendant. At that time plaintiff was in a position of distinct advantage, not only fully protected but afforded an opportunity to accuse defendant of any wrongful conduct against him. Thereupon, plaintiff made the statements above set out, exculpating defendant. After hearing plaintiff's testimony and hearing the evidence

which discredited and impeached plaintiff, the jury reasonably concluded that plaintiff was not entitled to money damages from a defendant who, as far as credible evidence disclosed, had done no wrong to plaintiff.

[2] Defendant in his answer, in addition to denying plaintiff's allegation of an assault and battery, set out separate affirmative defenses of self defense and removal of plaintiff in defense of defendant's property and to preserve the peace. At the time of the trial there was only the one defendant, Julius Deutchman and, as pointed out by plaintiff, defendant's testimony that he was not at the scene when the alleged offense took place would be inconsistent with a pleading that he was defending himself or preserving the peace. It seems not unreasonable that defendant's counsel foresaw that plaintiff might claim that some agent of defendant Julius Deutchman had done the deed although the named defendant was not personally present. This theory of defense finds some justification in plaintiff's own pleadings. In the original complaint it is alleged that another person —one *Victor* Deutchman—and *not Julius* Deutchman—was the one who made the assault, and that Victor and another defendant Jack Morgan "were partners, agents, servants or employees of the defendant Julius Deutchman * * * and were acting in the scope of their employment and under the authority" of Julius Deutchman and that their acts were ratified by the latter. It was not until he filed his first amended complaint that plaintiff charged Julius Deutchman with having committed the assault. Plaintiff's allegations as to the other two defendants Victor Deutchman and Jack Morgan in his amended complaint were legally so unsubstantial that the case as to them was ended by the order which was affirmed on appeal, as above indicated. This inconsistency in the special defenses did not serve to impeach defendant or to strengthen plaintiff's case.

Plaintiff cites the case of Niegel v. Georgetown Divide Water Co., 78 Cal.App. 2d 445, 177 P.2d 641, as supporting his objection to inconsistent defenses. The court in that case, in which a hearing was denied by the Supreme Court, stated: 78 Cal.App. 2d at page 446, 177 P.2d at page 642, "Our code system of pleading permits inconsistent defenses. Code Civ.Proc., sec. 441. This long has been the established rule in this state. Under it a defendant may set forth as many defenses as he may have. The fact that such defenses are inconsistent is immaterial."

Similarly, Jones v. Tierney-Sinclair, 71 Cal.App.2d 366, at page 373, 162 P.2d 669, at page 673, states: "It is well settled in California that a defendant may plead as many inconsistent defenses in an answer as she may desire and that such defenses may not be considered as admissions against interest in the action in which the answer was filed. (Citing cases.)"

[3] Plaintiff further complains because he was cross-examined on the inconsistency above noted, between the allegations of his original complaint in which he claimed that Victor Deutchman had assaulted him and the allegation of his amended complaint in which he said that it was Julius Deutchman who had committed the offense. No undue emphasis was placed on this matter and it is doubtful whether it added anything to the effect of the impeachment already discussed.

[4] The original complaint was not admissible in evidence as proof of facts stated therein. It was properly offered by defendant and considered for the purpose of impeaching plaintiff's testimony as to the identity of the man who assaulted him, the weight to be given it being a question for the jury. Gajanich v. Gregory, 116 Cal. App. 622, 629, 3 P.2d 389; Schuh v. R. H. Herron Co., 177 Cal. 13, 169 P. 682; Williams v. Seiglitz, 186 Cal. 767, 774, 200 P. 635.

[5] As stated by the trial court, "for the limited purpose of throwing light upon the question of damages from the alleged assault at bar" defense counsel was permitted to question plaintiff concerning another suit that the latter had brought against the chief of police and others, as defendants, claiming damages for assault and false im-

prisonment. This earlier assault was alleged to have occurred on a date prior to that on which the events of the case now before us were supposed to have occurred. For the injuries received by plaintiff at that time, including alleged choking by a police officer, damages were sought in the sum of $19,000. In the event, in the instant case, of a determination favorable to plaintiff on the issue of liability, the jury would have been entitled to consider how much, if any, of plaintiff's disability or suffering was due to injuries received at the time of a prior assault and for that reason would not be compensable in an action against this defendant. Certainly no inference adverse to plaintiff would follow disclosure that he had sought by legal means to obtain compensation for wrong which he claimed had been done to him by persons other than defendant, if the jury thought that he had done so in good faith.

The instructions to the jury were correct and comprehensive statements of the law applicable to the facts of the case.

We have examined the entire transcript of the proceedings because plaintiff has appeared in propria persona and his argument, both written and oral, in large part is confused and disconnected. The trial judge exercised courtesy toward the parties and was careful to limit the matters heard by the jury to those which were legally permissible and were not prejudicial. The case was a difficult one to try but no error occurred which can be said to have adversely affected plaintiff.

Plaintiff's notice of appeal states that he also appeals:

"2. From the order denying plaintiff's motion for new trial, made August 20, 1952, and entered August 22, 1952 in the Minutes of the above entitled Court.

"3. From the order denying motions to vacate and set aside the judgment and/or order denying a new trial, made September 22, 1952, under the provisions of Section 473 of the Code of Civil Procedure, and any unfavorable ruling on the motion to amend or correct the Minute Order of August 22, 1952, to make it conform to the truth, nunc pro tunc." These attempted appeals are dismissed.

Plaintiff in said notice of appeal concluded by stating that he appeals:

"4. From the order refusing to tax costs made August 13, 1952, and the order taxing said costs in the sum of $17.30, made August 22 and entered August 26, 1952." No legally sufficient reason has been given by plaintiff in his brief, oral argument or elsewhere for his claim that the order taxing costs was in any way improper. The motion to tax costs was made within the statutory time, and the items of costs allowed totaling $17.30 were reasonable and proper.

Judgment and order are affirmed.

---

119 Cal.App.2d 265

ZAINUDIN et ux. v. MEIZEL et al.

Civ. 15312.

District Court of Appeal, First District, Division 2, California.

July 21, 1953.

Rehearing Denied Aug. 20, 1953.

Hearing Denied Sept. 17, 1953.

Action for fraudulent representations leading to plaintiffs' purchase from defendants of a leasehold in a hotel. The Superior Court, in and for City and County of San Francisco, Franklin A. Griffin, J., entered judgment on verdict for plaintiffs, and defendants appealed. The District Court of Appeal, Nourse, P. J., held, inter alia, that plaintiffs' failure to plead their claim as a counterclaim in defendants' suit for cancellation of the leasehold agreement and to quiet title in hotel furniture did not preclude their maintaining the instant action, in view of fact that the claim for fraud could not have offset in any degree defendants' suit.

Affirmed.

1. Appeal and Error 🔑1078(1)

In absence of argument to support point made on appeal, it would be assumed that the point had been abandoned.

2. Set-Off and Counterclaim 🔑60

Within statute providing that if defendant omits to set up a "counterclaim" upon cause arising out of transaction set forth in complaint as foundation of plaintiff's claim, neither he nor his assignee can afterwards maintain action against plaintiff therefor, the quoted word means in effect a plea that will defeat plaintiff's claim in whole or in part. Code Civ.Proc. § 439.

See publication Words and Phrases, for other judicial constructions and definitions of "Counterclaim".

3. Statutes 🔑181(1), 184

In interpretation of statutes, the court should seek the purpose and intent of the legislature.

4. Set-Off and Counterclaim 🔑60

In enacting statute providing that if defendant omitted to set up counterclaim upon a cause arising out of transaction set forth in complaint as foundation of plaintiff's claim, neither he nor his assignee can afterwards maintain action against plaintiff therefor, legislature intended to require parties to consolidate their controversies on all claims arising out of the same transaction and thus avoid delay and multiplicity of suits, and only where second claim is claim for money which might affect or defeat plaintiff's claim for money is the term "counterclaim" applied. Code Civ.Proc. § 439.

5. Quieting Title 🔑39
Set-Off and Counterclaim 🔑60

Lessors' suit for cancellation of lease and to quiet title to personalty located in leased hotel could not have been offset in any degree by lessees' suit for damages for fraudulent representations leading to their purchase of the leasehold, and for that reason lessees' claim would not have been a proper "counterclaim" in lessors' suit and, therefore, fact that lessees had not pleaded their claim as a counterclaim to lessors' suit did not preclude lessees from maintaining their fraud action. Code Civ.Proc. § 439.

6. Evidence 🔑11

The arrival in San Francisco in 1947 of refugees from foreign parts was a matter of common knowledge.

7. Fraud 🔑57

In action for damages for fraudulent representations leading to plaintiffs' purchase from defendants of a leasehold in a hotel, it was proper for plaintiffs to show in support of their claim for punitive damages that the transactions of defendants were not only fraudulent in themselves but that they were deliberate, intentional, and vicious, by showing that defendants were engaged in meeting foreign refugees and "herding" them into the hotel for the purpose of building up occupancy to facilitate sale, and that that was defendants' general practice.

8. Appeal and Error 🔑882(7)

Where a party has prevented proof of a fact by his erroneous objection, and an erroneous ruling of the trial court, he will not be permitted to take advantage of his own wrong in the reviewing court, but the reviewing court will assume that the fact was duly proved.

9. Fraud 🔑62

In action for fraudulent representations leading to plaintiffs' purchase from defendants of a leasehold in a hotel, evidence that plaintiffs made an overall outlay of $29,000 and that the value of the leasehold was from $1,000 to $10,000 supported jury's award of $24,000 as actual damages.

10. Appeal and Error 🔑1001(3)

Where question raised on appeal was sufficiency of evidence to support verdict, appellants were required to demonstrate that there was no competent evidence to support the verdict, and their mere recital of evidence favorable to them was not sufficient.

11. Appeal and Error 🔑743(1)

Appellants' argument, without any reference to record, that portion of verdict awarding punitive damages for fraud was result of passion and prejudice was merely conclusion of counsel and would be disregarded.

12. Fraud 🔑28

Where plaintiffs were induced by fraudulent misrepresentations to pay an exorbitant price for leasehold interest in dilapidated and practically unoccupied old hotel, they were entitled to damages for the fraud.

Herman Daniel Gill and John F. O'Sullivan, San Francisco, for appellants.

Joseph F. Mannion, San Francisco, for respondents.

NOURSE, Presiding Justice.

Plaintiffs sued for damages for fraudulent representations leading to their purchase from certain named defendants of a leasehold in a hotel. At the trial plaintiffs dismissed as to three of the named defendants and a nonsuit was granted as to one other. On a trial to a jury a verdict was returned against the four remaining defendants for $24,000 compensatory damages and $5,000 punitive damages. Two of these defendants, Meizel and Cook, appealed. Pending the appeal the defendant Meizel deceased and his administratrix was duly substituted and the same counsel appears for her.

A brief outline of the proceedings shows that prior to the trial of this action two of the defendants brought suit against the plaintiffs herein for cancellation of the agreement of sale which is the subject of this action, and to quiet title to the hotel furniture. The plaintiffs herein did not set up their cause of action as a defense to that suit and judgment was taken against them by default. In the present action the defendants herein set up those circumstances in a special plea contending that the present claim of these plaintiffs is barred since it was not pleaded as a counterclaim to the suit for cancellation of the agreement, and that the whole matter is res adjudicata. A demurrer to this special plea was sustained and the present action went to trial without that special defense. The correctness of this ruling presents the only debatable issue on this appeal.

[1] On the question of res adjudicata appellants cite English v. English, 9 Cal.2d 358, 70 P.2d 625, 128 A.L.R. 467; Thompson v. Modern School, Etc., 183 Cal. 112, 190 P. 451; and Sutphin v. Speik, 15 Cal.2d 195, 99 P.2d 652, 101 P.2d 497, all of which are contrary to the point raised. Appellants then argue that these cases are unsound because they did not consider the effect of section 439, Code Civ.Proc. No further argument is made on the point and we may assume that it has been abandoned as it is wholly without merit.

The question of the application of section 439, Code Civ.Proc., presents the only difficulty. The section reads:

"If the defendant omits to set up a counterclaim upon a cause arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, neither he nor his assignee can afterwards maintain an action against the plaintiff therefor." The purpose of the section is clearly explained in Ward v. Goetting, 44 Cal.App. 435, 438, 186 P. 640, 642, where the court said: "'A counterclaim, when established, must in some way qualify or defeat the judgment tc which a plaintiff is otherwise entitled.' 'It must be something that resists or modifies the plaintiff's claim.' Leavenworth v. Packer, 52 Barb. (N.Y.) 132. And in Mattoon v. Baker, 24 How.Pr. (N.Y.) 329, the court, in discussing the subject, says: 'A counterclaim, to be available to a party, must afford to him protection in some way against the plaintiff's demand for judgment, either in whole or in part. It must, therefore, consist in a set-off or claim by way of recoupment, or be in some way connected with the subject of the action stated in the complaint. It must present an answer to plaintiff's demand for relief. * * * It must, therefore, contain not only the substance of what is necessary to sustain an action in favor of defendant against the plaintiff, but it must also operate in some way to defeat, in whole or in part, the plaintiff's right to recover in the action. An answer which does not meet this requirement is insufficient, whether regarded as a defense or counterclaim.'"

[2] Another element in which the authorities are in accord is that the counterclaim must tend "to diminish or defeat" the claim for damages alleged in the complaint. See Case v. Kadota Fig Ass'n, 35 Cal.2d 596, 604, 220 P.2d 912. None of these elements are present here. The plaintiffs commenced this action against eight defendants

to recover damages for fraud. Before the action was tried two only of the defendants commenced an action in equity to quiet title to personal property which had been part of the fraudulent sale. The suit for damages did not and could not qualify or defeat the plea to quiet title to the personalty since the contract of sale had been abandoned. That suit did not seek a money judgment for damages, or on any other basis. The claim for damages for fraud could not afford the respondents herein any protection against the suit to quiet title to the personal property. Assuming, as that is the only way in which the appellants can find a shadow of an argument, that the word "maintain" found in the code section does not include a counterclaim pleaded in an action already on file, we are nevertheless impelled to hold that a "counterclaim" means in effect a plea that will defeat plaintiff's claim in whole or in part. We may also suggest that if appellants' point is good here the rule they advocate would have defeated their suit to quiet title which was brought long after this action for fraud. The word "maintain" as used in the section has not been definitely defined. It has been used to signify "to begin", to "carry on", to "commence and prosecute to a conclusion". County of Los Angeles v. Craig, 52 Cal.App.2d 450, 452, 126 P.2d 448, 449.

[3, 4] But we do not deem it necessary at this time to seek a precise definition of the word "maintain" as used in the code section. Following the accepted rule of statutory construction that the court should seek the purpose and intent of the legislature, it requires no imagination to see that here the legislature intended to require the parties to consolidate their controversies on all claims "arising out of the [same] transaction" and thus avoid delay and a multiplicity of suits. The distinction between a counterclaim, section 439, and a cross-complaint, section 442, is well known. It is only when the second claim is a claim for money which may affect or defeat the plaintiff's claim for money that the term "counterclaim" is applied.

[5] Here the appellants' suit to quiet title to personalty could not have been "offset" in any degree by respondents' suit for damages for fraud. For that reason it would not have been a proper counterclaim in the suit to quiet title.

Appellants do not question the sufficiency of the evidence to support the finding that the sale was the result of fraudulent representations. The hotel was located on lower market street in the poor section of San Francisco. It was in a badly run down condition without sufficient baths, toilets or room furniture. Respondents were shown one or two rooms which were fairly furnished and were told that all the other 143 rooms were similarly furnished. They were told that it was amply supplied with adequate bathroom and toilet facilities. It contained five bathrooms and twelve toilets. They were told that it was filled to capacity with permanent guests. It was occupied entirely with refugees brought in from Shanghai, China, who were all transients. A few days after the sale defendants moved these guests to another hotel, leaving the respondents with empty rooms.

We anticipate that criticism will be made of the foregoing statement as to the character of the guests in the hotel. Counsel for appellants have carefully avoided a statement of the evidence upon which the jury's verdict rests—on the theory, we assume, that the evidence shows such a gross and unconscionable fraud on the part of appellants that it would be better to evade the true story of the case and rely on technical objections to the procedure. Respondents state as fact that: "In the autumn of 1947, large numbers of 'refugees' were arriving at the Port of San Francisco from Shanghai, China, while en route to predetermined destinations throughout the United States. While en route, their movements were controlled by a central agency which arranged for their stay at the Sunset Hotel as well as for payment for accommodations furnished. The combination of circumstances just referred to enabled appellants to literally 'herd' the 'refugees' into the Sunset Hotel and thereby to obtain an income from said hotel for a few months in the autumn of 1947 which was out of all proportion to what the hotel would normally produce."

[6, 7] In their reply brief the appellants contend that these facts were not in evidence. Parts of the statement were matters of common knowledge; parts were in evidence; parts were suppressed by objections of appellants. It would serve no useful purpose to break down the statement. The arrival in San Francisco of refugees from foreign parts was a matter of common knowledge. Whether these refugees were Jewish people from Germany, as respondents contend, middle Europeans, or Orientals has no bearing on the case. The facts which respondents sought to prove were that appellants were engaged in meeting these refugees and "herding" them into a hotel for the purpose of building up the occupancy to facilitate a sale, and that was their general practice. When the court sustained appellants' objections to such questions it committed error, because it was proper for respondents to show, in support of their claim for punitive damages, that the transactions of the appellants were not only fraudulent in themselves, but that they were deliberate, intentional, and vicious.

[8] Respondents have cited cases from other jurisdictions holding that when a party has prevented proof of a fact by his erroneous objection and an erroneous ruling of the trial court, he will not be permitted to take advantage of his own wrong in the reviewing court but the latter court will assume that the fact was duly proved. See Boatmen's Bank of St. Louis, Mo., v. Fritzlen, 8 Cir., 221 F. 145, 149. In the absence of authority in our own jurisdiction we are prone to adopt this rule which at first glance appears somewhat drastic.

But the whole controversy is unimportant and without any real bearing on the issues involved. If there was no proof of these outside activities of the defendants (and it must be borne in mind that there were other defendants who are not appealing) then there was no evidence of any character which would support appellants' plea that the verdict for punitive damages was the result of passion and prejudice. That part of the verdict rests upon the sound ground that the defendants—all of whom were experienced real estate operators—took an unfair and unconscionable advantage of two uneducated and inexperienced clients.

[9, 10] Expert witnesses were called by both sides to testify to the value of the leasehold. Their estimates ranged from $1,000 to $10,000. Proof was made that respondents made a down payment of $15,000 and additional installment payments, making an overall outlay of $29,000. The jury's award of $24,000 as actual damages was fully supported by the evidence. However the point is not properly presented. Since the question raised is the sufficiency of the evidence to support the verdict the appellants must practically demonstrate that there is no competent evidence to support the verdict. Their mere recital of evidence favorable to them is not sufficient. Nichols v. Mitchell, 32 Cal.2d 598, 600, 197 P.2d 550.

[11] Appellants' argument, without any reference to the record, that the portion of the verdict awarding punitive damages was the result of passion and prejudice is merely the conclusion of counsel and does not require treatment.

[12] The same may be said as to their statement that their motion for a nonsuit should have been granted. The respondents had proved that they were induced by fraudulent misrepresentations to pay an exorbitant price for the leasehold interest in a dilapidated and practically unoccupied old hotel. On such showing they were entitled to damages for the fraud and the amount of the award was clearly within the judgment of the jury.

Judgment affirmed.

DOOLING, J., concurs.

118 Cal.App.2d 815

PACIFIC BAL INDUSTRIES v. NORTHERN TIMBER, Inc., et al.

No. 15433.

District Court of Appeal, First District, Division 1, California.

July 1, 1953.

Action in contract for purchase price or value of lumber sold. On motion of the corporate defendants and two individual defendants for change of venue, the Superior Court, in and for the County of Marin, entered order denying motions, and the defendants appealed. The District Court of Appeal, Fred B. Wood, J., held that when plaintiff in single action joined individual and corporate defendants, and no question of separations of parties was presented, and individual defendants were entitled to change of venue to the county of their residence, such change of venue carried with it the causes pleaded against the corporate defendants.

Order denying change of venue reversed, with instructions.

1. Corporations 🔑503(3)

In action in contract for purchase price or value of lumber sold to defendants, wherein a defendant corporation moved for a change of venue, evidence was such as to warrant an implied finding that corporate defendant had agreed to perform its contract for purchase in county in which venue was laid, by an agreement to make payment therein for lumber delivered to it. Const. art. 12, § 16.

2. Venue 🔑41

Fact that a corporate defendant, which was one of several defendants, could not procure change of venue in action on contract because of its promise to perform its obligation in county of suit, did not preclude the individual defendants from exercising such right as they might otherwise have had to obtain change of venue to county of their residence. Code Civ.Proc. § 395; Const. art. 12, § 16.

3. Venue 🔑68

A plaintiff who seeks to sue an individual non-corporate defendant in county other than that of his residence has burden of clearly bringing himself within a statutory exception to the right of the defendant to be tried in county of his residence. Code Civ.Proc. § 395.

4. Venue 🔑66

Where plaintiff brought action in contract against corporate defendant, and complaint was thereafter amended to name two individual defendants and two additional corporate defendants, when all of the additional defendants were non-residents or had their place of business outside county in which suit was brought, affidavit which merely would have supported implied finding that original defendant was not entitled to change of venue because it had agreed to perform its contract in county in which suit was brought did not, as to the individual non-resident defendants, show that plaintiff was within statutory exception which would entitle it to maintain suit in county other than that of residence of the individual defendants. Code Civ.Proc. § 395.

5. Appeal and Error 🔑186

Where defendant alleged in suit against individual non-resident defendants and corporate defendants having their principal place of business in county other than that in which suit was brought, that defendants became, were and are indebted to plaintiff in county in which suit was brought, objection that such allegations were but conclusions, and not statements of fact, could not be raised for the first time on appeal from denial of motions for change of venue. Code Civ.Proc. § 395.

6. Appeal and Error 🔑907(3)

Where appellate court was furnished only a clerk's transcript on appeal from denial of motions for change of venue, presumption was that evidence supported the order denying motions, and appellate court could not consider any claim that upon hearing of motions defendants had interposed objections to the consideration, as evidence, of any allegations of the complaint.

7. Pleading 🔑45

Allegation in amended complaint in action in contract for purchase price or value of lumber sold, that defendants agreed to pay in county in which suit was brought was not a statement, as to the individual defendants, that they so agreed in writing, and could not be relied upon as basis of statutory exception to right of such defendants to be sued in county of their residence. Code Civ.Proc. § 395.

8. Venue ⇨72

When an individual, non-corporate defendant establishes his right to a change of venue to county of his residence as to one count of a complaint, his motion should be granted irrespective of what showing he makes concerning other counts of the complaint. Code Civ.Proc. § 395.

9. Corporations ⇨503(2)

The venue of an action of a corporation is governed by constitutional provision declaring in part that corporation may be sued in county where contract is made or is to be performed, or in county where principal place of business of such corporation is situated, subject to power of court to change place of trial as in other cases, and the right of removal, if any, is to be found within clause referring to power of court to change place of trial as in other cases. Code Civ.Proc. § 395; Const. art. 12, § 16.

10. Corporations ⇨503(3)

Burden is upon corporate defendant which seeks a change of venue, and not upon plaintiff, to show that action has not been brought in county authorized by constitutional provision relative to venue in actions against corporations since such constitutional provision is permissive, and does not prevent a plaintiff from suing in any county in state and venue as laid in title of action is sufficient to make out prima facie case for trial in county in which action is brought. Code Civ.Proc. § 395; Const. art. 12, § 16.

11. Corporations ⇨503(2)

Venue of action against corporate defendants on account for agreed price for lumber sold to them by plaintiff, allegedly under agreement by which defendants were to pay for lumber at plaintiff's place of business in county in which suit was brought, was properly laid in county in which payment was to be made, notwithstanding showing by corporate defendants that their principal places of business were in county to which they sought transfer. Code Civ.Proc. § 395; Const. art. 12, § 16.

12. Corporations ⇨503(3)

Statements in counts of complaint against corporate defendants for purchase price of lumber, that the defendants became, were and are indebted to the plaintiff in county in which venue was laid, were competent evidence sufficient to support an implied finding that obligation of defendant corporation's arose in such county, and that they were properly sued therein. Code Civ.Proc. § 395; Const. art. 12, § 16.

13. Contracts ⇨208

Where suit is brought upon the contract of a corporation, and no place of performance is expressly stipulated, contract is to be held performable in place where the circumstances, viewed in the light of pertinent code provisions, indicate that the parties expected or intended it to be performed.

14. Corporations ⇨503(3)

Statement in affidavit of plaintiff in opposition to motions of corporate defendants for change of venue in action in contract for purchase for value of lumber sold, that place of business of plaintiff was in county in which suit was brought, served as basis for implied finding that place of performance of contract of each corporate defendant was in that county, when contract did not specify place for making payment, since it is ordinarily the duty of the debtor to seek the creditor for the purpose of making payment in absence of stipulation to the contrary. Civ.Code, §§ 1488, 1489; Code Civ.Proc. § 395; Const. art. 12, § 16.

15. Corporations ⇨503(3)

Where corporate defendants were joined with individual defendants, and corporate defendants were not entitled in their own right to a change of venue, they could not avail themselves of the rights of the individual defendants in that regard. Code Civ.Proc. § 395; Const. art. 12, § 16.

16. Parties ⚷29
Venue ⚷41

Where a plaintiff's rights of action are joint against corporations and individuals, if plaintiff chooses to pursue the individuals, he is bound to join them as defendants, but such necessity does not deprive the individual defendants of their right of removal to county of their residence. Code Civ.Proc. § 395; Const. art. 12, § 16.

17. Corporations ⚷503(4)

Where plaintiff brought action in contract against three corporate defendants and two individual defendants in form of a single and entire action, when the individual defendants procured a change of venue to the county of their residence, causes pleaded against each of the corporate defendants were carried along since plaintiff thereby waived benefit of the constitutional provision relating to venue as to corporate defendants. Const. art. 12, § 16; Code Civ. Proc. § 395.

◆

Maurice J. Hindin, Los Angeles, for appellants.

Wallace S. Myers, San Anselmo, for respondent.

FRED B. WOOD, Justice.

This is an action in contract brought in Marin County for the purchase price or the value of lumber sold.

In the complaint first filed plaintiff named but one defendant, Northern Timber, Inc., a corporation, which moved for a change of venue. Its motion was denied and it did not appeal.

Plaintiff then amended its complaint, bringing in four additional defendants: two individuals, R. J. Holmes and U. C. Graffeo, and two corporations, W. B. Jones Lumber Company and El Segundo Trucking Co.

Each of the five defendants moved for change of venue. Their motions were denied. All of the defendants except Northern Timber have appealed. Because of its bearing upon this appeal, it is desirable to consider the motion made by Northern Timber when it was the sole defendant.

The motion first made by Northern Timber was for transfer of the cause to Los Angeles County upon the ground that its sole residence and office is in Los Angeles County; that it has never maintained any office in Marin County, nor did it have any servants, agents, officers, or employees engaged in any business in Marin County; that if any obligation was incurred by it in favor of plaintiff such obligation was consummated and negotiated in Los Angeles County; and the performance of any such obligation was to occur in Los Angeles County.

[1] Plaintiff, in its affidavit filed in opposition to the motion, stated that it delivered a certain quantity of lumber to defendant Northern Timber, Inc., at Redding, Shasta County, and forwarded its invoice to defendant; that through defendant's error the invoice was paid to E. W. Whitney, a lumber broker operating in Northern California, and plaintiff was required to get that payment from Whitney; that on August 18, 22, and 28, 1950, plaintiff delivered additional quantities of lumber to defendant, in Shasta County, each time forwarding its invoice to defendant; that the invoices were payable to plaintiff at San Anselmo, Marin County. A copy of the invoice of August 28, 1950, annexed to the affidavit, indicates as the buyer: "Northern Timber, Inc., 117 North Robertson Blvd., Los Angeles, Calif." The affidavit sets forth a letter of August 29th to Northern Timber, Inc., in which plaintiff said: "Any and all invoices in the future should be paid through this office." In response, August 31, 1950, Northern Timber, Inc. wrote plaintiff: "We will follow the instructions in your letter and pay all future invoices to you through the San Anselmo office." This evidence would support an implied finding that the defendant had agreed to perform its contract in Marin County, hence that Marin is a county in which section 16 of Article XII of the state Constitution permits that defendant to be sued.

After the filing and service of the amended complaint,[1] which joined the additional four defendants, *each of the defendants moved for transfer of the cause to Los Angeles County,* the residence or the principal place of business and residence of the moving party. Their motions were denied. The appeals of the four new defendants are now before us.

Upon such a motion the basic test is furnished by § 395 of the Code of Civil Procedure: "(1) In all other cases, except as in this section otherwise provided, * * * the county in which the defendants, or some of them, reside at the commencement of the action, is the proper county for the trial of the action. * * * When a defendant has contracted to perform an obligation in a particular county, either the county where such obligation is to be performed, or in which the contract in fact was entered into, or the county in which the defendant, or any such defendant, resides at the commencement of the action, shall be a proper county for the trial of an action founded on such obligation, and the county in which such obligation is incurred shall be deemed to be the county in which it is to be performed unless there is a special contract in writing to the contrary."

In respect to the defendant corporations, we have additionally to consider section 16 of Article XII of the state Constitution: "A corporation * * * may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases."

From the affidavits presented in support of the motions it appears that each of the individual defendants resides in Los Angeles and never resided in Marin County; and that each of the three corporations has its principal place of business in Los Angeles and never had an office or engaged in business in Marin County.

Plaintiff presented no affidavit in opposition to these motions except, it would appear, the affidavit he filed in opposition to the motion first made by Northern Timber, Inc. That affidavit would, as before, support an implied finding that Northern Timber, Inc., agreed to perform its alleged contract in Marin County and, therefore, was properly sued in that county, as authorized by section 16 of Article XII of the Constitution.

[2] That, plaintiff claims, is an all-sufficient reason for affirmance of the order appealed from, saying "it must be conceded in this case that as between the plaintiff and Northern Timber, Inc., Marin County is the proper place for the trial of this action. That being true, the other defendants have no right to have the case tried in Los Angeles simply because their residences happen to be there * * *." Plaintiff invokes Monogram Co. of California v. Kingsley, 38 Cal.2d 28, 237 P.2d 265 as so holding. That case does hold that non-resident defendants cannot have a cause transferred when there is a resident individual, noncorporate defendant in the action, because § 395 of the code says that the county in which the defendants "or some of them" reside is the "proper county" for the trial of the action. This is not a holding that, when none of the defendants is a local resident and one of the defendants, a corporation, can not transfer because it promised to perform its obligation in the county of suit, none of the others may exercise the right he might otherwise have to move to the county of his residence. The court in the Monogram case carefully limited its holding to the factual situation there presented, a case in which one of the individual defendants was a local resident. See, the discussion of that type of case, 38 Cal.2d at pages 29 and 30, 237 P.2d at page 266 and the "distinguishable consideration" of cases involving the joinder of local and transitory

---

[1] The amended complaint contains the same four counts that were pleaded in the original complaint and a fifth count for an additional load of lumber sold and delivered.

causes of action or the contract exceptions to the general venue provision where *none* of the defendants resides in the county of suit, at page 31 of 38 Cal.2d, at page 267 of 237 P.2d. Plaintiff's point is not well taken.

[3] As to individual non-corporate defendants, the court in the Monogram case said: "In such situation, reference is made to the 'important right * * * of the defendant to have the cause tried in the county of his residence' and to the burden of the plaintiff in claiming 'the exceptional right of having the cause tried in some other county,' to 'clearly bring himself within a statutory exception.' Goossen v. Clifton, supra, 75 Cal.App.2d 44, 49, 170 P.2d 104, 108; see, also, Bardwell v. Turner, supra, 219 Cal. 228, 230, 25 P.2d 978; Turlock Theatre Co. v. Laws, supra, 12 Cal.2d 573, 576–577, 86 P.2d 345 [120 A.L.R. 786]." At page 31 of 38 Cal.2d, at page 267 of 237 P.2d.

[4] Has plaintiff in our case sustained this burden?

Its affidavit does not aid it. We find nothing in that affidavit which tends to show that any of the defendants later joined comes within any of the exceptions to the general venue provisions. Indeed, the affidavit speaks only of Northern Timber, Inc., as if it were the sole contracting party.

Certain statements in the amended complaint do affect the defendants now appealing.[2] In the first count (for recovery of $1,307.43 as the agreed price for lumber sold by plaintiff to the defendants) plaintiff says they "agreed to pay for said lumber at plaintiff's place of business in San Anselmo, California."

The second, third, and fourth counts plead the same claim as does the first count, in different forms; i. e., as an open book account, an account stated, and debt for lumber furnished at defendant's special instance and request. The fifth count is for $1,367.73 in respect to a separate shipment of lumber allegedly furnished at defendant's special instance and request. In each of these counts (2 to 5, inclusive), the statement appears that "in the County of Marin" the defendants "became, were and are indebted" to plaintiff in the amount stated.

Appellants do not challenge the sufficiency of the statement in the first count that defendants agreed to pay in Marin County.

[5] They do question the sufficiency (as evidence) of the statements in the other counts, that defendants "became, were and are indebted" in Marin County. They say these are but conclusions, not statements of fact. It is too late to make that objection now. If appellants had interposed timely objections to those portions of the complaint, at the hearing of their motions by the trial court, the trial court doubtless would have sustained them. Plaintiff would then have been in a position, were it so advised, to request leave of court to prepare and present a supplemental affidavit stating the relevant probative facts as plaintiff believed them to be.

It is too late now for appellants to make this type of objection. In Falk v. Falk, 48 Cal.App.2d 780, 120 P.2d 724, the appellant contended that plaintiff's affidavit was incompetent evidence for the reason that it contained averments which were hearsay and amounted to mere conclusions. In overruling that contention the court said: "Even conceding that many of the averments of the affidavit are conclusions or hearsay, they became competent evidence for the reason that they were admitted without objection. Sec. 2009, Code Civ.Proc.; Mercantile Trust Co. v. Sunset, etc., Co., 176 Cal. 461, 168 P. 1037; Soares v. Ghisletta, 1 Cal.App.2d 402, 36 P.2d 668."

---

[2] Appellants do not question that the amended complaint, with its allegations, was properly in evidence before the trial court; e.g., in their opening brief, at page 4, appellants say that the "only evidence before the trial court in connection with the motions of the individual defendants * * * was the allegations of the first amended complaint * * * and the affidavits of Graffeo and of Holmes," and in their closing brief, at page 4, "The Record Before the Court * * * Consisted Only of the Plaintiff's Amended Complaint and the Affidavits of the Moving Defendants."

48 Cal.App.2d at page 789, 120 P.2d at page 729. In People v. Odom, 72 Cal.App.2d 72, 164 P.2d 68, the appellant claimed that the trial court committed error in permitting a certain witness to give his opinion (apparently, for neglecting to qualify the witness) but the reviewing court refused to consider this point "for the reason that the law is established in California that an objection to the introduction of evidence may not be made for the first time on appeal. [Citations.]" 72 Cal.App.2d at page 74, 164 P.2d at page 69. This rule is of general application. See, as to hearsay testimony, In re Estate of Sproston, 4 Cal.2d 717, 723, 52 P.2d 924, and Powers v. Board of Public Works, 216 Cal. 546, 552, 15 P.2d 156; secondary evidence, Hickey v. Coschina, 133 Cal. 81, 84, 65 P. 313; asserted lack of foundation for documentary evidence, Supreme Grand Lodge, etc., v. Smith, 7 Cal.2d 510, 513–514, 61 P.2d 449, and Hurd v. Walker, 9 Cal.App.2d 525, 527–528, 50 P.2d 1074; book entries not made contemporaneously with transactions recorded, Palpar, Inc., v. Thayer, 83 Cal.App.2d 809, 811, 189 P.2d 752, and Argue v. Monte Regio Corp., 115 Cal.App. 575, 579, 2 P 2d 54; oral statements of party or counsel not sworn, In re Estate of Wilson, 116 Cal.App.2d 523, 253 P.2d 1011. See also, cases collected in 3 Cal.Jur.2d 634, Appeal and Error, § 156, and in 10 Cal.Jur. 822, Evidence, § 111.

[6] Appellants do not claim that upon the hearing of their motions they interposed any objection of any kind to the consideration, as evidence, of the allegations now under discussion, nor of any other allegations of the complaint. Even were appellants now making such a claim we could not consider it because they have furnished only a clerk's transcript, not a reporter's transcript. See Douglas v. Westfall, 113 Cal.App.2d 107, 111, 248 P.2d 68; Utz v. Aureguy, 109 Cal.App.2d 803, 806–807, 241 P.2d 639.

Moreover, the affidavits presented by Holmes, Graffeo, and W. B. Jones Lumber Co. contain no statement concerning the county in which the contract, if any, was executed, nor where the obligation arose, was incurred, or was to be performed. The affidavit presented by El Segundo Trucking Co. is similarly lacking on this subject, even though in that affidavit the statement appears that El Segundo at no time purchased or secured merchandise or property from the plaintiff. That statement pertains to an issue which may develop if and when El Segundo answers the complaint. If we may view it as furnishing a basis for an inference that no debt was incurred or to be performed in Marin County (because no purchase was made by El Segundo) it merely creates a conflict in the evidence, a conflict which the trial court resolved in favor of the plaintiff.

The affidavit which Northern Timber, Inc. filed in support of its last motion [3] has no significant bearing upon the issues now before us. The affiant states that Northern Timber, Inc., dealt only with one E. W. Whitney; has at no time dealt with plaintiff; has not ordered or purchased or agreed to purchase any lumber from plaintiff; that the sole transaction relating to or affecting the lumber sued on herein was had in Los Angeles County solely between said defendant and E. W. Whitney; "that if any implied agreement or alleged obligation whatsoever exists between this defendant and the plaintiff, the existence of which implied agreement or obligation is expressly denied by this defendant, the said agreement or obligation was wholly consummated and negotiated within the County of Los Angeles, and not elsewhere; and that performance thereof, if any existed, was to be done solely within the County of Los Angeles, and not elsewhere." The quoted statement conflicts with plaintiff's affidavit, which is buttressed by said defendant's own letter, showing that Northern Timber, Inc., agreed in writing to pay in Marin County. That conflict the trial court resolved in favor of the plaintiff.

[7] *As to the individual defendants,* the statement in the first count of the amended complaint that the defendants agreed to pay

---

[3] It is substantially the same as the affidavit filed in support of the motion first made by Northern Timber, Inc.

in Marin County is not a statement that they so agreed "in writing." Also, the first count is silent as to the county in which the contract was made or the obligation incurred. In Armstrong v. Smith, 49 Cal. App.2d 528, 122 P.2d 115, it was held, in effect, that in such a case the plaintiff has failed to bring himself within any of the exceptions mentioned in § 395 of the code. In considering the effect of the limitation expressed in § 395 that the "county in which such obligation is incurred shall be deemed to be the county in which it is to be performed unless there is a special contract in writing to the contrary", the court in the Armstrong case said: "What the legislature has in substance said is that all actions arising on contract shall be tried in the county in which the defendant resides, or in which the contract was made, unless the defendant has contracted specially and in writing as to the county in which his obligation is to be performed, in which event such county is also a proper county for the trial of the action." 49 Cal.App.2d at page 532, 122 P.2d at page 117. "The effect of the limitation is to cut down the number of counties in which an action may properly be tried to two, namely, the county in which the defendant resides, and the county in which the contract was made." 49 Cal.App. 2d at page 531, 122 P.2d at page 117. This holding has been cited with approval in Hale v. Bohannon, 38 Cal.2d 458, 468–469, 241 P.2d 4; Caffrey v. Tilton, 38 Cal.2d 371, 374, 240 P.2d 273; Campbell v. Clifford, 52 Cal.App.2d 615, 618, 126 P.2d 887; Wilson v. Hoffman, 81 Cal.App.2d 664, 666–667, 184 P.2d 951; and De Campos v. State Compensation Ins. Fund, 75 Cal.App.2d 13, 20–21, 170 P.2d 60.

While it is true that in the Armstrong case there was evidence showing the county in which the contract was executed, and none in our case, as concerns these appellants, the principle would seem nevertheless to apply because of the duty of the plaintiff affirmatively to bring himself within the exception when it clearly appears that none of the defendants resides in the county in which the action is brought. Goossen v. Clifton, 75 Cal.App.2d 44, 48, 170 P.2d 104; Crofts & Anderson v. Johnson, 101 Cal.App.2d 418, 420, 225 P.2d 594; see, also, Brady v. Times-Mirror Co., 106 Cal. 56, 58, 39 P. 209; Brown v. Happy Valley Fruit Growers, 206 Cal. 515, 522, 274 P. 977.

We conclude, as to the cause of action stated in the first count of the amended complaint, that defendants Holmes and Graffeo have the right to transfer the cause to Los Angeles County, the county of their residence.

[8] As to them, it is not necessary to consider the other counts. In such a case as this when an individual, a non-corporate defendant establishes his right to transfer as to one count, his motion should be granted irrespective of what showing he makes concerning other counts of the complaint. See Goossen v. Clifton, supra, 75 Cal.App. 2d 44, 170 P.2d 104; Crofts & Anderson v. Johnson, supra, 101 Cal.App.2d 418, 420–421, 225 P.2d 594; Tringali v. Vest, 106 Cal.App.2d 720, 721, 236 P.2d 171; Gilman v. Nordin, 112 Cal.App.2d 788, 790, 247 P. 2d 394; Erwin v. Cee-Tee Construction Co., 114 Cal.App.2d 364, 370, 250 P.2d 287.

As to the defendant corporations who have appealed, we have additional factors to consider.

Their rights are governed by § 16 of Article XII of the state Constitution, not by § 395 of the Code of Civil Procedure. Hale v. Bohannon, supra, 38 Cal.2d 458, 470–472, 241 P.2d 4, and cases there cited.

One of the counties in which § 16 authorizes a plaintiff to sue a corporation is the county "where the contract * * * is to be performed," with no requirement that the contract be in writing. Marin is that county, as concerns the issues to be tried under the first count of the complaint.

[9] Moreover, § 16 is silent in respect to a corporation's right of removal, except in its concluding clause, "subject to the power of the court to change the place of trial as in other cases." Its right of removal, if any, must be predicated upon that clause. Hale v. Bohannon, supra, 38 Cal. 2d 458, 469, 241 P.2d 4.

[10] Upon such a motion the burden rests upon the defendant corporation, not

upon the plaintiff, to show that the action has not been brought in a county authorized by § 16. Chase v. South Pacific Coast Railroad Company, 83 Cal. 468, 23 P. 532; Rowe v. Policy Holders Life Ins. Ass'n, 131 Cal.App. 339, 21 P.2d 443; Konig v. Associated Almond Growers, 37 Cal.App.2d 360, 363–365, 99 P.2d 678; Swartz v. California Olive Growers', etc., Corp., 56 Cal.App.2d 168, 133 P.2d 20; G. W. McNear, Inc., v. Geo-Physical Service, 90 Cal.App.2d 662, 203 P.2d 550; 25 Cal.Jur. 909–910, Venue, § 42. Section 16 is permissive. It does not prevent a plaintiff from suing in any county in the state. Venue as laid in the title of the action is sufficient to make a prima facie case for the trial in the county in which the action is brought. Chase v. South Pacific Coast Railroad Co., supra, 83 Cal. 468, 472, 23 P. 532; Konig v. Associated Almond Growers, supra, 37 Cal. App.2d 360, 364–365, 99 P.2d 678.

The defendants claim when they showed that their principal places of business were in Los Angeles County, the burden was cast upon the plaintiff, if not before, of showing that the contract was made or to be performed, the obligation or liability arose, or the breach occurred in Marin County. They cite Hammond v. Ocean Shore Development Co., 22 Cal.App. 167, 133 P. 978, and California Bean Growers' Ass'n v. C. H. & O. B. Fuller Co., Inc., 78 Cal.App. 522, 248 P. 967. The answer is furnished by Konig v. Associated Almond Growers, supra, 37 Cal.App.2d 360, 363–364, 99 P.2d 678, to the effect that such statements in those and other cases were but dicta.

[11] We conclude that the trial court was correct in impliedly finding that, as against the appellant corporations, the cause of action stated in the first count was properly brought in Marin County.

[12] In respect to counts two to five of the complaint, we have to consider the statement in each that the defendants (including, of course, the appellant corporations) "in the county of Marin * * * became, were and are indebted to the plaintiff." These statements, competent evidence under the circumstances of this case, support an implied finding that the obligation arose in Marin County; hence, that the appellant corporations were properly sued in Marin County.

[13, 14] Furthermore, in a "'* * * suit upon the contract of a corporation, where no place of performance is expressly stipulated, it ought to be held performable in the place where the circumstances, viewed in the light of pertinent code provisions, indicate that the parties expected or intended it to be performed.' [Citations.]" Hale v. Bohannon, supra, 38 Cal.2d 458, 466, 241 P.2d 4, 8. This brings into play the presumptions indicated in §§ 1488 and 1489 of the Civil Code. These sections "state the rules as to the place of performance in the payment of a debt. By their terms, as at common law, if there be no agreement or stipulation to the contrary, a debt is payable at the place where the creditor resides, or at his place of business, if he has one, or wherever else he may be found. Bank of Yolo v. Sperry Flour Co., supra [141 Cal. 314, 74 P. 855, 65 L.R.A. 90]; Pacific Freight Lines v. Pioneer Express Co., 39 Cal.App.2d 609, 614–615, 103 P.2d 1056; Konig v. Associated Almond Growers, 37 Cal.App.2d 360, 366, 99 P.2d 678. Under ordinary circumstances, it is the duty of the debtor to seek the creditor for the purpose of making payment." Hale v. Bohannon, supra, 38 Cal.2d 458, 467, 241 P.2d 4, 8; and, see, Blumer v. Kirkman Corporation, 38 Cal.2d 480, 484, 241 P.2d 17. It appears from plaintiff's affidavit that its place of business was in San Anselmo, Marin County. There was, therefore, a basis for an implied finding that the place of performance of the contract of each of the corporate defendants was Marin County, making Marin a proper county under § 16 of Article XII of the Constitution.[4]

---

[4] The provisions of Civil Code §§ 1488 and 1489 do not have the effect of a "special contract in writing" within the meaning of § 395 of the Code of Civil Procedure. Hence, though such provisions constitute an implied provision of any contract, such fact does not alter the conclusion that as to the first count the individual defendants are entitled to a change of venue to the county of their residence under the provisions of § 395 of the Code of Civil Procedure. Caffrey v. Tilton, supra, 38 Cal.2d 371, 240 P.2d 273.

[15] We conclude that the appellant corporations were not entitled, in their own right, to a change of venue. Nor may they avail themselves of the individual defendants' rights in this regard. Strassburger v. Sante Fe Land Imp. Co., 54 Cal. App. 7, 200 P. 1065; Walker v. Wells Fargo Bank & Union Trust Co., 24 Cal. App.2d 220, 223, 74 P.2d 849.

[16] *The effect of joinder of the parties defendant.* Plaintiff in the amended complaint pleads five causes of action against all of the defendants in the action. If the plaintiff's rights of action are joint as against the corporations and the individuals, and if plaintiff chooses to pursue the individuals, he is bound to join them as defendants. Strassburger v. Sante Fe Land Imp. Co., supra, 54 Cal.App. 7, 10, 200 P. 1065. Such necessity does not deprive the individual defendants of their right of removal. A plaintiff cannot by joining a corporation or corporations as defendants, under the circumstances of this case, impair the right or thwart the exercise of the right of an individual defendant to remove the cause to the county of his residence. In effect, by joining the individual defendants, neither of whom resides in Marin County, plaintiff has waived whatever procedural rights were granted him by Article XII, § 16, of the Constitution, to bring his action against the corporate defendants in Marin County. Brady v. Times-Mirror Co., supra, 106 Cal. 56, 39 P. 209; Griffin and Skelly Co. v. Magnolia and Healdsburg Fruit Cannery Co., 107 Cal. 378, 40 P. 495; Nelson v. East Side Grocery Co., 26 Cal.App. 344, 146 P. 1055; Walker v. Wells Fargo Bank & Union Trust Co., supra, 24 Cal.App.2d 220, 222, 74 P.2d 849; Delno v. Market St. Ry. Co., 63 Cal.App.2d 489, 147 P.2d 67. See, also, Strassburger v. Santa Fe Land Imp. Co., supra, 54 Cal.App. 7, 200 P. 1065.

[17] Since plaintiff has chosen to present his claims against these defendants in the form of a single action, alleging in each count that the obligations pleaded are the obligations of all of them, with a prayer for relief against all, and since no question of separation of parties is before us on this appeal, we are bound to treat the action in so far as the parties are concerned, as an entire one. A similar situation was presented in Walker v. Wells Fargo Bank & Union Trust Co., supra, 24 Cal.App.2d 220, 223, 74 P.2d 849. (A petition for hearing by the Supreme Court was denied.) In that case plaintiff brought a transitory action against an individual and a corporation. Both defendants joined in a motion for change of venue. After concluding that the individual defendant was entitled to a change of venue to the county of his residence under § 395 of the Code of Civil Procedure, the court said, "We find it unnecessary to determine whether the cause was one within the meaning of article 12, section 16, of the Constitution, for by joining the individual defendant with the corporate defendant, plaintiffs waived the benefit of the constitutional provision at least so far as the individual defendant was concerned. [Citations.]" 24 Cal. App.2d at page 222, 74 P.2d at page 850. "Both defendants here joined in the motion for a change to the city and county of San Francisco, and while the corporation was not entitled to such a change on its own behalf, Strassburger v. Sante Fe Land Imp. Co., supra, the situation presented to the trial court was one where there was a motion duly made by the individual defendant for a change to a proper county and there was no conflicting motion made by a codefendant. We conclude that the motion of the individual defendant should have been granted. The order is reversed, with directions to the trial court to grant said motion." 24 Cal.App.2d at page 223, 74 P.2d at page 850.

The same situation was presented to the trial court in our case; hence, the trial court should have granted the individual defendants' motion to transfer the entire action, as pleaded, to the County of Los Angeles. The result is that the causes pleaded against each of the corporate defendants, including Northern Timber, Inc., are carried along, under these pleadings, upon the granting of the motions of the individual defendants.

The order denying the motions for a change of venue is reversed, with instructions to the trial court, in the present state of the pleadings, to grant the motions for transfer of the action to Los Angeles County in accordance with the views herein expressed.

PETERS, P. J., and BRAY, J., concur.

119 Cal.App.2d 365

PEOPLE v. ALLEN.

Cr. 861.

District Court of Appeal, Fourth District, California.

July 24, 1953.

Petition for writ of error coram nobis to set aside decree declaring petitioner a habitual criminal. The Superior Court of Kern County, Stockton, J., denied petition and petitioner appealed. The District Court of Appeal, Mussell, J., held that the three prior convictions relied upon in sentencing petitioner as a habitual criminal could not be tested on a writ of error coram nobis.

Order affirmed.

1. Criminal Law 🔑1202(1)

Where defendant was convicted in other states of assault with intent to commit murder, assault and battery with a dangerous weapon and theft from person, regardless of the names by which they were designated, the offenses were felonies within habitual criminal statute. Pen.Code, §§ 487, 644.

2. Criminal Law 🔑1202(1)

The habitual criminal statute does not create a substantive offense. Pen.Code, § 644.

3. Criminal Law 🔑1202(2)

Question whether prior felony convictions were felonies within California habitual criminal statute was determined by defendant's admission, and there was no burden of proof on prosecution as to prior felonies. Pen.Code, § 644.

4. Criminal Law 🔑997

Whether prior convictions in other states were for acts constituting offenses comprised within any of the crimes specified in habitual criminal statute and whether declaration of habitual criminality was an offense of which petitioner was not accused, were questions which could have been raised on motion for new trial or on appeal from judgment of conviction, and writ of error coram nobis would not lie. Pen.Code, § 644.

Willis Mevis and Richard Hosking, Bakersfield, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

Defendant was charged in an amended information, filed December 23, 1949, with the murder of one Leo Jones. The information also contained allegations that the defendant had been previously three times convicted of felonies, as follows:

(1) That he was convicted on April 22, 1930, in the District Court of the County of Gray, State of Texas, of the crime of felony, to wit, Assault With Intent to Murder, and that he had served a term of imprisonment therefor in the Texas State Prison at Huntsville.

(2) That on April 6, 1933, in the District Court of the County of Custer, State of Oklahoma, he was convicted of the crime of felony, to wit, Assault and Battery With a Dangerous Weapon With Intent to Kill, and that he served a term of imprisonment therefor in the Oklahoma State Prison at McAlester.

(3) That on April 24, 1940, in the District Court of the County of Travis, State of Texas, he was convicted of the crime of felony, to wit, Theft from Person, and that he served a term of imprisonment therefor in the Texas State Prison at Huntsville.

A jury found the defendant guilty of murder in the second degree. The trial court, on pronouncing judgment, recited that defendant had admitted the three prior felony convictions by pleading guilty thereto and thereupon sentenced the defendant to state prison for the term prescribed by law for the crime of murder in the second degree. It was further ordered and decreed that the defendant be declared an habitual criminal.

In May, 1952, the defendant filed a petition in the Superior Court of Kern county for a writ of error coram nobis for the purpose of setting aside the "judgment of habitual criminality" pronounced in his case. His petition was denied and he appeals from the order of court denying his application for the writ.

Defendant contends that he was not legally determined to be an habitual criminal, it being neither alleged nor proved that his acts in committing the prior felonies charged in sister states were acts constituting any of the crimes enumerated in Section 644 of the Penal Code, and that he was convicted of an offense of which he was never accused, the offense being that of "habitual criminality".

[1, 2] The first prior felony conviction alleged was Assault With Intent to Murder, the second Assault and Battery With a Dangerous Weapon With Intent to Kill, and the third Theft from Person. Penal Code Section 644, as it read in the year of the charge in the amended information (1950) provided that "assault with intent to commit murder" and "felonious assault with a deadly weapon" were "priors" within the terms of that section. It also provided that "Grand Theft" might be charged as such a "prior" and Section 487 of the same code provided in part as follows:

> "Grand theft defined.
>
> * * * * * *
>
> "2. When the property is taken from the person of another."

It is apparent that all three of the priors alleged, in their substance, come within California's definition of the enumerated crimes. In re McVickers, 29 Cal.2d 264, 267, 176 P.2d 40. Likewise, there is no merit to the contention that defendant was convicted of the offense of "habitual criminality". As was said In re McVickers, supra, 29 Cal.2d pages 270–271, 176 P.2d page 45:

> "That prior convictions are not elements of a substantive offense is necessarily so under the reasoning of the cases which have upheld the constitutionality of section 644 against the attack that it is *ex post facto* as applied to convictions suffered prior to its enactment. * * * That prior convictions are not elements of a substantive offense likewise appears from section 1158 of the Penal Code, which requires the jury to find separately on the issue of prior convictions, and from such cases as People v. Eppinger (1895), 109 Cal. 294, 41 P. 1037, which holds that a general verdict, 'guilty as charged,' must be treated as a finding against defendant as to the basic offense alleged but in favor of defendant as to alleged prior convictions."

[3] The question as to whether the prior felony convictions were felonies in California was also determined by defendant's admission and there is no burden of proof on the prosecution as to the prior felonies when the defendant admits the convictions in open court. People v. Herod, 112 Cal. App.2d 764, 766, 247 P.2d 127. As was said in In re Gilliam, 26 Cal.2d 860, 866, 161 P. 2d 793, 796, quoting from People v. Stone, 69 Cal.App.2d 533, 536, 159 P.2d 701,

> "'Contention that the trial court's judgment is erroneous because it did not take evidence upon the question of the prior convictions is utterly without merit. It is not an arbitrary judgment of the court when it adjudicates a prisoner to be an habitual criminal after he admits in open court two prior convictions for felonies and service of prison terms therefor at the time of his pleading guilty to the felony charged in the pending accusation. The confession of a prisoner at the bar of his guilt as charged as well as of the truth of the allegation of prior convictions is, in the absence of insane delusions, most satisfactory evidence upon which to convict and will support a judgment

that he is an habitual criminal. People v. Nicholson, 34 Cal.App.2d 327, 93 P.2d 223; In re Boatwright, 216 Cal. 677, 15 P.2d 755; People v. Dawson, 210 Cal. 366, 292 P. 267; People v. Birdsell, 6 Cal.App.2d 749, 45 P.2d 378.' "

[4] Furthermore, the matters which defendant attempted to raise on his petition for writ of error coram nobis could have been presented upon a motion for a new trial or on an appeal and since these remedies were not sought, a writ of error coram nobis will not lie. People v. Whitton, 112 Cal.App.2d 328, 332, 246 P.2d 60.

The order denying the writ is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

---

119 Cal.App.2d 224

PEOPLE v. BENNETT.

Cr. 2892.

District Court of Appeal, First District,
Division 2, California.
July 14, 1953.

Defendant was convicted of burglary, rape, violation of Pen.Code, § 288a, assault with intent to commit rape, and assault with a deadly weapon. The Superior Court, for City and County of San Francisco, H. J. Neubarth, J., entered judgment and defendant appealed. The District Court of Appeal, Nourse, P. J., held that defendant was fairly tried and convicted; that he was accorded reasonable opportunity to present his defense, and that grounds raised on appeal were all insubstantial.

Judgment and orders affirmed.

1. Criminal Law 🔑620(1)

Where crimes of rape, violation of statute penalizing sex perversion, assault with intent to commit rape, and assault with a deadly weapon were all of same pattern and committed in same manner, it was not error to consolidate the indictments for trial. Pen.Code §§ 288a, 954.

2. Criminal Law 🔑1166(1)

Consolidation for trial of indictment charging robbery with indictments charging unrelated offense was not prejudicial where robbery was not found.

3. Criminal Law 🔑1137(1)

Where defendant exercised only eight peremptory challenges and announced satisfaction with jury, he could not complain on appeal because he was not allowed more than ten peremptory challenges.

4. Criminal Law 🔑339

Testimony disclosing identification of defendant at police line-up was admissible to supplement testimony of some witnesses identifying defendant by facial appearance, voice, and articles of clothing.

5. Criminal Law 🔑1036(5)

Argument that testimony disclosing identification of defendant at police line-up was hearsay could not be considered on appeal where objection was not made during trial.

6. Criminal Law 🔑1166(8)

Where court had given four months delay, subpoenas had been issued and served, and witnesses had been brought in with exception of one who could not be found, denial of continuance to prove alibi was not prejudicial.

7. Criminal Law 🔑1037(1, 2)

Where no objection to alleged misconduct by district attorney or request for instructions was made at trial, the point was not available on appeal.

8. Sodomy 🔑1

To establish violation of statute penalizing sex perversion, it was not necessary that penetration be shown. Pen.Code, § 288a.

9. Criminal Law 🔑823(15)

That trial court omitted "reasonable doubt" and "moral certainty" in one of the instructions, was not reversible error where they were fully covered in other instructions given. Pen.Code, §§ 1096, 1096a.

Ernest Spagnoli and John W. Bussey, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Charles E. McClung, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

The defendant was tried to a jury on five indictments charging thirteen separate offenses, and a prior conviction of a felony. He admitted the prior conviction and went to the jury with a general denial of all the other charges. He insisted upon conducting his own defense and refused the offer of the trial court to assign counsel to aid him. After ten days of trial the defendant was found guilty of six of the thirteen offenses charged in the indictment, i. e., burglary, rape, violation of section 288a of the Penal Code, assault with intent to commit rape, and assault with a deadly weapon. He was acquitted on the charge of robbery. The jury disagreed on the fourth and fifth indictments—presumably because of the insufficiency of the identification by the two alleged victims named therein. The appeal is taken from the several judgments and from the orders denying a new trial.

We will consider the grounds of appeal in the order made by appellant. But primarily we should state that there is no contention that the evidence was insufficient to support the several verdicts.

[1, 2] *First.* There was no error in the consolidation of the five indictments for purposes of trial. The offenses of which defendant was convicted were all of the same pattern and were all committed in the same manner. They were all properly consolidated under section 954, Penal Code. The unrelated charges of robbery were not found and their joinder was not prejudicial. However, defendant made no objection to the consolidation and the point cannot be raised for the first time on appeal. People v. Chessman, 38 Cal.2d 166, 175, 238 P.2d 1001; People v. Van De Wouwer, 91 Cal. App.2d 633, 640, 205 P.2d 693.

[3] *Second.* That the trial court erred in denying defendant more than ten peremptory challenges since some of the counts included a charge of robbery. The point is not clearly presented. The record discloses that preliminarily defendant demanded fifty peremptory challenges—ten for each count in the indictment. This was denied, and properly so. Now he argues that he was entitled to twenty because of the robbery charge. But he exercised only eight challenges on the whole case and announced his satisfaction with the jury as drawn. He may not complain on appeal. People v. Bugg, 79 Cal.App.2d 174, 176, 179 P.2d 346 and cases there cited.

[4, 5] *Third.* Error is assigned to the admission of testimony of the several victims of the attacks disclosing their identification of the defendant at line-ups of prisoners in the city jail. This is a common complaint which is not here supported by any authority. The argument that the testimony of these witnesses was hearsay falls because no objection was made. But it was admissible to supplement the testimony of the same witnesses identifying the defendant by his facial appearance, his voice, and articles of clothing worn by him. See People v. Slobodion, 31 Cal.2d 555, 559, 560, 191 P.2d 1; and Vol. IV, Wigmore, Evidence, sec. 1130.

[6] *Fourth.* This is the all too common charge of misconduct on the part of the trial court. The main complaint is the denial of defendant's numerous requests for continuances to enable him to procure witnesses—mainly to prove his defense of alibi. The court had given him four months' delay. Subpoenas had been issued and served; three witnesses had been brought in from the State Penitentiary and one from the county jail; the one missing was a woman who he had hoped would testify to their co-habitation during the periods charged in the indictment. The sheriff returned the subpoena with the report that she was well past eighty years of age and could not be found. Criticisms of rulings on the admission of evidence are trivial. We find there was no prejudicial misconduct.

[7] *Fifth.* We do not need to discuss the trivial charges of misconduct by the

district attorney. No objection was made to any of them and no request was made for an instruction. The point is not now available. People v. Codina, 30 Cal.2d 356, 362, 181 P.2d 881.

[8] *Sixth.* Insufficiency of the evidence to establish a violation of section 288a, Penal Code. The argument is based wholly on the assertion that penetration was not shown. It was not necessary. People v. Coleman, 53 Cal.App.2d 18, 127 P.2d 309.

[9] *Seventh.* Complaint is made that the trial court omitted "reasonable doubt" and "moral certainty" in one of the instructions. These were fully covered in other instructions given. Penal Code sections 1096 and 1096a were adequately covered.

There is no reversible error in the record. The defendant was fairly tried and convicted. He was accorded every reasonable opportunity to present his defense and the grounds raised on appeal are all insubstantial.

Judgments and orders affirmed.

DOOLING, J., and McCOMB, Justice assigned, concur.

ELBERT, Limited, v. FEDERATED INCOME PROPERTIES. *

Civ. 19552.

District Court of Appeal, Second District, Division 2, California.

July 7, 1953.

Rehearing Granted Aug. 5, 1953.

Action for partition of realty. The Superior Court, Los Angeles County, Thurmond Clarke, J., rendered adverse interlocutory decree, and defendant appealed. The District Court of Appeal, Fox, J., held that where titles of purchaser of tax deed from state and purchaser of treasurer's deed to same property after foreclosure of street improvement bond lien were on a parity, purchaser of tax deed was entitled to reimbursement out of proceeds of partition sale for sum paid by it, before purchaser of treasurer's deed perfected title, to redeem a certificate of sale issued upon a street improvement bond which was a lien upon the property.

Affirmed as modified.

1. Partition 🔑111(1)
Tenancy in Common 🔑3

Purchaser of tax deed from State and purchaser of treasurer's deed to same property after foreclosure of street improvement bond lien were each entitled, upon sale, to receive price paid for his interest plus half of excess proceeds consistent with ownership of an undivided one-half interest in the property as a tenant in common. Revenue and Taxation Code, § 3900.

2. Partition 🔑34

Action of partition is an equitable proceeding.

3. Equity 🔑62

Equity which penetrates beyond the form to the substance of a controversy is nonetheless bound by prescriptions and requirements of the law.

4. Partition 🔑87

Where titles of purchaser of tax deed from state and purchaser of treasurer's deed to same property after foreclosure of street improvement bond lien were on a parity, purchaser of tax deed was not entitled to reimbursement out of proceeds of partition sale for taxes against the property which were paid by it before purchaser of treasurer's deed perfected its title, since obligation of purchaser of tax deed to pay taxes was corollary of its ownership, failure to pay taxes would not have prejudiced improvement bond lien, and payment of taxes conferred no benefit upon purchaser of treasurer's deed. Revenue and Taxation Code, § 3712.

5. Partition 🔑87

Where titles of purchaser of tax deed from state and purchaser of treasurer's deed to same property after foreclosure of street improvement bond lien were on a parity, purchaser of tax deed was not entitled to reimbursement out of proceeds of partition sale for sums expended by it in quiet title action or to sum spent for title search, before purchaser of treasurer's deed perfected title, since expenditures contributed nothing to partition action and did not inure to the common benefit. Revenue and Taxation Code, § 3712; Code Civ.Proc. §§ 798, 799.

---

* Subsequent opinion 261 P.2d 743.

6. Partition ⚿87

Where titles of purchaser of tax deed from state and purchaser of treasurer's deed to same property after foreclosure of street improvement bond lien were on a parity, purchaser of tax deed was entitled to reimbursement out of proceeds of partition action for sum paid by it, before purchaser of treasurer's deed perfected title, to redeem a certificate of sale issued upon a street improvement bond which was a lien upon the property. Revenue and Taxation Code, § 3712; Civ.Code, § 2903.

7. Subrogation ⚿17

Generally, right of subrogation is given to one who, having a lien upon specific property, discharges a prior lien thereon in order to protect his own claim, notwithstanding that he was not compelled to do so.

8. Partition ⚿87

One holding an after-acquired parity title who exercises right of partition should be compelled to an equitable adjustment as between him and an earlier tax title holder whose expenditures in connection with the property redound to the common benefit. Revenue and Taxation Code, § 3712.

9. Appeal and Error ⚿863

On appeal from interlocutory judgment in action of partition between tenants in common, questions whether defendant was entitled to be reimbursed for costs expended in quiet title action involving the common property and for cost of procuring quitclaim deed from record owner were prematurely raised, since such allowances may only be awarded in final judgment. Code Civ.Proc., § 798.

10. Partition ⚿114(6)

In partition proceeding, costs or attorney's fees may not be allowed until final judgment is entered and have no proper place in interlocutory decree.

11. Partition ⚿114(6)

In partition proceeding, question whether services of attorneys for either of the parties have been for the common benefit and the reasonable value thereof is required to be determined at conclusion of the litigation, at which time such fees may be specified and included in the final judgment.

James M. Gammon, Los Angeles, for appellant.

John F. Bender, Compton, and Gizella M. Allen, Los Angeles, for respondent.

FOX, Justice.

Defendant appeals from an interlocutory judgment in an action for the partition of real property.

This suit for partition was filed by plaintiff corporation in September, 1950, as tenant in common with defendant corporation of an undivided one-half interest in a vacant lot located in the County of Los Angeles. Defendant's answer admitted that it claimed an interest in the property but alleged it had expended certain sums for the common benefit and prayed that it be awarded this sum from the sale of the property, plus a reasonable attorney's fee, in addition to its one-half share of the net proceeds.

The evidence discloses that defendant's title to the property derives from its purchase of a tax deed from the State of California in December, 1945, for which it paid the sum of $70. At that time, the property was subject to a lien of plaintiff's street improvement bond, issued November 17, 1930, under the Boundary Line Act of 1911. Plaintiff's lien was carried into title through foreclosure proceedings pursuant to which it received a Certificate of Sale on December 3, 1948. It received its Treasurer's Deed on June 12, 1950.

Subsequent to its acquisition of its tax deed in 1945, defendant paid the current yearly taxes accruing up to and including the year 1949, in the sum of $90; it paid $238.58 to redeem a Certificate of Sale which had been issued on another street improvement bond which was a lien on the property on a par with plaintiff's lien at the time defendant purchased its tax deed, and it paid $25 to Leslie Wood, the record owner of the fee prior to the tax sale, for a quitclaim deed to the property. Defendant also disbursed $22.50 for a title search by the Title Insurance and Trust Company and expended the sum of $100 as costs and attorney's fees in a quiet title proceeding against the County of Los Angeles, which appeared to have an interest in the property for sums advanced by it as relief payments to the former fee-holder. These expenditures, totalling $494.98, were incurred before plaintiff received its Treasurer's Deed in 1950, for which it paid $450.56.

Following a trial, the court found that plaintiff and defendant were tenants in common, by virtue of parity of titles, each owning an undivided one-half interest in the property, with plaintiff holding an equitable lien of $450.56 and defendant holding an equitable lien of $70 based on the amounts paid for the Treasurer's Deed and the tax deed respectively. It found that all of the expenditures made by defendant and enumerated above occurred prior to the date the Treasurer's Deed was issued to plaintiff on June 12, 1950. The court ordered partition by sale, holding that plaintiff had a lien for $450.56 and defendant a lien for $70, and adjudged that defendant was not entitled to reimbursement for its expenditures prior to June 12, 1950. The court further decreed that from the proceeds of the sale, after payment of referee's fees and expenses incident to the sale, there be paid to plaintiff the sum of $450.56 and to defendant $70, with any balance equally distributed to the parties. The decree also awarded to plaintiff reasonable counsel fees and costs, including the cost of abstract of title, the necessity for which and its availability for the use of the parties plaintiff had alleged in its complaint.

Defendant essentially raises two issues for consideration, each of which contains elements requiring particularized discussion. These are:

(1) Did the court err in failing to reimburse defendant from the proceeds of the partition sale for the sums it expended:

(a) In paying annual taxes levied on the property through 1949;

(b) In bringing a quiet title action against the County of Los Angeles;

(c) In obtaining a report of title search;

(d) In redeeming the Treasurer's Certificate of Sale obtained by the holder of a bond lien;

(e) In procuring a quitclaim deed from the record owner of the fee.

(2) Did the court err:

(a) In awarding costs and authorizing counsel fees to plaintiff in the interlocutory decree;

(b) In not awarding a similar relief to defendant.

[1] The parties are in accord that the respective tax liens of plaintiff and defendant are on a parity. Revenue & Taxation Code, sec. 3900; Monheit v. Cigna, 28 Cal. 2d 19, 168 P.2d 965, 167 A.L.R. 995. As a consequence of such liens having been carried into deeds acquired by private purchasers, "each tax purchaser is entitled upon sale to receive the price paid for his interest plus half of the excess proceeds consistent with ownership of an undivided one-half interest in the property as a tenant in common. [Citations.]" Anger v. Borden, 38 Cal.2d 136, 139, 238 P.2d 976, 978. Relying on this rule, and making reference to general principles of subrogation, defendant contends that it is entitled to reimbursement for each item of expense already mentioned prior to the division of proceeds of a partition sale. Plaintiff's reply to this is disarmingly simple: since no co-tenancy existed at the time of these advances, defendant cannot support its claims either on the theory of subrogation or contribution.

[2, 3] It is beyond cavil that all of the expenditures occurred prior to the creation of a tenancy in common between the parties in June of 1950. However, although the action of partition is of statutory origin in this state, it is nonetheless an equitable proceeding, Goodale v. 15th Dist. Court, 56

Cal. 26; Emeric v. Alvarado, 64 Cal. 529, 2 P. 418, and in its evolution has been conditioned and controlled by the broad principles governing equity jurisprudence. Jameson v. Hayward, 106 Cal. 682, 687–688, 39 P. 1078. Whenever a party affirmatively seeks relief through the interposition of the remedy of partition, the courts have adhered, in adjusting the rights of co-tenants and defining their interest in the common property, to the classic formulas encapsuled in the maxims that equity is equality and he who seeks equity must do equity, and have dispensed equitable relief only upon condition that the equitable rights of a co-tenant are respected and safeguarded. Ventre v. Tiscornia, 23 Cal.App. 598, 605, 138 P. 954; Willmon v. Koyer, 168 Cal. 369, 143 P. 694, L.R.A.1915B, 961. We must therefore examine defendant's claims in harmony not only with these established principles, but cognizant that equity, which penetrates beyond the form to the substance of a controversy, is nonetheless bound by the prescriptions and requirements of the law.

[4, 5] Defendant's claim of reimbursement for taxes must be disallowed. The tax deed obtained by defendant from the State conveyed to him a complete title, Rev. & Tax.Code, sec. 3712; Helvey v. Sax, 38 Cal.2d 21, 24, 237 P.2d 269, subject only to the continued existence of designated tax and assessment liens of equal rank as an encumbrance on the property. Rev. & Tax. Code, § 3520; Monheit v. Cigna, supra; Elbert v. Nolan, 32 Cal.2d 610, 615, 197 P.2d 537; Neary v. Peterson, 1 Cal.2d 703, 705, 37 P.2d 82. As owner of the fee, defendant could have at any time discharged such liens by payment of the amount due. Further, defendant would have been entitled to any rents or profits produced out of the property by virtue of his status of title holder. Rev. & Tax.Code, § 3712; People v. Maxfield, 30 Cal.2d 485, 183 P.2d 897; see Merchants Finance Corp. v. Kuchel, 83 Cal.App.2d 579, 189 P.2d 513. Prior to its accession to the position of cotenant, plaintiff was a mere lien-holder with no right to share in any yield from the property, and with no warrant to exercise any rights of ownership therefrom. The taxes paid by defendant were solely its own obligation, a corollary of its ownership of the fee. Just as its failure to pay taxes would in no way prejudice plaintiff's lien so did defendant's payment of such taxes confer no boon upon plaintiff for which it should be obliged to reimburse defendant. Likewise, by the express mandate of section 798 of the Code of Civil Procedure, that part of defendant's outlay of $100 in the quiet title action against the County of Los Angeles which it paid out as counsel fees is not chargeable as a part of defendant's lien. So, too, the sum of $22.50 spent for a title search was an expenditure for defendant's own purposes, to ascertain for its own use the identity of interested parties and to inform itself of outstanding liens, encumbrances or clouds on its title. It contributes nothing to the present action nor does it inure to the common benefit; and to be compensable, under section 799 of the Code of Civil Procedure, its procurement should be pleaded in the complaint, in which should also be stated its availability for the inspection and use of all the parties to the action. Defendant has made no such showing.

[6, 7] With respect to defendant's payment of the sum of $238.58 to redeem a certificate of sale issued upon a street improvement bond which was a lien upon the property co-equal with plaintiff's lien at the time defendant purchased its tax deed, a different situation prevails. Had this bond been foreclosed, its holder would have become a tenant in common with defendant, and ultimately with plaintiff. The amount of the lien, swelled by foreclosure costs and other charges, would have been on a parity with the respective liens of plaintiff and defendant and entitled to payment out of, and an equal share in, the avails of the present partition action. That this lien no longer exists and that no third party is on the scene to participate in the division of proceeds is of undeniable financial advantage to plaintiff. Elementary concepts of fair and equitable apportionment between the parties should require that an allowance be made for this expenditure. Nor are we without authority to uphold such a conclusion. Section 2903 of the Civil Code provides: "Every person, having an interest in property subject to a lien, has the right to redeem it from the lien, at any time after the claim is due, and before his right of redemption is foreclosed, and, by such redemption, becomes subrogated to all the benefits of the lien, as against all owners of other interests in the property, except in so far as he was bound to make such redemption for their benefit." In the case of Diehl v. Hanrahan, 68 Cal.App.2d 32, 37, 155 P.2d 853, 856, the court states: "It is the general rule that the right of subrogation is given to one who, having a lien upon specific property, discharges a prior lien thereon in order to protect his own claim, and this notwithstanding that he was not compelled to do so." Cf. District Bond Co. v. Pollack, 19 Cal.2d 304, 121 P.2d 7, 16 Cal.Jur. 349–51. It should not matter in an equitable proceeding that this transaction, culminating in the elimination of this lienholder, took place before plaintiff became a tenant in common with defendant. It is a measure of the virility and flexibility of equitable principles that they may be applied to the end that neither party is permitted to secure an advantage to the prejudice of another and that the interest of one party will not be diminished in any degree to advance the interests of another.

Furthermore, defendant's redemption of an outstanding assessment lien which stood on an equal basis with plaintiff's lien may also be considered as constituting a part of its *investment* in acquiring the property and perfecting the tax title it purchased. When so considered, the following language in Monheit v. Cigna, supra, 28 Cal.2d at pages 27–28, 168 P.2d at page 970, becomes particularly pertinent on the question of defendant's right to have such payment included as a part of its lien: "Also, since the property was originally subject to more than one lien on an equal basis, that is, without priority, the property should be subject to liens to the extent of the respective purchase prices paid. In that manner *each purchaser is given the full benefit of the investment* made by him in the purchase of the property. Otherwise absurd results would follow. One purchaser of the property would receive his interest for a few dollars, while another might have paid thousands. To effect *equality and parity* as between the co-owners there is therefore necessarily *an equitable lien against the property in favor of each co-tenant to the extent of the amount paid by him.* The result of such liens as between the cotenants would be that in the event of the subsequent sale of the entire property, each co-tenant would be entitled to reimbursement for the amount paid by him before equal division of any excess." (Italics added.) We entertain no doubt that the amount paid by defendant to discharge a lien on a parity with plaintiff's lien is properly included in establishing the measure of defendant's equitable lien on the property in order that he may be "given the full benefit of the investment made by him in the purchase of the property." Otherwise, one of the "absurd results" apprehended by the court in the Monheit case would follow, for it cannot be gainsaid that an opposite conclusion would confer upon plaintiff an undeserved windfall, a truly unjust enrichment.

[8] Finally, and of equally compelling significance, is the fact that such a conclusion is in consonance with the broad statutory policy underlying the legislative pattern in treating the problem engendered by the existence of co-equal liens and parity titles. Cf. Stafford v. Realty Bond Service Corp., 39 Cal.2d 797, 805, 249 P.2d 241. In a line of cases culminating in Monheit v. Cigna, supra, it was established that liens emanating from the assessments of separate taxing entities were on a par, and a tax deed from one such agency would not extinguish a co-equal lien. However, in 1945 the Legislature enacted comprehensive changes affecting the duration and enforcement of assessment liens, which constituted a "revision of the entire subject". Rombotis v. Fink, 89 Cal.App.2d 378, 390, 201 P.2d 583, 591. This legislation, now embodied in section 2911 of the Civil Code and section 330 of the Code of Civil Procedure, provided for a statute of limitations and a definite period of time upon the expiration of which street improvement liens would be not only unenforceable by foreclosure but also would be presumed to have

been extinguished. Scheas v. Robertson, 38 Cal.2d 119, 125, 238 P.2d 982. This legislation was actuated by a recognition of the deleterious effect which such liens had upon property, which remained fallow, unimproved and unproductive, and completely sterile as a source of tax income to the community. See Rombotis v. Fink, supra. It would not be in furtherance of the legislative design to allow a lien-holder to sit back while a tax-title holder develops the property and renders it income-and-tax-productive by improvement or other means entailing the investment of funds, and then, by the grace of section 752, Code of Civil Procedure, to reduce his lien to a parity title and be permitted to partition and share equally in the increased value of the property. There would then be little incentive for one holding a tax title, with sufficient money only to improve the land but not to disencumber it, to invest his capital therein. The specter of such a lien-holder becoming, as here, a cotenant equally entitled to share in his labors would haunt and daunt him. While this is not the precise case before us, it is an analogous one, and from it should emerge the principle that one holding an after-acquired parity title who exercises the right of partition should be compelled to an equitable adjustment as between him and an earlier tax title holder whose expenditures in connection with the property redound to the common benefit. This would accomplish the ultimate objectives of preventing the accumulation of tax delinquent land in the hands of the taxing authorities and providing added incentive for the improvement and disencumbrance of such lands and making them positive contributors to the public revenue.

[9] Whether defendant is justified in its contention that it should be reimbursed for its costs (exclusive of attorney's fees) expended in the quiet title litigation against the County of Los Angeles is a question which is prematurely raised upon this appeal from the interlocutory judgment. That this item may, under proper circumstances, be legitimately apportioned between co-tenants is clearly recognized by section 798 of the Code of Civil Procedure which provides: "If it appear that other actions or proceedings have been necessarily prosecuted * * * by any one of the tenants in common, for the protection, confirmation, or perfecting of the title, * * * the court shall allow to the parties to the action, * * * all the expenses necessarily incurred therein, except counsel fees, which shall have accrued to the common benefit * * * and the same must be pleaded and allowed by the court, and included in the *final* judgment, * * *." (Italics added.) Thus, such an allowance, where proper, can only be awarded in the final judgment, and the court properly excluded such determination from its interlocutory order. Similarly, the cost of procuring a quitclaim deed from the record owner, if found to be a reasonable expense for the common benefit, can only be allowed upon final judgment. We may observe in passing, however, that we are unable to agree with plaintiff's argument that merely because the expenses were incurred prior to the existence of the tenancy in common between the parties, such expenses cannot be allowed. In the light of our previous discussion of the equitable and public policy considerations which should control an action of this nature, it is our conviction that the court's final determination should be based not on when these expenses were incurred but rather as to whether such expenses were reasonable, served to advance the purposes of the partition proceeding, and whether they were ultimately for the common benefit. It is a matter of widespread knowledge that tax titles of every character have been viewed with great distrust by potential buyers,—who all too frequently and rudely discover they have purchased little more than a lawsuit. Sheeter v. Lifur, 113 Cal.App.2d 729, 249 P.2d 336; 62 Harv.L.Rev., 93. The merchantability of a title and in consequence the price which will be paid for the property it represents is clearly enhanced by a quitclaim deed from the record owner of the premises as well as by the removal of claims which becloud the title. The court, in computing the quantum of the lien of each of the parties, upon the completion of the partition sale, should not be foreclosed from awarding to each

party such expenses in these respects as it may find were reasonably incurred in facilitating the saleability of the land and in assisting in securing a merchantable title to the ultimate purchaser.

[10, 11] The final question presented relates to the provision in the interlocutory decree awarding costs and authorizing fees for plaintiff's attorney. The court erred in so doing. The law is clearly established that costs or attorney's fees may not be allowed until the final judgment is entered and have no proper place in the interlocutory decree. Broome v. Broome, 179 Cal. 638, 645, 178 P. 525; Harrington v. Goldsmith, 136 Cal. 168, 170, 68 P. 594; Williams v. Wells Fargo Bank, 56 Cal.App. 2d 645, 652, 133 P.2d 73; 20 Cal.Jur. 639. In Broome v. Broome, supra [179 Cal. 638, 178 P. 528], it is stated that "the subject of fees and costs [is] to be determined by the final findings and judgment", and in Williams v. Wells Fargo Bank, supra [56 Cal.App.2d 645, 133 P.2d 77], the court states "that whether the services of the attorneys for either or both parties have been for the common benefit, and the reasonable value thereof is matter for determination at the conclusion of the litigation, at which time such fees may be specified and included in the final judgment." This long-entrenched point of law is in no whit altered by the case of Elbert, Ltd. v. Nolan, 32 Cal.2d 610, 197 P.2d 537. In that case, plaintiff brought an action for partition and declaratory relief. The court denied plaintiff's right to partition and rendered a *final judgment* quieting title in defendant subject to the lien of the unpaid amounts of plaintiff's bonds. Upon appeal, the court reversed, holding that plaintiff had the statutory right to bring a partition action. In further declaring plaintiff's rights, the court determined that plaintiff was entitled to reimbursement for costs of partition and attorney's fees. No question was involved as to the propriety of including such costs and fees in an interlocutory decree, and the decision, in directing the court to order a partition sale, in no way intimates that attorney's fees shall be awarded at any time other than in accord with the practice established by the cases previously cited.

For the reasons stated, the interlocutory judgment of partition and order of 'sale is modified by adding the sum of $238.58 to the amount of defendant's equitable lien therein decreed and striking therefrom the award to plaintiff of costs and counsel fees. As so modified, the judgment is affirmed. Each party to bear its own costs on appeal.

MOORE, P. J., and McCOMB, J., concur.

---

119 Cal.App.2d 210

ERICKSON v. WATER LAND TRUCK LINES et al.

Civ. 19449.

District Court of Appeal, Second District,
Division 1, California.
July 13, 1953.

Rehearing Denied July 30, 1953.

Hearing Denied Sept. 10, 1953.

Action by motorist against owner of tractor-trailer which was driven in opposite direction on highway for injuries received from collision occurring when driver of tractor-trailer was in process of overtaking and passing another vehicle traveling in his direction. The Superior Court, Los Angeles County, Joseph M. Maltby, J., entered judgment for owner of tractor-trailer and denied motion for new trial and motorist appealed. The District Court of Appeal, Scott, J. pro tem., held that giving of instruction embodying sections of Vehicle Code enumerating exceptions to rule that vehicles shall be driven on right side of roadway and providing that center white line of roadway is established marking indicating there should be no driving to left side thereof was not error.

Judgment affirmed; purported appeal from order dismissed.

1. Trial 🔑241

In action by motorist against owner of approaching tractor-trailer for injuries received from collision occurring when driver of tractor-trailer was in process of overtaking and passing another vehicle, giving of instruction embodying sections of Vehicle Code enumerating exceptions to rule that vehicle shall be driven on right half of roadway and providing that center white line of roadway is established marking indicating there should be no driving to left side thereof was not error. Vehicle Code, §§ 525(a), 525(a) (1), 525(b).

2. Trial ⟹295(1)

It is elementary that a judgment will not be reversed for error which can be found only by detaching a portion of a charge from the context, when such charge in its entirety fairly and correctly states the law.

◆

Harry A. Kaplan, San Pedro, and Wanzer & Litwin, Long Beach, by: W. O. Wanzer and Charles S. Litwin, Long Beach, for appellant.

Ball, Hunt and Hart, by: Clarence S. Hunt, Long Beach, for respondant.

SCOTT, Justice pro tem.

Plaintiff appeals from an adverse judgment following verdict of a jury in a personal injury case.

Plaintiff was driving her automobile west and defendant Petrillo was driving defendant corporation's tractor and semi-trailer east, both on Alameda Boulevard, in the Wilmington-Los Angeles Harbor area. It was on November 3, 1950, at about 4:30 o'clock P.M., daylight, weather clear, visibility good. The highway was 44 feet wide with four lanes of 11 feet each, two on each side of two solid white lines down the center. Each party produced evidence that the collision occurred on her or their respective side of the center double lines. There were no intersecting streets, private roads or alleys or lanes. At the time of the collision and immediately prior thereto defendants' vehicle was in the process of overtaking and passing another vehicle travelling in the same direction as defendants'.

[1] There is no claim that the evidence is inadequate to support the verdict. The sole ground of appeal is that toward the conclusion of the trial the court, at request of defendants, read to the jury a section based on section 525(a) of the Vehicle Code, with an addition thereto, all of which plaintiff, on this appeal, declares was prejudicially erroneous because it was not properly applicable to the facts, and confused and misled the jury. That instruction is as follows:

"Section 525, Vehicle Code, State of California, provides in part as follows:

"'(a) Upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway, except as follows:

"'(1) When overtaking and passing another vehicle proceeding in the same direction under the rules governing such movement.

"'(2) When placing a vehicle in a lawful position for and when such vehicle is lawfully making a left turn.

"'(3) When the right half of a roadway is closed to traffic while under construction or repair.

"'(4) Upon a roadway designated and signposted for one-way traffic.'

"A solid double white line painted along the center of a roadway is the established marking indicating that there shall be no driving to the left side thereof."

The court also read to the jury the following instruction which included subdivision (b) of section 525 of the Vehicle Code:

"Section 525(b) of the Vehicle Code of the State of California reads as follows:

"'The State Department of Public Works shall by regulation determine a distinctive roadway marking which shall indicate no driving over such marking, and is authorized either by such marking or by signs and markings to designate any portion of a state highway where the volume of traffic or the vertical or other curvature of the roadway renders it hazardous to drive on the left side of such marking or signs and marking. When such markings or signs and markings are in place, the driver of a vehicle shall not drive along the highway to the left thereof, but this shall not prevent turning to the left across any such markings at any intersection or private driveway.'

"You are further instructed that the State Department of Public Works, pursuant to this section of the Vehicle Code, has provided:

"'Article 2. "Distinctive Markings for State Highways indicating no driving to the left thereof.

"'"Section 1411. Said distinctive roadway marking is determined as the double line now in use on said highways. Said marking shall consist of two white stripes, or one white stripe and one yellow stripe, painted on the roadway, each stripe three inches wide, and the two stripes separated by a three-inch black stripe,

"'"Section 1414. Signs shall not be required in connection with said distinctive markings."'"

Plaintiff urges that in applying the instruction containing section 525(a) of the Vehicle Code the jury would disregard subsections 2, 3 and 4 as inapplicable under the evidence because neither vehicle was making a left turn, neither half of the highway was closed to traffic and it was not a one-way street. Going on from there she expresses her belief that the jury would consider subsection 1 of section 525(a) as authorizing defendants' tractor and semitrailer, while passing another vehicle, to drive to the left side of the highway, and since defendant driver was thus passing another vehicle, at and prior to the moment of impact, and plaintiff was not, this would tell the jury they could excuse defendants if their driver went over onto the left side of the road notwithstanding the double center line. But as noted above, following the reading of subsection (a) of section 525 of the Vehicle Code the instruction said:

"A solid double white line painted along the center of a roadway is the established marking indicating that there shall be no driving to the left side thereof."

It would credit jurors with less than average understanding to assume that they were confused or misled by the challenged instruction. The instructions as a whole were clear, correct and comprehensive, although it is true that some part of the particular instruction might have been modified.

[2] "It is elementary that a judgment will not be reversed for error which can be found only by detaching a portion or portions of a charge from the context, when such charge in its entirety fairly and correctly states the law." Lund v. Pacific Elec. R. Co., 25 Cal.2d 287, 294, 153 P.2d 705, 708. Similarly, in Shuey v. Asbury, 5 Cal.2d 712, 713, 55 P.2d 1160, 1161, it is stated: "* * * a judgment will not be reversed by reason of an erroneous instruction, unless upon a consideration of the entire case, including the evidence, it shall appear that such error has resulted in a miscarriage of justice. The usual consequence is that there will be no cause for reversal unless the evidence indicates that without such error in the instructions the verdict probably would have been different from the verdict actually returned by the jury."

We have considered the cases cited by plaintiff as supporting her contention that the one instruction was improper. But the instant case is one in which where all the instructions, considered and construed as a whole, can be resolved into a correct and harmonious statement of the law.

We find no adequate support for plaintiff's claim of error.

Judgment affirmed. The purported appeal from order denying motion for new trial is dismissed.

WHITE, P. J., and DORAN, J., concur.

119 Cal.App.2d 478

MARIANI v. STEELE et al.

Civ. 19687.

District Court of Appeal, Second District, Division 1, California.
Aug. 3, 1953.

Purchaser of lots brought action against vendor to recover purchase price because it turned out that there was a judgment lien on lots and lots were sold at execution sale. The Superior Court of Los Angeles County, A. A. Scott, J., entered judgment for vendor, and purchaser appealed. The District Court of Appeal, Drapeau, J., held that findings in favor of vendor found substantial support in the evidence.

Judgment affirmed.

1. Appeal and Error ⟹996

Where two or more inferences can be reasonably deduced from facts, reviewing court is without power to substitute its deductions for those of trial court.

2. Vendor and Purchaser ⟹341(3)

In action by purchaser of lots against vendor to recover purchase price because it turned out that there was a judgment lien on lots and lots were sold at execution sale, wherein vendor contended that she did not know about judgment lien at time of sale, and that after discovering existence of lien she offered to return purchase price to purchaser, if he would reconvey lots to her, but that he refused because he wished to take the chance of keeping the lots, evidence sustained finding in favor of vendor.

◆

Ben C. Cohen and Alfred Lubin, Los Angeles, for appellant.

Myron W. Silverton, Los Angeles, for respondents.

DRAPEAU, Justice.

Plaintiff, Ralph Mariani, purchased two city lots from defendant, Nona H. Steele, for $2,500. They did not put the deal through escrow and have the title searched and insured. Plaintiff paid the money and took delivery of the deed.

Mrs. Steele testified:

"A. Mr. Mariani told me he made a loan on those there lots without going into escrow and that paved the way to save that expense. He didn't want to pay it and he had just Jewed me down to $2500.

"Q. Did you tell him not to go into escrow at any time?

"A. No, he said he didn't want to."

Mr. Mariani testified that he figured out himself the property must be clear "and went through with the deal."

But, like the girl who counted her chickens before they were hatched, Mr. Mariani's figuring wasn't so good. For a few days after the deed was delivered he received a title report, with the information that there was a judgment lien upon the property.

The judgment had been rendered when the title was in a Mrs. Starr. Thereafter Mrs. Starr conveyed to Mrs. Steele, to avoid foreclosure of a trust deed securing a loan from Mrs. Steele to Mrs. Starr.

The judgment was not only against Mrs. Starr, but against Mr. Mariani as well. Mr. Mariani admitted that he knew about the judgment. The execution had been levied against his interest in the property and Mrs. Starr's. The execution and the marshal's certificate of sale thereunder had been recorded in the office of the county recorder before Mrs. Steele conveyed to Mr. Mariani.

Eventually Mr. Mariani was evicted from the premises by the record owner under the execution sale.

Then Mr. Mariani sued Mrs. Steele for the purchase price of the lots.

It is unnecessary to discuss the rights of the other party defendant named in the amended complaint, Alfred Keizer. His only connection with the case is that he owned for a time other property in which Mrs. Steele had a beneficial interest.

Issues were tried without a jury, findings and judgment were for defendants, from which judgment plaintiff appeals.

Mrs. Steele testified that prior to Mr. Mariani's purchase she did not know of the judgment lien; also that after Mr. Mariani's "discovery" of it, she offered to "undo the deal" with him.

She said:

> "A. I told him we would undo that deal. I said, 'You return the lots and I will return you your money,' and then he laughed and he said, 'Oh, it is nothing to worry about,' and he said that his attorney told him that the filing of that paper, whatever it was, didn't mean a thing and he needn't pay any attention to it. He said, 'Why, they can't do a thing.' That is what he told me.
>
> "Q. Did you offer to return him any money at that time if he would give you the lots back? A. I told him he would get his money back and the cost of the transfer would be paid by me.
>
> "Q. What, if anything, did he say to your offer to return the money? A. He said he wanted to keep the lots; he would take the chance."

Mrs. Steele finally offered Mr. Mariani $4,000; but he said he wanted $4,000 and would keep the lots too.

The trial judge pertinently summed up the case when he told plaintiff it would have been better for him to have kept his conscience clear; that he had tried to take advantage of a woman 94 years of age, who couldn't see very well; and that, in any event, the judge believed defendant's version of the transaction and not plaintiff's.

Whether Mr. Mariani had been damaged in the sum of $2,500, or whether there was a failure of consideration and unjust enrichment of Mrs. Steele, or whether there was a mutual mistake of fact as to the title, liens and encumbrances concerning the property all were questions of fact submitted to the trial judge for decision.

[1] It is the traditional rule in this state that when two or more inferences can be reasonably deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. Crawford v. Southern Pac. Co., 3 Cal.2d 427, 429, 45 P.2d 183; In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689.

Plaintiff relies upon Lenchner v. Chase, 98 Cal.App.2d 794, 220 P.2d 921, and Moore v. White, 98 Cal.App.2d 510, 220 P.2d 918. Neither case is in point here, for the reason that the evidence in both cases was uncontradicted, and no completed sale of property was involved.

[2] The findings find substantial support in the evidence, and the judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

119 Cal.App.2d 239

SASSER v. MILES & SONS TRUCKING SERVICE et al.

Civ. 15375.

District Court of Appeal, First District,
Division 2, California.

July 20, 1953.

Hearing Denied Sept. 17, 1953.

Personal injury action by truck driver against employers. The Superior Court in and for the County of Santa Clara, Leonard R. Avilla, J., sustained demurrer to third amended complaint without leave to amend, and trucker appealed. The District Court of Appeal, Goodell, J., held that driver, who was injured when employers' truck allegedly left road because of defective condition of truck and driver's excessive fatigue for which employers were allegedly responsible, who sought to recover compensation proper through Industrial Accident Commission and exemplary damages through the civil courts, and who waived issue of compensatory damages in his civil action against employer, could not recover exemplary damages in such civil action.

Judgment affirmed.

1. Damages ⚷87(2)

Where actual damages are not alleged, are alleged but not proved, or are waived, there is no basis for computation of exemplary damages. Civ.Code, § 3294.

2. Workmen's Compensation ⚷2084

Remedy provided by Workmen's Compensation Act is exclusive of all other statutory or common-law remedies.

3. Master and Servant ⚷282

Driver, who was injured when employers' truck allegedly left road because of defective condition of truck and driver's excessive fatigue for which employers were responsible, who sought to recover compensation proper through Industrial Accident Commission and exemplary damages through the civil courts, and who waived issue of compensatory damages in his civil action against employer, could not recover exemplary damages in such civil action. Civ.Code, §§ 3294, 3534; Public Utilities Code, § 2106.

◆

Emmett R. Burns, Edward A. Friend, San Francisco, for appellant.

Mullen & Filippi, San Francisco, for respondent.

GOODELL, Justice.

In this action for personal injuries a demurrer to plaintiff's third amended complaint was sustained without leave to amend and this appeal followed.

The partnership business of defendants is a public utility engaged in hauling. Plaintiff was employed as the operator of one of its tractors at the time of his injuries on March 22, 1951.

The complaint alleged that just before the accident he had been compelled by his employers' orders to drive for them continuously for 38 hours without sleep or rest; that the tractor shimmied so badly that it was difficult to hold it on the road; that seven other drivers had, on the night in question refused to drive it; that because of its defective condition and plaintiff's excessive fatigue it ran off the road at the overpass at the intersection of Bayshore Boulevard and the old Monterey Highway.

It alleged on information and belief that respondents on this occasion wilfully violated provisions of the vehicle code and safety rules and regulations of the Public Utility Commission, including General Order 93-A.

It alleged that plaintiff not only sustained serious injuries but lost his job with defendants and was out of work for a considerable time as a result of the accident.

The prayer was for $50,000 "as and for exemplary damages", and costs.

Defendants demurred on the general ground, and on the ground that jurisdiction was vested exclusively in the Industrial Accident Commission. There was a special demurrer as well.

Appellant asserts that the complaint is sufficient since it shows that defendants wilfully violated laws and regulations governing public utilities, and that he was injured because of such violations. From these premises he argues that he has a specific statutory right of action under § 2106 of the Public Utility Code which reads:

"Any public utility which does, causes to be done, or permits any act, matter, or thing prohibited or declared unlawful, or which omits to do any act, matter, or thing required to be done, either by the Constitution, any law of this State, or any order or decision of the commission, shall be liable to the persons or corporations affected thereby for all loss, damages, or injury caused thereby or resulting therefrom. If the court finds that the act or omission was wilful, it may, in addition to the actual damages, award exemplary damages. An action to recover for such loss, damage, or injury may be brought in any court of competent jurisdiction by any corporation or person. * * *"

The complaint contains the following waiver: "That plaintiff, although he has been seriously injured by reason of the premises heretofore alleged, waives all claim to compensatory damages in this action, preserving, however, his right to recover compensatory damages in any other proceeding that may be authorized by law."

Appellant contends that he "has a specific statutory right to recover exemplary damages" and that "The remedy afforded by the Industrial Accident Commission is exclusive as to compensatory damages only and not as to exemplary damages."

This position completely divorces exemplary damages from compensatory damages.

Section 3294 Civil Code provides that in certain actions "the plaintiff, *in addition to the actual damages,* may recover damages for the sake of example and by way of punishing the defendant." (Emphasis added.) Section 2106 adopted the language just emphasized.

In Pickwick Stages Northern Division v. Board of Trustees, 54 Cal.App. 730, 731, 215 P. 558, the court stresses this language saying: "Concededly there could be no recovery of exemplary damages in the absence of a showing that actual damages had been suffered." It is only natural that judicial decisions should draw attention to the words *"in addition to* the actual damages" since they tell the whole story. In Leavitt v. Gibson, 3 Cal.2d 90, 108, 43 P.2d 1091, the court speaks of the language of § 3294 as "too simple and clear to require interpretation * * * The object of the statute is plainly twofold."

Appellant has produced no case holding that exemplary damages are recoverable as matter of right or in the absence of a showing of actual damages, and the authorities hold directly to the contrary. Clark v. McClurg, 215 Cal. 279, 282, 9 P.2d 505, 506, 81 A.L.R. 908, does so in so many words. It holds also that exemplary damages "are mere incidents to the cause of action and can never constitute the basis thereof."

Appellant's contention really comes to this: that he can recover his compensation proper through the Industrial Accident Commission and at the same time recover exemplary damages through the civil courts.

In Alaska Packers Ass'n v. Industrial Acc. Comm., 200 Cal. 579, 583, 253 P. 926, 928, the court said: "The California Workmen's Compensation Act * * * substitutes a new system of rights and obligations for the common-law rules governing the liability of employers for injuries to their employees. [Citation.] When the specified conditions exist, *the remedy provided by the act is exclusive of all other statutory* or common-law *remedies.* [Citation.]" (Emphasis added.) Later cases are Freire v. Matson Navigation Co., 19 Cal.2d 8, 10, 118 P.2d 809; Baugh v. Rogers, 24 Cal.2d 200, 207, 148 P.2d 633, 152 A.L.R. 1043; Burton v. Union Oil Co., 129 Cal.App. 438, 19 P.2d 9; Buttner v. American Bell Tel. Co., 41 Cal.App.2d 581, 107 P.2d 439, and Jiminez v. Liberty Farms Co., 78 Cal.App.2d 458, 459, 177 P.2d 785.

Workmen's Compensation legislation within its own structure provides in Labor Code § 4553, for "additional compensation", (see E. Clemens Horst Co. v. Industrial Acc. Comm., 184 Cal. 180, 193, 193 P. 105, 110, 16 A.L.R. 611, where an employee has been injured by his employer's "serious and willful misconduct".

A situation somewhat similar to this (where, however, no independent statute such as § 2106 Pub.Utility Code was involved) was before this court in Law v. Dartt, 109 Cal.App.2d 508, 240 P.2d 1013, 1014, where the plaintiff's second cause of action in the Superior Court was "based on the alleged malicious misconduct of defendant in permitting plaintiff to work on the machine without proper instruction or guidance." We held that § 4553 of the Labor Code was the measure of the employee's recovery for his employer's serious and wilful misconduct. In the instant case appellant concedes that the Labor Code is exclusive as to normal or basic compensation; consistently with our holding in the Dartt case, we must hold that the Labor Code is exclusive also as to "additional compensation" arising from serious and wilful misconduct of the employer.

The waiver in the complaint completely removed the issue of compensatory damages from the case and left the plaintiff with no pleading upon which a finding or verdict for actual damages could have been based. Had the plaintiff attempted to prove actual damages he would have been halted by the objection that there was no such issue. He would have found himself ultimately in the same situation as if he had alleged actual damages but failed to prove them. Such was the case in Mother Cobb's Chicken Turnovers v. Fox, 10 Cal.2d 203, 73 P.2d 1185, where the trial court found that there were no actual damages, and in Haydel v. Morton, 8 Cal.App.2d 730, 48 P.2d 709, where the verdict for exemplary damages was not based on actual damages. See, also Pickwick Stages Northern Division v. Board of Trustees, supra, and Chavez v. Times-Mirror Co., 72 Cal.App. 694, 697, 237 P. 1085.

In the Fox case [10 Cal.2d 203, 73 P.2d 1136], the court quoted from Gilham v. Devereaux, 67 Mont. 75, 214 P. 606, 33 A.L.R. 381, 382–383, as follows: "The foundation for the recovery of punitive or exemplary damages rests upon the fact that substantial damages have been sustained by the plaintiff. Punitive damages are not given as a matter of right, nor can they be made the basis of recovery independent of a showing which would entitle the plaintiff to an award of actual damages. Actual damages must be found as a predicate for exemplary damages. This is the rule announced in many authorities. * * *" The court added: "This case has been cited with approval in this state in Clark v. McClurg, 215 Cal. 279, 9 P.2d 505, 81 A.L.R. 908; Haydel v. Morton, 8 Cal.App.2d 730, 48 P.2d 709, 712, and in Chavez v. Times-Mirror Co., 72 Cal.App. 694, 697, 237 P. 1085. In Haydel v. Morton, supra, the most recent of the cited cases, the jury returned a verdict for plaintiff in an action for slander in the following form: 'We the jury find a verdict for the plaintiff and against the defendant on said count and assess the compensatory damages in the sum of $00; we assess the exemplary damages at $10,000; making a total verdict for the plaintiff in the sum of $10,000.' The appellate court reversed the judgment based on this verdict, citing Gilham v. Devereaux, supra, and Clark v. McClurg, supra."

Other cases on the subject are Brewer v. Second Baptist Church, 32 Cal.2d 791, 800, 801–802; 197 P.2d 713; Warfield v. Krueger, 96 Cal.App. 671, 673, 274 P. 764; Rosenberg v. J. C. Penney Co., 30 Cal.App.2d 609, 628, 86 P.2d 696; Birch Ranch & Oil Co. v. Campbell, 43 Cal.App.2d 624, 628, 111 P.2d 445; Oppenheimer v. Deutchman, 104 Cal.App.2d 165, 166, 230 P.2d 873, 874. In the last-cited case (hearing denied) it is said: "As no actual damage is alleged, no award of punitive or exemplary damages could be made." (Citing Penney and McClurg cases, supra.)

[1] It is self-evident that in a case where no actual damages are alleged, or where they are alleged but not proved, or where—as in this instance—they are waived, there is no basis for the computation of exemplary damages. See Plotnik v. Rosenberg, 55 Cal.App. 408, 203 P. 438; Wilkinson v. Singh, 93 Cal.App. 337, 345, 269 P. 705.

[2, 3] Appellant cites § 3534 Civil Code which provides that "Particular expressions qualify those which are general", and argues therefrom that the provisions of § 2106 override the general provisions of the Labor Code. He argues, further, that the parent section of § 2106 was enacted earlier than the Workmen's Compensation Act. We see no reason to go into these questions in view of the settled line of authority already cited and of the several pronouncements of the Supreme Court that "the remedy provided by the act is exclusive of all other *statutory* or common-law remedies." Alaska Packers Ass'n v. Industrial Acc. Comm., 200 Cal. 579, 583, 253 P. 926, 928, supra; Baugh v. Rogers, 24 Cal.2d 200, 207, 148 P.2d 633, 152 A.L.R. 1043, supra (Emphasis added.)

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

119 Cal.App.2d 551

PEOPLE v. ERKINGER.

Cr. 5028.

District Court of Appeal, Second District, Division 2, California.

Aug. 6, 1953.

Prosecution for pilfering billfold from woman's purse in darkened theater. The Superior Court, County of Los Angeles, Edwin L. Jefferson, J., entered judgment of conviction, and defendant appealed. The District Court of Appeal, Moore, P. J., held that the evidence supported the conviction.

Affirmed.

1. Larceny 🔑55

Evidence supported conviction for pilfering billfold from woman's purse in darkened theater.

2. Criminal Law 🔑1144(13)

Evidence must be considered in light most favorable to judgment.

3. Criminal Law 🔑1159(2)

It is not function of appellate court to determine weight of evidence, but its task is to determine whether, upon consideration of evidence as recorded, sufficient facts could not have been found by jury to warrant inference of guilt.

4. Criminal Law 🔑1159(2)

Before judgment in criminal action can be reversed, it must be made clear that upon no hypothesis whatever is there sufficient substantial evidence to support conclusion of trial court.

5. Criminal Law 🔑1160

After fact finder in first instance has determined guilt of defendant, and trial court has found no reason for granting new trial, if there is adequate evidential support, reviewing court is powerless to interfere with judgment.

6. Criminal Law 🔑1159(2)

Testimony that witness had seen defendant pilfer billfold from woman's purse in darkened theater, notwithstanding obstruction of view of purse by seat backs and coats thrown over arm separating seats was not so inherently improbable as to require reversal of conviction, in view of fact that testimony accorded with well-known laws governing human conduct and with known behavior of pilfering persons.

7. Criminal Law 🔑562

Where testimony in criminal trial accords with facts established by other proof or with well-known physical laws or laws governing human conduct, it is not inherently improbable but affords substantial evidence of the crime.

◆

Nathan H. Snyder and Abraham Gorenfeld, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Alan R. Woodard, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Wearing a sport shirt and carrying his coat over his arm, appellant entered the balcony of a theater on Hollywood Boulevard in Los Angeles about nine o'clock in the evening. It was the last day of August, 1952. As he entered from the west side of the upper balcony, he glanced up and then looked to the lower floor. Starting across the main aisle dividing the two sections of the balcony, he looked about and proceeded toward the back where he occupied the ninth seat from the aisle in the third row. He sat looking at the people in all directions for about three minutes. Then he arose, still carrying his coat, walked eastward and down the main aisle toward the west end of the balcony. There he occupied a seat about seven rows from the front and gazed about him, paying no attention to the picture. As he sat, his head moved from side to side, only at times toward the front although the screen was directly before him. Following a three-minute intermission, defendant arose, proceeded down the main aisle, crossed the balcony to its east entrance and turned his gaze backward toward the audience. As the house lights were dimmed and the screen was again illuminated, appellant crossed the balcony to its west entrance. In doing so, he looked both downward into the loge section and up into the general admission area. On arriving at the west entrance, he turned, walked back toward the east side of the balcony to its fourth aisle from the west end and entered a row in the loge section in which no other person was seated. He occupied a seat behind and to the right of the witness, Mrs. Tobey, whose husband sat on her left. Her coat was on the seat to her right and her purse was beneath it. Removing his own coat from his arm, appellant draped it over the seat upon which lay the coat and purse, and sat down. He then withdrew a cigarette from his pocket and on putting it into his mouth he leaned over, extending both hands to his coat as if in the act of searching for a match. But his hands went further. They reached under Mrs. Tobey's coat and to her purse which he opened. He picked out the billfold and brought it up under his coat. He then started out of the aisle toward the west side of the balcony, continued to the main aisle and directed his course to the east entrance. During such movements he kept his coat over his arm with both hands thereby concealed. But as he approached the exit, he began to don his coat.

Just then, police officer Boardman who served as house detective and who had observed every movement of appellant in the theater, placed him under arrest. Instantly appellant turned and threw away the billfold which fell in the loge section of the balcony. After the officer searched his quarry for arms, he applied handcuffs and escorted the unfortunate man to the office of the theater. There a uniformed policeman guarded the prisoner while officer Boardman returned to the balcony for Mrs. Tobey. On learning of the absence of her wallet, she accompanied the officer to the office where he searched appellant. Not finding the billfold on appellant's person, the officer returned to the balcony. By inspecting the floor of the loge he retrieved the wallet which the lady identified in the presence of the two officers and her husband as the one that had been in her purse in the balcony. When told by the officer that the latter had seen him remove the billfold from the purse, appellant denied having any knowledge of it whatsoever.

Mrs. Tobey testified that she had given no one permission to remove her billfold from her purse and that the one recovered by the officer was her own.

[1] The sole ground for appeal is that the testimony of officer Boardman was inherently improbable. The improbability urged by appellant lies in his claim that although the officer was seated six or eight feet to the left of appellant with his vision obstructed by Mr. and Mrs. Tobey, he could see appellant extract a billfold from a pocketbook lying on the seat to the right of Mrs. Tobey and covered by the coats of Mrs. Tobey and appellant. He argues that in order to see appellant extract an object so slight, it would have been necessary "for appellant to lean forward and bring his hand over the back, down to the bottom of the seat on which the purse was placed. * * * This area was obstructed by Mr. and Mrs. Tobey, the two coats and the back of the seat itself." Such contention ignores other important evidence as well as ordinary and reasonable inferences to be drawn from established facts. Mrs. Tobey's billfold was in her purse; it was removed without her consent; the officer observed appellant lean over the seat, take something from beneath her coat; make his retreat to the exit; and, when arrested, throw the object into a loge. Therefore, whether the officer's eye detected the color or size of the billfold at the very instant it was being moved from the purse is not important. The fact of appellant's being in the immediate presence of the billfold, his leaning forward, placing his hand beneath the lady's coat, his immediate departure from the place where he had sat, his subsequent movements and arrest and his casting the stolen wallet to the floor, are sufficient facts to justify the finding of his guilt.

[2-5] Evidence must be considered in the light most favorable to the judgment. It is not the function of the appellate court to determine the weight of evidence. Its task is to determine whether, upon a consideration of the evidence as recorded, sufficient facts could not have been found by the jury to warrant the inference of guilt. Before the judgment in a criminal action can be reversed, it must be made clear that upon no hypothesis whatever is there suffi-

cient substantial evidence to support the conclusion of the trial court. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778. After the fact finder in the first instance has determined the guilt of the defendant and the trial court has found no reason for granting a new trial, if there is adequate evidential support the reviewing court is powerless to interfere with the judgment. People v. Kristy, 111 Cal.App.2d 695, 698, 245 P.2d 547.

Appellant cherishes a restricted view of the significance of what is "inherently improbable." The word probable is from the Latin verb *probare,* meaning to prove. Hence, probable is provable. If a proposition is probable, it is likely to be true or real. Webster's New International Dictionary. If it is probable, it is credible; such as to commend itself to the mind. Oxford English Dictionary.

[6, 7] To claim that the testimony of the police officer is "inherently improbable" is to disregard all inferences reasonably to be drawn from his observations. To say that a sworn statement is inherently improbable would mean that it is wholly unacceptable to reasonable minds. Kircher v. Atchison, Topeka & Santa Fe Railway Co., 32 Cal.2d 176, 183, 195 P.2d 427. But the officer's testimony is readily reconcilable with (1) the known behavior of pilfering persons who roam about in the nighttime where people congregate, (2) the known conduct of thieves who use devices to cover the objects of their immediate desires, (3) the incontrovertible facts that appellant threw the wallet into a loge and that Mrs. Tobey had not given permission to have it removed from her purse, (4) the experience of officers in detecting the aims of prowlers and in observing their movements, (5) the inferences that the apparently purposeless movements of a man's walking from aisle to aisle and from row to row of seats in a theater until he finally comes to rest behind the chair on which a lady has placed her purse and her outerwrap, (6) the act of appellant in ostensibly searching for a match in his own coat pocket when he reaches all the way down to the purse concealed by the wraps. Where the testimony of a witness in a criminal trial accords with facts established by other proof or with well known physical laws or laws governing human conduct, then it is not inherently improbable but it affords substantial evidence of the crime. See Corcoran v. Ward, 115 Cal.App. 180, 185, 1 P.2d 455.

The judgment and the order denying the motion for a new trial are affirmed.

McCOMB and FOX, JJ., concur.

STAFFORD v. SHULTZ et al.*

Civ. 19539.

District Court of Appeal, Second District,
Division 2, California.

July 21, 1953.

Rehearing Denied Aug. 21, 1953.

Hearing Granted Sept. 17, 1953.

Action against physicians for allegedly negligent treatment of wounded leg. The Superior Court, Los Angeles County, Philbrick McCoy and Roy L. Herndon, JJ., sustained demurrers to amended complaint and entered judgments of dismissal, and plaintiff appealed. The District Court of Appeal, Moore, P. J., held that complaint showed that action was barred by one-year statute of limitations and that allegation that timely commencement of action was prevented by fraudulent concealment by defendants of their knowledge of plaintiff's true condition was insufficient to avoid bar of limitations.

Judgments affirmed.

1. Limitation of Actions 🔑31

Causes of action against physicians for damages arising from allegedly negligent treatment of wounded leg more than one year before commencement of action were barred by one-year statute of limitations. Code Civ.Proc. § 340, subd. 3.

2. Limitation of Actions 🔑55(1)

A cause of action for tort accrues on the day the wrong is done. Code Civ.Proc. §§ 335, 340, subd. 3.

---

* Subsequent opinion 270 P.2d 1.

3. Limitation of Actions ⚿192(3)

Allegation that prompt commencement of action against physicians for allegedly negligent treatment of wounded leg more than one year before commencement of action was prevented by fraudulent concealment by defendants of their knowledge as to true condition of plaintiff was insufficient to avoid bar of one-year statute of limitations, in view of other allegations showing that throughout first year following injury plaintiff had knowledge sufficient to put him on notice that something was preventing proper recovery and had been given full information concerning his condition approximately six months after injury and more than one year before complaint was filed. Code Civ.Proc. §§ 335, 340, subd. 3.

4. Limitation of Actions ⚿100(13)

Where patient, suing physicians for allegedly negligent treatment of wound more than one year before commencement of action, had means of gaining all available knowledge of the true status of wound and had notice of its aggravated condition, he could not avoid the bar of one-year statute of limitations by merely pleading that he was deceived by statements of defendants. Code Civ.Proc. §§ 335, 340, subd. 3.

5. Limitation of Actions ⚿95(1)

Patient, having knowledge of such a character as would reasonably cause him to make a diligent investigation which would have revealed all knowledge and acts of physicians with reference to his injury, was charged with having discovered such knowledge and acts of physicians as of the time he would have discovered them by the exercise of reasonable diligence in making his investigation.

◆

Elsan H. Stafford, in pro. per.

Fulcher & Wynn, Los Angeles, by Chas. E. R. Fulcher, Los Angeles, for respondents Ellwood L. Shultz and Woodrow Meier.

Highsmith & Allen, by John C. Allen, Los Angeles, for respondents John D. Gillis, Elizabeth Kelpien and William Kelpien.

Bauder, Gilbert, Thompson & Kelly, Los Angeles, for respondent Arthur Ferree.

MOORE, Presiding Justice.

General demurrers having been sustained to the fifth amended complaint, judgments of dismissal were entered from which comes this appeal.

The substance of the voluminous complaint is that appellant accidentally shot a bullet into his left leg, eight inches above the knee, February 25, 1949, and on the same day came under the care of respondents Shultz, Meier and Ferree and was confined to an emergency hospital until March 6. During his nine days' treatment at such hospital, the last named respondents discovered that the bullet had damaged the popliteal artery and severed the sciatic nerve. They removed the bullet and the damaged portions of the artery but made no effort to repair the injured artery or the nerve. They did give him blood transfusions, sedatives and injections of penicillin and kept the wounded member in dressings and in ice packs. But it remained "considerably extended by reason of neglect of said defendants to remove said accumulated blood."

On March 6 he was transferred to the Beverly Hospital in Montebello where respondents Kelpien assumed and continued the care and treatment of him until March 29. They did not know of the infection in the wound and neglected to take additional X-ray pictures. On the last named date appellant was removed to the Good Samaritan Hospital and respondent Gillis took charge and treated the injured limb until April 12 when appellant was discharged. While he was at the Good Samaritan, Dr. Gillis made incisions in the calf of the left leg and removed 500 cubic centimeters of old blood clots and pus, but neglected to take any X-ray pictures or to repair the damaged popliteal artery or sciatic nerve. On leaving the Good Samaritan he again went under the care of Shultz, Meier and Ferree until September 2, 1949. During that four and two thirds months, those doctors took only one X-ray of the wound, on May 5, but they administered sedatives and penicillin while pus continued to drain, and appellant ran a temperature, had chills and was delirious.

On September 2, 1949, Dr. Gillis advised appellant that his leg would never be of any benefit; his health was endangered and the leg should be amputated. Appellant having consented, the left leg was removed on September 22 by Dr. Gillis, but "with the application of the proper knowledge and skill said left leg could still [have] been saved and have been of use and benefit." Defendants led plaintiff, during all such time and treatment, to believe that the left leg would be cured. But not until August 2, 1950, did plaintiff learn material facts from other parties which caused him to make an investigation.

On that day the State Compensation Insurance Fund served on plaintiff copies of reports made by defendants Shultz, Meier, Ferree and Gillis. It was learned therefrom that the bullet had damaged the popliteal artery; that ostitis, periostitis and osteomyelitis had already infected the bones on May 5, 1949; that on September 16, 1949, infection had spread throughout the tibia and fibula, and the lower half of the femur.

By his second count appellant pleads the same facts with the additional charge and allegations that respondents fraudulently concealed their knowledge of his true condition at all times and prevented his prompt action to institute an action for damages. But from any view taken, as will subsequently appear, the action is barred by the provisions of section 340(3)[1], Code of Civil Procedure.

[1, 2] The first count is clearly barred. Respondents Shultz, Meier and Ferree served the first nine days after the injury while appellant was in the emergency hospital when examinations, blood transfusions and sedatives were administered. If they did, or omitted to do anything to prevent the recovery of the injured leg, such negligence was not less than one year and six months prior to the filing of the action on September 12, 1950. They served him again from May 5, 1949, to September 2, 1949. The treatment administered by all other defendants occurred prior to the latter date. If within that period any of the defendants had been negligent in their treatment of him, such negligence could not have been less than one year and ten days prior to the filing of the action. The first count is barred by the plain letter of the statute for the reason that any cause of action for a tort accrues on the day the wrong is done. Harding v. Liberty Hospital Corporation, 177 Cal. 520, 524, 171 P. 98; Jefferson v. Kenoss, 38 Cal.App.2d 496, 503, 101 P.2d 711. If the period of limitations cannot begin to run until the tort occurs, Mohn v. Tingley, 191 Cal. 470, 474, 217 P. 733, then it must commence on the day of the tort. And if a year elapses before action is filed, it is barred.

[3] Appellant asserts that if perchance the first count of his fifth amended complaint is demurrable under the plain reading of the statute, his second count is secure by virtue of the allegation of the fraudulent concealment of his condition, which the defendants well knew and of which he was ignorant. However, appellant omits to point out his allegation that "on September 2, 1949, he was informed by defendant Gillis as follows: that said left leg would never be of any material use and benefit to plaintiff; that plaintiff's general health was gravely endangered and would continue to be so endangered by reason of the condition of said left leg; that said left leg should be amputated. That plaintiff then believed and relied upon the truth of said information. That thereupon plaintiff became interested in saving his life and lost interest in saving his left leg." It is thus

---

[1] Code of Civil Procedure, Sec. 335: "The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows:

"§ 340. Within one year:

* * * * *

"3. An action for libel, slander, assault, battery, false imprisonment, seduction of a person below the age of legal consent, or for injury to or for the death of one caused by the wrongful act or neglect of another, or by a depositor against a bank for the payment of a forged or raised check, or a check that bears a forged or unauthorized indorsement * * *."

seen by appellant's allegation that he knew all the facts concerning his condition at least one year and ten days prior to the filing of his complaint and therefore no concealment of facts alleged could have been the cause of delay beyond the date on which Gillis imparted to appellant full knowledge of the latter's true condition.

As to Shultz, Meier and Ferree, the complaint alleges that during their first ten days of service prior to March 6, 1949, they represented to plaintiff that they severed and ligated only one branch of the popliteal artery; that it was not necessary then to repair and restore the damaged artery or the severed sciatic nerve to effect a cure; that the accumulated blood in the tissues would be absorbed by natural process. As to Kelpien and Kelpien, the complaint alleges that they represented that they knew the facts of his case; knew the condition of the leg without taking X-ray pictures; they would effect a cure; it was not necessary to repair the artery or the sciatic nerve to effect a cure; the blood in the tissues would be absorbed; proper measures were being taken to guard against infection. But all their services preceded the disclosure to appellant of the leg's true condition by Dr. Gillis on September 2, 1949.

As to Dr. Gillis, the pleading sets forth substantially the same allegations of "representations" made with respect to the Kelpiens, and that all the clotted blood and pus would drain from the incisions. He alleges all such representations were believed and relied upon; if he had known the falsity of the aforesaid representations he would have required the services of competent physicians and surgeons to treat his injured leg, and would have commenced this action well within one year of the commission by the defendants of their negligent acts described in count one.

[4] Such allegations are not sufficient. Appellant had knowledge throughout the first year of his injury sufficient to put him on notice that something was preventing his recovery; for example, the removal prior to April 12, 1949, of 500 cubic centimeters of old blood and pus. Since he had means of gaining all available knowledge of the true status of his wound and had notice of its aggravated condition, he cannot avoid the force of the statute of limitation by merely pleading that he was deceived by the statements of the defendants. Lady Washington Consolidated Company v. Wood, 113 Cal. 482, 487, 45 P. 809.

[5] In his attempt so to plead as to avoid the statute, appellant alleges that on September 2, 1949, Gillis told him that the left leg would never be of use again; that it gravely endangered and would continue to imperil his general health and that it should be amputated. Obviously he relied upon that advice for on the twentieth day thereafter Dr. Gillis removed the offending member. Now, such information imparted to appellant six months and seven days after the accident, by his physician in whose judgment he placed reliance, disposes of all contentions that appellant was prevented from filing his action by the fraudulent concealment of defendants. His reading on August 2, 1950, the reports of defendants filed with the Insurance Fund and his learning therefrom the knowledge of defendants concerning the fatal condition of his wound added nothing to the opinion of Dr. Gillis on September 2, 1949, when he advised that the leg would never be of use again. If a true knowledge of the steady deterioration of his wound was essential to the filing of an action, appellant was fully advised by Dr. Gillis after which he deferred his filing for a year and ten days. By reason of the fact that appellant had knowledge of such a character as would reasonably cause him to make a diligent investigation that would, in turn, have revealed all knowledge and acts of the defendants with reference to his injury, he is charged with having discovered the alleged fraud "as of the time he would have discovered it" by the exercise of reasonable diligence in making his investigation. Consolidated R. & P. Co. v. Scarborough, 216 Cal. 698, 704, 16 P.2d 268, 270. The second count is insufficient in that it distinctly fails to allege any facts showing why appellant did not make such investigation at an earlier date "and, if sooner made, why it would not have disclosed the fraud prior to the running of the period of limi-

tations." Ibid. Merely because the diagnoses of defendants were secreted in their own minds prior to Dr. Gillis' prognosis on September 2, 1949, appellant was not thereby relieved of the operations of the rule of pleading with reference to the tolling of the statute of limitations. See Crabbe v. White, 113 Cal.App.2d 356, 360, 248 P.2d 193.

Inasmuch as there is no allegation that either of the firms of physicians involved was the agent of the other or of Dr. Gillis, or that he was agent of any one of the five others who participated in the treatment of appellant, it cannot be said that appellant did not receive medical advice independent of that of all the others who treated him. For that reason the cases cited by appellant, Pashley v. Pacific Electric Ry. Co., 25 Cal.2d 226, 153 P.2d 325; and Bowman v. McPheeters, 77 Cal.App.2d 795, 176 P.2d 745, are not pertinent.

Judgment affirmed.

McCOMB and FOX, JJ., concur.

---

119 Cal.App.2d 470

LAGUNA SALADA UNION ELEMENTARY SCHOOL DIST. v. PACIFIC DEVELOPMENT CO. et al.

Civ. 15484.

District Court of Appeal, First District, Division 2, California.

Aug. 3, 1953.

Rehearing Denied Sept. 2, 1953.

Hearing Denied Oct. 1, 1953.

Condemnation proceeding. The Superior Court in and for the County of San Mateo, W. A. Deans, J., entered judgment on awards made by jury, and condemnees appealed. The District Court of Appeal, Dooling, J., held that evidence was sufficient to sustain awards.

Judgments affirmed.

1. Witnesses 🔑4

Condemnation actions are within purview of statute providing that, whenever it appears to court that expert evidence is or will be required by court or any party, court may, on motion of any party or on motion of court, appoint one or more experts. Code Civ.Proc. § 1871.

2. Witnesses 🔑4

Statute providing that, whenever it appears to court that expert evidence is or will be required by court or any party, court may, on motion of party or of court, appoint one or more experts does not confer absolute right upon party to have expert appointed but gives court discretion in such matter. Code Civ.Proc. § 1871.

3. Eminent Domain 🔑265(5)

In condemnation proceeding, condemnee's costs in preparing for trial are collectible from condemnor even though condemnor abandons case after large award has been made. Code Civ.Proc. § 1871.

4. Witnesses 🔑4

In condemnation proceeding, facts that condemnor might have abandoned action if verdict were over $1,000, that property of one condemnee was valued at $7,500 but highest offer was $350, thus making variance requiring testimony of experts, and that, if experts were hired by condemnee and low award made, condemnee would be deprived of value of his award were not sufficient to require court to appoint expert witnesses. Code Civ.Proc. § 1871.

5. Eminent Domain 🔑262(1)

Upon appeal in condemnation proceeding, wherein trial court had found that improvement was necessary, question whether it was proper to try issue of value before condemnor put in its prima facie case upon issue of necessity was moot in view of fact that condemnee's argument upon issue was that if they could show lack of necessity they would not have to go to expense of employing experts on issue of value.

6. Eminent Domain 🔑221

In condemnation proceedings, only matter for jury is question of value or compensation, and all else is to be tried to the court.

7. Eminent Domain 🔑262(5)

In condemnation proceeding, condemnees could not complain that they were unable to cross-examine as to necessity or power to condemn before jury since such issue was to be tried to court.

8. Eminent Domain ⚷200

In condemnation proceeding, burden was upon condemnees to show that nature of improvements would increase their consequential damages.

9. Eminent Domain ⚷198(1)

It is proper, or at least not controllable by prohibition proceedings, for court in condemnation proceedings to reserve question of necessity until after verdict of jury on question of compensation, but jury must have sufficient information to conclude as to compensation before such procedure can be followed. Code Civ.Proc. § 2055.

10. Evidence ⚷571(7)

In condemnation proceeding, expert's testimony pertaining to inquiries he made concerning comparable sales for purpose of establishing opinion as to value of condemned land was entitled only to the credit that could be attached to expert's knowledge of area in which condemned land was situated.

11. Evidence ⚷546

In condemnation proceeding, there is great liberality in testing knowledge of realty appraiser and wide discretion in trial court in such matter.

12. Eminent Domain ⚷201

In condemnation proceeding, questions concerning other sales, other assessments, and other specific facts are proper solely for purpose of impeaching realty appraiser.

13. Evidence ⚷558(8)

In condemnation proceeding, cross-examination question whether condemnees' realty appraiser knew that 800 lots in area had been lost by foreclosure was relevant since question whether such lots were valuable for development might be affected by such fact.

14. Evidence ⚷560

In condemnation proceeding, question whether condemnees' realty appraiser knew that 800 lots in area had been lost by one condemnee constituted proper impeachment of such realty appraiser.

15. Eminent Domain ⚷202(4)

In condemnation proceeding, evidence of proposed use of condemned realty may be relevant, not to enhance damages, but to show that such plan used is feasible and, as such, might enter into determination of market value of such realty.

16. Eminent Domain ⚷201

In condemnation proceeding, evidence of profit, method of operation, cost, etc., of proposed use is not relevant once testimony is in that proposed plan would be highest and best use.

17. Eminent Domain ⚷202(4)

In condemnation proceeding, exclusion of evidence of condemnees' witness, who was expert not on realty but on supermarkets, was properly excluded in view of fact that condemnees' realty appraiser had testified that such use would be highest and best use.

18. Eminent Domain ⚷219

In condemnation proceeding, exclusion of rebuttal evidence of condemnees' realty appraiser was not error in view of absence of offer of proof and fact that appraiser's testimony apparently would have been repetitious.

19. Eminent Domain ⚷220

In condemnation proceeding, denial of view of premises by jury was matter within discretion of trial court.

20. Eminent Domain ⚷134

Special use of realty to condemnor school district is to be excluded in arriving at market value of condemned realty.

21. Eminent Domain ⚷219

In condemnation proceeding, jury was not forced to an early decision because of statements of one juror that she had an appointment to make, especially in view of fact that verdict was rendered an hour before such appointment was set.

22. Evidence ⚷142(1)

In condemnation proceeding, evidence of amounts of offers and sales prices of other similar realty, which were higher than that received by or offered to condemnees, was not admissible.

23. Eminent Domain ⚷205

In condemnation proceeding, evidence was sufficient to sustain awards made to condemnees.

Eli D. Langert, San Francisco, Norman S. Menifee, Redwood City, Antonio J. Gaudio, South San Francisco, for appellants.

Louis B. DeMatteis, Dist. Atty. of San Mateo County, and Keith C. Sorenson, Asst. Dist. Atty., Redwood City, for respondent.

DOOLING, Justice.

This is an appeal by two property owners from a judgment and decree in a condemnation action instituted against appellants by the school district. Two lots owned by Jones were condemned and one owned by Schroyer. Jones owned other contiguous land for which severance damages were sought. The jury awarded Jones $700 for his two lots and no severance damage. It awarded $150 to Schroyer for his one lot.

The trial was set for June 11, 1951. A motion for change of venue was made by both parties and a motion for an order of court appointing expert witnesses was made by Schroyer. Trial was continued to June 18 and the motions were denied on that day. Appellants complain of the denial of the motion to appoint expert witnesses. When the trial began the order of proof was ordered to be as follows: first defendants would put in their evidence of value, second plaintiff would put in its evidence of value, third plaintiff would put on its prima facie case, including public good and necessity after the verdict as to value. Appellants complain of this order of proof. The next four complaints concern certain rulings on the evidence, including the court's ruling that the jury would not view the premises. An objection is made to an instruction given, to misconduct of the court in allegedly forcing a hurried verdict, to the denial of the motion for new trial and that the evidence is insufficient to sustain the verdict.

[1-4] The motion for the appointment of expert witness was made by Schroyer only on affidavit of his attorney. The affidavit alleges that affiant had been told that if the verdict were over $1,000 plaintiff would abandon the action. This is denied in the counter affidavit. It was further alleged that the property of Schroyer was valued at $7,500 but that the highest offer was $350 and that this variance required the testimony of experts, but if experts were hired by defendant and a low award were made defendant would be deprived of the value of his award. The necessity of experts was denied in the counter affidavit for the reason that the defendants themselves could properly testify as to value and if they had to pay for experts that was an expense that defendants properly and customarily bear. The section upon which this motion was based reads in part "Whenever it shall be made to appear to any court or judge thereof, either before or during the trial of any action * * * that expert evidence is, or will be required by the court or any party to such action or proceeding, such court or judge may, on motion of any party, or on motion of such court or judge, appoint one or more experts * * *." Code Civ.Proc. § 1871. Condemnation actions are within the purview of the section. City of Los Angeles v. Clay, 126 Cal. App. 465, 14 P.2d 926. The section confers no absolute right on a party to have an expert appointed; it gives the court discretion. People v. Rickson, 112 Cal.App.2d 475, 246 P.2d 700. In the last cited case the court said, 112 Cal.App.2d at page 479, 246 P.2d at page 703: "Defendant had full opportunity to examine the expert witness who testified as to his competency and ability. The trial court properly concluded that further expert testimony was not needed to enlighten the court as to the facts. Defendant produced a witness who testified on that subject. In view of all the surrounding facts, no abuse of discretion appears." In Daly City v. Smith, 110 Cal. App.2d 524, 533, 243 P.2d 46, 51, the court in a condemnation action said: "Certainly it is not the law that whenever the parties' experts radically differ on the issue of value, the court must, as a matter of law, appoint experts." Although a defendant may be awarded only a small sum for his property, he may also be award-

ed a large sum and the court, at the time the motion was made, had no way of telling how much would eventually be awarded and thus no way of telling what proportion the cost of experts would be to the total award. Appellants also point out that the plaintiff might abandon the case if a large award were made and thus defendants would have to pay their costs for their own experts. This difficulty, however, is alleviated to a great extent by the fact that their costs in preparing for trial are collectible, and this includes the preparations made by their experts, which are a large percentage of an expert's fees. Metropolitan Water Dist. of Southern Calif. v. Adams, 23 Cal.2d 770, 147 P.2d 6. This argument would be equally good in any condemnation suit, thus requiring, if it were a good argument, the appointment of experts in all such cases. As the court said in the Daly City case, "If that were so [the argument as to differences between party employed experts] such experts would have to be appointed in practically every case where expert evidence is admissible. The point is without merit." It would appear that the point is without merit here also.

[5–9] We find no error in requiring the case as to value of the property to be heard before the condemnor put on its prima facie case. Appellants' first argument that if they could show, as an initial matter, that there was no necessity for the improvement they would not have had to go to the expense of employing experts, is answered by the fact that the court did find necessity. This question was thereby rendered moot. The only matter for the jury in condemnation cases is the question of value or compensation. People v. Ricciardi, 23 Cal.2d 390, 144 P.2d 799. All else is to be tried to the court. Hence, appellants cannot complain that they were unable to cross-examine as to necessity or power to condemn before the jury as the jury is not required to hear these matters. Nevertheless appellants' second argument on this matter is that the manner in which the improvement is to be constructed is relevant to the question of severance and consequential damages. Apparently appellants contend that they could in no way get in the evidence of the nature and type of improvement planned except by plaintiff first putting on the prima facie case. If appellants contended that the nature of the improvements would increase their consequential damages, the burden was on them to prove it. Although the matter may have been within the singular knowledge of plaintiff there is always a remedy by Code Civ.Proc. § 2055. It has been held that it is proper (or at least not controllable by prohibition proceedings) for the court to reserve the question of necessity until after the verdict of the jury on compensation. The only condition, or reservation, is that the jury must have sufficient information to conclude as to compensation. Beaulieu Vineyard v. Superior Court, 6 Cal.App. 242, 91 P. 1015. The court's dictum in that case is that such procedure is "not even erroneous, much less in excess of jurisdiction."

[10–14] Appellant's witness Riley had testified to his qualifications as a realty appraiser but that he had little experience in the area under consideration. He looked over the area and found no shopping area, for which there was a need. He told his method of arriving at what he considered the highest and best use. He made inquiries of certain parties and found comparable sales. On this basis he formed an opinion of high values. It is elementary that such testimony is entitled only to the credit that can be attached to the expert's knowledge of the area in which the subject lots are situated. There is great liberality in testing such an expert's knowledge and a wide discretion in the trial court. Santa Ana v. Harlin, 99 Cal. 538, 34 P. 224. This is simply a matter of impeachment, Reclamation Dist. No. 730 v. Inglin, 31 Cal.App. 495, 160 P. 1098, and questions on other sales, other assessments and other specific facts are proper solely for this purpose. City of Los Angeles v. Cole, 28 Cal.2d 509, 170 P.2d 928. In spite of these rules appellants claim that the following questions were not proper. While testing the expert's knowledge of the area, the cross-examiner asked "Do you know that in 1946 Ray Jones (a defendant) purchased on time under a deed of trust over 900 of those lots in the Edgemar area? A. I wouldn't know the figures, no, sir.

"Q. Do you know that approximately four years later he lost—

"Mr. Cutler: If your Honor please, I will object to the question as to what Ray Jones did, unless the relevancy is indicated.

"Mr. Sorenson: I am attempting, if I may, to show, to find out if Mr. Riley investigated the history of the lots in the immediate area to show a development, to determine whether he really knows what the stage of development in that area is with reference to the needs for a commercial district." It was allowed with the condition that an instruction would later be given limiting its purpose. Then a question was asked whether the witness knew that Jones had lost 800 of the lots by foreclosure. The witness did not know. Whether the lots were valuable for development might be affected by the fact that they were being foreclosed, and hence the question was relevant. Whether the witness knew of such a large transaction would be proper impeachment. The jury was instructed on impeaching evidence, contrary to appellants' claim.

[15–17] Appellants' next argument refers to the propriety of excluding evidence of defendants' witness Puolis, an expert, not on real property, but on supermarkets (defendants throughout contended that the highest and best use was for a supermarket). It is true that evidence of a proposed use may be relevant in some cases, not to enhance damages but merely to show that the plan is feasible and, as such, might enter into a determination of the market value. Daly City v. Smith, supra, 110 Cal.App.2d 524, 243 P.2d 46. But this is far from saying that evidence of the profit, method of operation, costs, etc., of the proposed plan is admissible. It is not even relevant, laying aside the collateral problems it would raise, at least once testimony is in that the proposed plan would be the highest and best use. And defendants' witness Riley had already testified to this. He was the expert on realty, not Puolis. See People v. Al. G. Smith Co. Ltd., 86 Cal.App.2d 308, 194 P.2d 750.

[18] Appellants assign as error the exclusion of rebuttal evidence of witness Riley. There was no offer of proof, however, and it appeared that his testimony would have been repetitious.

[19] The next assignment of error was the denial of the view of the premises by the jury. This is in the discretion of the court. Nunneley v. Edgar Hotel, 36 Cal.2d 493, 225 P.2d 497.

[20] The instruction stating, in effect, that the special use to the school district is to be excluded in arriving at market value correctly states the law. United States v. Miller, 317 U.S. 369, 63 S.Ct. 276, 87 L.Ed. 336; Santa Ana v. Harlan, supra, 99 Cal. 538, 542, 34 P. 224; San Diego Land & Town Co. v. Neale, 88 Cal. 50, 25 P. 977, 11 L.R.A. 604.

[21] Appellants say that the court attempted to force an early decision of the case by reminders that a juror had to make an appointment that she had on the last day of the trial. The court nowhere forced a jury verdict. What appellants are referring to are the statements of the juror that she had to make the appointment. Besides the verdict was rendered an hour before the appointment was set, thereby indicating no rush.

[22] Appellants claim that a new trial should have been granted. They offered evidence of amounts of offers and sales prices of other similar land, which were higher than that received by or offered to appellants. But this is inadmissible evidence. City of Los Angeles v. Cole, supra, 28 Cal.2d 509, 170 P.2d 928. The affidavit stated that appellants had not had time to prepare for trial. This was countered by an affidavit that counsel for respondent offered to postpone the trial. The court evidently believed the latter.

[23] Lastly, appellants contend that the evidence does not sustain the verdict. The jury determined the value exactly as testi-

fied to by plaintiff's expert Clark. Clark's evidence is not objected to, although appellants attempt to challenge its weight. That is for the jury.

Judgments affirmed.

NOURSE, P. J., concurs.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

---

119 Cal.App.2d 319

MALONEY, Ins. Com'r, v. AMERICAN INDEPENDENT MEDICAL & HEALTH ASS'N et al.

Civ. 4517.

District Court of Appeal, Fourth District, California.
July 22, 1953.

Proceeding by Health Commissioner against Medical and Health Association, wherein commissioner applied for order appointing conservator or liquidator of association. The Superior Court of San Diego County, Joe L. Shell, J., entered judgment for commissioner, and association and others appealed. The District Court of Appeal, Barnard, P. J., held that, where corporation had agreed, in return for dues paid, to indemnify beneficiary members against hazards of illness or injury by paying medical and hospital bills in accordance with schedule in beneficial membership certificate, but corporation did not employ physicians or contract with hospitals, and only service rendered by corporation was payment, dependent upon chance, of member's bills, corporation was transacting insurance business.

Judgment affirmed.

1. Insurance 🔑2

Where corporation had agreed, in return for dues paid, to indemnify beneficiary members against hazards of illness or injury by paying medical and hospital bills in accordance with schedule in beneficial membership certificate, but corporation did not employ physicians or contract with hospitals, and only service rendered by corporation was payment, dependent upon chance, of member's bills, corporation was transacting insurance business. Insurance Code, §§ 700, 1010–1016; Corporations Code, § 9000 et seq.

2. Insurance 🔑2

Existence of assumption of a risk is not sole test to be used in determining whether plan constitutes insurance. Insurance Code, §§ 700, 1010–1016.

3. Searches and Seizures 🔑7(1)

Summary procedure provisions of Insurance Code do not violate constitutional guaranties against search and seizure. Insurance Code, §§ 1010–1016.

◆

Foster W. Powell, La Mesa, Joseph E. Daly, Long Beach, for appellants.

Edmund G. Brown, Atty. Gen., Walter L. Bowers, Asst. Atty. Gen., for respondent.

BARNARD, Presiding Justice.

This is an appeal from a judgment in a proceeding brought by the insurance commissioner against the American Independent Medical and Health Association, which will be referred to as A I M, and its directors. On November 20, 1950, the insurance commissioner filed an application for an order appointing a conservator or liquidator of A I M, under sections 1015 and 1011. (All section numbers herein refer to the Insurance Code unless otherwise stated.) An order was made appointing the insurance commissioner as such conservator and he took charge of the records and business of A I M. These appellants filed an answer to the application and a petition for the removal of the conservator, and also filed a cross-complaint for declaratory relief to which an answer was filed by the commissioner. The court found in all respects in favor of the commissioner, and entered a judgment adjudging that A I M was transacting insurance business in this state without the certificate required by section 700; that it was insolvent; appointing the insurance commissioner as liquidator; and directing him to wind up said business for the benefit of its members, its creditors, and the public, in accordance with the provisions of sections 1010–1016. This appeal followed.

There is no dispute as to the material facts. A I M commenced operations in June, 1947, as an unincorporated association. In June, 1948, it was incorporated as a non-profit corporation pursuant to Title 1, Division 2 of the Corporations Code. Its main purpose, as set forth in its Articles, was "to enter into contracts with duly licensed physicians, surgeons and hospitals for the purpose of making available to the members of this corporation and their dependents, medical, surgical, hospital and related health services." The Articles provide for five directors who should have the right to vote, and that "no other member or members shall have any voting right." Three of the original directors consisted of Mr. and Mrs. Fortune and the latter's mother. The other two directors resigned in 1949, and were not replaced. The by-laws were amended to provide that Mr. and Mrs. Fortune should have full authority to obligate and bind the corporation in all matters pertaining to contracts or financial matters in which the corporation had an interest, or to which it was a party; and providing that Mr. and Mrs. Fortune should have authority to change or amend any of the membership certificates or services or by-laws, subject only to ratification by the membership committee, of which Mrs. Fortune was to be chairman and to appoint the other two members. The directors then entered into a contract with Mr. and Mrs. Fortune, retaining him as "technical business consultant" and her as "office management consultant". This contract provided that for his services as such consultant Mr. Fortune was to be paid $150 per week retainer, plus 1% of the "net sale income" of A I M, plus an additional amount for expenses. It also provided that in the event of his retirement 50% of the average amount paid to him during his active participation should be paid him during the balance of his life, with a guaranteed period of ten years in any event, and with the further provision that after his death, whenever it occurred, the 1% of the net sale income should be paid to his estate at monthly intervals, "so long as this association shall exist." A similar but smaller compensation was provided for Mrs. Fortune.

Solicitation for membership was limited to California. The public at large was solicited and members were not required to belong to any particular organization or lodge, to be employed by any particular employer, or to have any particular characteristic in common with other members. The solicitors were paid on a commission basis and after procuring an application they would send the amount collected, less the commission, to the A I M office which would then issue to the member a contract in the form set forth as "Exhibit B" in the Stipulation of Facts. At the time the commissioner took possession of A I M, in November, 1950, there were 1,600 active memberships outstanding which represented, on a family basis, about 5,000 people. Various forms of certificate of membership had been issued by A I M but in November, 1950, most of those outstanding were in the form of "Exhibit B".

A I M furnished no medical care itself, and employed no doctors. A member needing medical or hospital care was supposed to inform a doctor or hospital that he was a member of A I M, and ask them to send their bills direct to A I M. In most cases, the bills were paid by A I M directly to the doctor or hospital. In a few cases A I M paid the member direct, where he had already paid the bill.

The contract issued by A I M (Exhibit B) is headed "Certificate of Beneficial Membership," and is strikingly similar to the ordinary health insurance policy. It consists of nine pages with an annexed "Fee Schedule" setting forth several hundred fixed fees for specific medical services. It provides that A I M issues this certificate to the member for a term of one year; and that "A I M agrees that the benefits recited herein shall be available to the member" providing the member is eligible for such benefits under the terms set forth in the certificate and in accordance with the "accompanying fee schedule governing the specific availability of the respective benefits." It then states that when the member is confined in any licensed hospital anywhere in the world "your A I M membership pays for" a list of named hospital benefits; that A I M membership pays for certain surgical and medical benefits which are listed; and that "These benefits are available to members and dependents when care and service is rendered by any licensed physician or surgeon" according to the association's fee schedule. The certificate then provides that these benefits "shall be available" to the member during the periods for which membership dues are paid in advance; for the payment of renewal dues in advance; for a "grace period" of ten days; and for reinstatement in case of suspension for nonpayment of dues. It then provides that the member may select any licensed hospital or licensed physician or surgeon; that when first applying for professional services the member must notify the doctor or hospital that he is a member of A I M; that A I M shall treat with all licensed hospitals and licensed doctors equally; that the benefit provisions shall apply whether the illness or injury occurs within this state "or anywhere in the world"; that in case of bodily injury or illness "A I M assures the member benefits applying to expenses actually incurred in such procedures but not to exceed the amount of benefits specified in the schedule"; that claim for benefits must be made in writing to A I M within 45 days of the first day that care or treatment was rendered; that proof must include an itemized statement from the doctor or hospital involved; and that in case a member received benefits in connection with a personal injury caused by the negligence of another, and then recovers damages through action, settlement or otherwise, A I M should be subrogated to such claim and be entitled to the monies thus received to the extent of any and all benefits paid under this certificate. It was then provided that A I M would faithfully perform the duty of "agent and custodian" for its members; that each physician and surgeon or professional man assumes full responsibility for his own acts of omission or commission; and that A I M is not an insurer or liable for negligence on the part of any hospital.

A form of a letter sent out to doctors by A I M in March, 1950, appears in the record. This letter states that it is sent to the doctor so that he will be familiar with "our procedures" in the event that "one of our members" should need his services; that A I M will pay the full amount of the fees set forth in the enclosed medical schedule; that these fees are higher than those "offered by the average insurance company"; that the doctor is free to charge the patient additional fees if he so desires; and that all checks for services rendered to members are made payable only to the doctor. At the bottom of this letterhead, in large letters, appear the words

"We Have No Panel Doctors
No Member Hospitals."

When the insurance commissioner took possession of A I M in November, 1950, an audit of its books disclosed that its liabilities exceeded its assets by $56,619.44; that of this amount $39,108.86 was owed to Mr. Fortune and $11,796.67 was owed to Mrs. Fortune under their compensation and expense contract; that 85% of all dues and fees collected by the corporation were used for overhead and promotion; and that only 12¢ of each dollar of dues collected had been used to pay medical and hospital claims for members.

Admittedly, A I M has never applied for a certificate of authority or other permit to transact an insurance business in this state, as required by section 700; it has not complied with the requirements for the issuance of such a certificate; it has never complied with section 9201 of the Corporations Code; and it does not possess the qualifications required for the issuance of the certificate mentioned in that section.

At the trial counsel for A I M stated that the only issue to be decided was whether this non-profit corporation had been engaged in the insurance business, and conceded that if it had been doing an insurance business it had no defense to this proceeding. It is here contended that the application filed by the insurance commissioner did not state facts constituting a cause of action; that the court had no jurisdiction over the proceeding because A I M, being organized as a non-profit corporation, was not subject to any of the regulations set forth in the Insurance Code; that it was operating under its charter as a non-profit corporation, and "rendering services"; that it was merely acting as an agent for its members, and assuming no risk; that all risk was assumed by licensed doctors and hospitals who looked solely to the corporation for compensation upon a fixed schedule of fees; and that it follows that A I M was merely rendering a service and not transacting an insurance business of any kind. In support of these contentions appellants rely on California Physicians Service v. Garrison, 28 Cal.2d 790, 172 P.2d 4, 167 A.L.R. 306 and Transportation Guarantee Company v. Jellins, 29 Cal.2d 242, 174 P.2d 625.

It is argued that section 9200 of the Corporations Code permits the organization of a non-profit corporation for the purpose of "rendering services"; that the basic and fundamental purpose for which A I M was formed, as expressed in its Articles of Incorporation, was to enter into contracts with licensed doctors and hospitals for the purpose of making medical and hospital service available to its members; and that the provisions of the Insurance Code cannot be applied to a corporation thus organized for that express purpose. While section 9200 of the Corporations Code authorizes the formation of a non-profit corporation for the purpose, among other things, of rendering services, it also provides that this authorization shall be "subject to laws and regulations applicable to particular classes of non-profit corporations or lines of activity." Not only are some of the provisions of the Insurance Code existing laws and regulations which are applicable to this class of non-profit corporation and this line of activity, but section 9201 of the Corporations Code provides other requirements for the formation of a non-profit corporation for certain purposes, which would include the basic purpose here involved. Moreover, it clearly appears, by evidence and admission, that A I M entered into no contracts with licensed doctors or hospitals for the purpose of making these medical and health services available to its members, and entirely failed to carry out the main purpose of its organization.

[1, 2] There is no merit in the contention that A I M was merely rendering a service to its members, as distinguished from transacting an insurance business, and there is nothing in the cases cited which compels or supports such a conclusion. On the contrary, the business transacted by A I M constitutes an insurance business as defined in California Physicians Service v. Garrison, 28 Cal.2d 790, 172 P.2d 4, 167 A.L.R. 306. By the certificates of beneficial membership issued A I M agreed that it would make the specified benefits available to the member when needed, in return for the dues paid. A I M employed no physicians and made no contracts with hospitals, and its contract clearly discloses that it was itself rendering or furnishing no such service. The member, when needing such services, was to secure them wherever he desired and anywhere in the world. The corporation agreed to pay the bills therefor, within specified limits, and this was not dependent upon the amount of dues that might be collected from other members within any period. Under this contract A I M undertook to indemnify the beneficiary member against the hazards of illness or injury by paying the medical and hospital bills specified. There was no agency here, other than that common to any insurance contract, and the business here transacted was not a mere rendering of service within the principles established in the case of California Physicians' Service v. Garrison, supra. While the assumption of a risk is not the sole test of the status involved, there was here a definite assumption of risk on the part of the corporation, and not merely one assumed by the doctors and hospitals as argued by the appellants.

No service was rendered or to be rendered by A I M other than that of paying the bills incurred by the members, in accordance with its agreement; the doctors were to get a fixed fee regardless of the amount of dues collected; any increase of illness or injury would increase the cost to

A I M; and whether benefits were to be furnished, and the amount furnished, was dependent upon chance. Viewing the plan of operation as a whole, it clearly appears that its only object and purpose was in the nature of an "indemnity" and not merely the furnishing of a "service". The findings that A I M was transacting insurance business in this state without the certificate required by section 700, and that it was insolvent within the meaning of the provisions of the Insurance Code, are fully supported by the record.

[3] Some contention is made that the summary seizure provisions of the Insurance Code, which are here involved, are in violation of the constitutional guarantees against search and seizure. This contention is without merit. Carpenter v. Pacific Mut. Life Ins. Co., 10 Cal.2d 307, 74 P.2d 761; Rhode Island Ins. Co. v. Downey, 95 Cal.App.2d 220, 212 P.2d 965.

Finally, it is contended that the dissolution of a corporation, or forfeiture of its franchise, can be accomplished only by a *quo warranto* proceeding. Whether or not this is true in view of the provisions of section 1017, need not be here decided. The judgment appealed from provided for the winding up of the insurance business being conducted by A I M, but made no provision for dissolution of the corporation itself.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

---

119 Cal.App.2d 244

MAGUIRE et al. v. CORBETT et al.

Civ. 15419.

District Court of Appeal, First District,
Division 2, California.
July 20, 1953.

Proceedings on motion by plaintiffs for issuance of execution on judgment held by them. The wife of a defendant, as a third party claimant, claimed the automobile on which execution was levied. The Superior Court in and for the County of Santa Clara, John D. Foley, J., entered judgment from which the third-party claimant appealed. The District Court of Appeal, Goodell, J., held that record warranted conclusion that transaction by which wife had obtained automobile registered solely in her name had been fraudulent and for purpose of defeating execution, and that automobile was in fact community property.

Orders affirmed.

1. Appeal and Error 🔑935(3)

In view of fact that findings on hearing of claim by third person of property levied on for satisfaction of execution, are expressly dispensed with by statute review is limited by rule that all presumptions and inferences applicable must go to the support of the judgment. Code Civ.Proc. § 689.

2. Appeal and Error 🔑935(3)

In view of fact that facts of transaction allegedly for fraudulent purpose of defeating execution on plaintiffs' judgment are peculiarly within knowledge of those sought to be charged with fraud, and proof indicative of fraud must come by inference from circumstances surrounding transaction, and from the relationship and interest of the parties, if there are any circumstances from which trial court could have drawn inference that a particular transaction was for purpose of defeating execution, order upholding execution on the property in the hands of the transferee will be affirmed.

3. Fraudulent Conveyances 🔑299(12)

Where husband against whom plaintiffs held judgment purchased automobile which was registered in name of husband and wife, and plaintiffs moved for issuance of execution, and two days before day set for hearing wife changed registration into her sole name, and automobile was thereafter used as part payment on new automobile which was registered solely in wife's name, such circumstances were sufficient to support inference that automobile had been put in wife's name to defeat impending execution, and that title to new automobile had been taken in her name for the same purpose. Civ.Code, § 3439.07.

4. Fraudulent Conveyances ⚷278(2)

Where plaintiffs held judgment against husband who purchased automobile and registered title in his and his wife's name, and plaintiffs moved for issuance of execution against automobile, and two days before hearing wife procured registration solely in her own name, and automobile was thereafter used as partial payment on new automobile which was registered solely in wife's name, presumptions of title which flowed from fact that wife had possession of new automobile from time it was purchased, and had exercised the usual acts of dominion over it from the beginning, were disputable and burden rested on plaintiffs to rebut them. Civ.Code, § 3439.07.

5. Evidence ⚷589

Testimony of wife, as third party claimant of property on which execution was levied on judgment of plaintiffs against husband, although not contradicted by other testimony, did not have to be taken as true by court hearing charge that transaction whereby wife obtained title to the property was for fraudulent purpose of defeating execution. Civ.Code, § 3439.07.

6. Appeal and Error ⚷991

In proceedings on motion by judgment creditors of husband for issuance of execution on automobile which wife claimed had been a gift to her, wherein it appeared that part payment for automobile had been made with automobile previously purchased by husband from his community earnings and registered in name of husband and wife, and partially with husband's community earnings, but that automobile had been registered solely in wife's name, evidence made question of fact for trial court on whether transactions by which wife obtained title was a gift or for fraudulent purpose of defeating execution. Civ.Code, § 3439.07.

7. Fraud ⚷50

Relationship between the parties charged with together perpetrating a fraud is of great importance, and when coupled with other circumstances tending to show fraudulent design, may justify an inference of fraud.

8. Fraudulent Conveyances ⚷272

Where a transaction is sought to be avoided because of fraudulent design as to creditors, once the intent of the debtor to hinder or delay creditors is shown, it is not necessary to prove that debtor was insolvent at that time. Civ.Code, § 3439.07.

9. Execution ⚷203

Wife, against whose husband plaintiffs held judgment on which they moved for execution against automobile registered in wife's name, assumed all the burdens of a litigant when she entered the litigation as a third-party claimant, including liability for costs and necessary disbursements of proceedings by judgment creditor in aid of execution. Code Civ.Proc. § 1032.6.

10. Execution ⚷203

In proceedings on motion by plaintiff who held judgment against husband of third-party claimant for issuance of execution and levy on automobile registered in name of third-party claimant, question of whether seizure of the automobile and storage pending dispute was necessary under all the circumstances, and thus an item of costs to be allowed against third-party claimant who court found to have acquired possession of automobile by fraudulent transaction to defeat execution, was for determination by trial judge in his discretion. Code Civ.Proc. § 1032.6.

◆

W. Frank Butters, San Jose, for appellant.

Hardy, Carley & Thompson, Palo Alto, for respondents.

GOODELL, Justice.

This is an appeal from an order in favor of plaintiffs and respondents and against appellant Marilyn Corbett on her third-party claim, and from an order taxing costs.

The action was brought by plaintiffs against Edward J. and Felix K. Corbett and tried before the Court sitting without a jury. The record does not contain the pleadings but appellant testified that the action arose out of an accident. Findings were waived and on May 12, 1939 a judgment was entered against both defendants and in favor of Theodore Maguire for $486.91, Rita Maguire for $250, Bert Maguire for $250, Beverly Maguire for $750, and $28.25 costs, a total of $1,765.16. No appeal was taken.

Appellant married Edward J. Corbett in 1940, after the rendition of the judgment.

On April 2, 1949, while Corbett was home from Arabia on a visit the Corbetts bought a Pontiac automobile, the purchase price being paid out of his earnings. At that time the unsatisfied judgment amounted to $2,822.09. The car was registered in the names of "E. J. Corbett and/or Marilyn Corbett."

In November, 1949 the judgment creditors moved under § 685 Code Civ.Proc. for the issuance of execution, and after a hearing in which appellant testified on behalf of her husband, the court on December 5, 1949 made an order directing the issuance of an execution, which recited that "said judgment remains wholly unsatisfied, that plaintiffs have been unable prior to this time to find any property of the defendants in this state which might be applied to the satisfaction of said judgment, and that there is now in this state property of the defendants subject to execution which may be seized to satisfy said judgment."

On November 15, two days before the day set for the hearing of the § 685 proceeding, Marilyn Corbett recorded a declaration of homestead covering the family home, and on December 6, the day after the order directing execution to issue, she caused the registration of the Pontiac to be changed from the names "E. J. Corbett and/or Marilyn Corbett" into her sole name. She held a general power of attorney from her husband dated September 18, 1947 and recorded September 19, 1947.

An appeal was taken by Edward J. Corbett from the order directing execution to issue, the same counsel appearing therein for appellant and respondents as now appear for appellant and respondents. On February 21, 1951 the order was affirmed, Maguire v. Corbett, 101 Cal.App.2d 314, 225 P.2d 606.

On January 12, 1951 a 1950 Oldsmobile Sedan was purchased for $2,977.59, at which time the unsatisfied judgment amounted to $3,024.92. At that time Corbett was again home on a visit. In that transaction a credit of $1,600 was allowed on the trade-in of the Pontiac and the balance of $1,377.59 was paid in cash, $1,300 of which admittedly was supplied by Corbett out of his earnings, in currency which he carried on his person.

On June 22, 1951 an execution issued and on July 13, 1951 it was levied on the Oldsmobile in the possession of appellant who, on August 6, filed a third-party claim asserting her absolute ownership thereof. She alleged that she had purchased it from Bray Motor Company of Redwood City, and had paid $2,977.59 therefor, and that its reasonable value was $2,250. The Oldsmobile was registered in her name. A hearing was set, execution sale stayed, notices given, and after the hearing a minute order was entered "that the automobile in question is the community property of Mr. and Mrs. Corbett and hence is subject to levy by the judgment creditors of Mr. Corbett." A few days later a formal order was entered which determined that the Oldsmobile, registered in the name of Marilyn Corbett, the community property of Edward and Marilyn Corbett, was subject to execution for the satisfaction of the judgment in the action, and ordering its sale. This appeal followed.

Appellant's principal contention is that the evidence is insufficient to sustain the court's determination that the Oldsmobile was community property and hence subject to execution for the husband's debts.

Section 3439.07, Civil Code, provides that "Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors."

[1] Section 689, Code Civ.Proc., expressly dispenses with findings, hence this

review "is limited by the rule that all presumptions and inferences applicable must go to the support of the judgment." Crofts v. Nicolaides, 25 Cal.App.2d 474, 77 P.2d 882, 883.

In Fross v. Wotton, 3 Cal.2d 384, 393, 44 P.2d 350, 354, it is said: "From the very nature of the action, direct proof of the fraudulent intent of the parties is an impossibility. For this reason and because the real intent of the parties and the facts of the transactions are peculiarly within the knowledge of those sought to be charged with the fraud, proof indicative of fraud must come by inference from the circumstances surrounding the transaction, the relationship and interests of the parties. [Citation.]"

[2] It follows that if there are any circumstances from which the court could have drawn the inference that the Oldsmobile had been put into the wife's name for the purpose of defeating execution on the plaintiffs' judgment, the order has to be affirmed.

[3] While it is true that the levy was made on the Oldsmobile which at all times after its purchase stood in Mrs. Corbett's name, still the antecedent facts and circumstances were all before the court, and from them it appears that in the acquisition of the Oldsmobile the Pontiac was part of the consideration, having been traded in at a $1,600 valuation. The situation has to be viewed as a whole, and presumably the trial judge so viewed it. When the first move was made by the judgment creditors and the court ordered execution to issue, appellant at once effected the change of registration of the Pontiac into her own name. The timing of this transfer was significant and must have aroused a serious question in the court's mind as to its *bona fides*. Appellant then held a general power of attorney from her husband which had been made two years before, and which was broad enough to give her the authority to effect this change in registration. When she exercised that power the transfer was of course the act of her principal, the judgment debtor. This eleventh-hour transfer was made in the face of the order for execution after proceedings in which appellant was a participant, having given testimony therein by affidavit on behalf of her husband (then absent from the United States) in an unsuccessful attempt to prevent the issuance of execution.

The fact that the Oldsmobile was never registered in any name but appellant's does not destroy or lessen the probative force of the transfer of the Pontiac and the particular time of its transfer. These circumstances alone were sufficient to support an inference that the Pontiac had been put into the wife's name to defeat the impending execution, and that title to the Oldsmobile (which replaced the Pontiac as the family car) had been taken in her name for the same purpose.

[4, 5] Appellant testified that her husband had made a gift to her of the Pontiac at the time of its purchase, to make up for the usual gifts which she had not received because of his extended absences from this country. Further, that she had had possession of it from the time it was purchased, had held the keys and the pink slip, and had exercised the usual acts of dominion over it from the beginning. Appellant relies on the presumptions of title which flow from these facts, and she relies as well on the fact that her testimony that the Pontiac was given to her stands without contradiction. The presumptions are of course disputable and the burden rests on the person attempting to rebut them. Estate of Simonini, 110 Cal.App. 548, 294 P. 24; Whitaker v. Whitaker, 137 Cal.App. 396, 30 P.2d 538; Sayles v. Peters, 11 Cal.App.2d 401, 54 P.2d 94; People v. One 1939 La Salle Sedan, 45 Cal.App.2d 709, 115 P.2d 39. Moreover, her testimony, although not contradicted by other testimony, did not have to be taken as true by the court. Watwood v. Steur, 89 Cal.App.2d 620, 623–624, 201 P.2d 460, a third-party-claim case, and authorities there cited.

There are other facts from which the court could have concluded that when the Pontiac was acquired and later the Oldsmobile, no gift had been made or intended. When the Pontiac was bought Corbett was home and took part in the transaction; admittedly the whole purchase price came out of his (community) earnings; title was taken in the names of E. J. Corbett and/or Marilyn Corbett, which was consonant with community ownership, although it did not necessarily create a presumption thereof under § 164, Civ.Code. If originally title to the Pontiac had been taken in the wife's name a much better argument than that now presented, could have been made in favor of a gift. When in 1951 the Oldsmobile was bought, Corbett was again home and took part in the transaction. That was a little over a year after the order for execution, and an appeal was then pending. Into that purchase went the $1,600 credit from the Pontiac and $1,300 in currency which Corbett again produced from his (community) earnings *which he carried on his person.*

The two automobile transactions cannot be divorced and no trial court could be expected to divorce them on this set of facts.

Nor could the trial court be expected to give too much weight to the disputable presumptions arising from the wife's exclusive possession of the automobiles, since the record shows that her husband was thousands of miles away overseas most of the time and a car was needed to take their daughter to and from school. Whether it stood in the wife's name or in joint names, she would naturally have exclusive possession.

[6] Thus aligned on appellant's side you have her testimony respecting the gift, plus the disputable presumptions of title arising out of exclusive possession and control, while aligned on respondents' side you have the admitted facts that both cars were purchased with, and the product of, the husband's community earnings plus the documentary evidence of the over-night transfer of the Pontiac in the face of the order for execution. These opposing positions presented questions of fact for the trial court alone, Fross v. Wotton, 3 Cal. 2d 384, 390, 44 P.2d 350, supra; Lawler v. Solus, 101 Cal.App.2d 816, 818, 226 P.2d 348, and they were resolved in respondents' favor on evidence which, in our opinion, was sufficient to sustain the order appealed from.

[7] Fross v. Wotton, supra, holds that in cases such as this the "proof indicative of fraud must come by inference from the circumstances surrounding the transaction, *the relationship and interests of the parties.*" (Emphasis added.) At the time of the proceeding under § 685 appellant's husband was many miles away in Arabia; the moving papers were served on appellant, who admitted that she held her husband's general power of attorney, and it would appear that in that proceeding she took his place in resisting the issuance of an execution. What she did after the adverse decision already appears. These facts presented to the trial court a combination of *relationship* (husband and wife plus principal and agent) *and interest,* rarely found in a single record. "Relationship between the parties is * * * of great importance, and when coupled with other circumstances tending to show fraudulent design, may justify an inference of fraud." 12 Cal.Jur., p. 1070.

[8] We see no reason to discuss other points presented in the briefs respecting insolvency, or respecting other assets which the Corbetts possessed, since it is settled that if the intent of the debtor to hinder or delay creditors is shown, it is not necessary to prove that the debtor was insolvent at the time. Fross v. Wotton, supra.

The appeal also challenges the taxation of $90.75 costs against appellant, for the storage of the Oldsmobile during the four months from August 6, to December 5, 1951 while the third party claim proceeding was pending. Appellant does not question the reasonableness of the charge but does claim that it is not taxable against her.

Section 1032.6, Code Civ.Proc., provides that "In superior courts * * * the judgment creditor is entitled to the costs and necessary disbursements of proceedings taken by him in aid of an execution upon any judgment rendered therein."

[9] The execution issued, and but for the interposition of appellant's third-party claim the car would have been sold to satisfy the judgment against her husband. Her claim brought about the hearing, to which she was entitled. Pending the hearing the car was stored. The third-party claim made the appellant an adversary party to the judgment creditors where, theretofore, only her husband had been such adversary. When she entered the litigation she assumed the burdens of a litigant.

[10] The only question seems to be whether the storage of the car pending the dispute was a reasonable thing to do and within the discretion of the court. Appellant argues that in order to try title to the car its seizure was not necessary. True, but the car was under levy of a court writ. The question really is whether its impounding was unnecessary in view of all the circumstances, and this was a question for the trial judge to decide. It is not practicable for the legislature to foresee all the various items of costs that arise in litigation, and as said in Bond v. United Railroads, 20 Cal.App. 124, 129, 128 P. 786, 788, "Our Supreme Court has said that 'the allowance or disallowance of items for expenses and disbursements incurred upon the trial of the action must be left in nearly every instance to the discretion of the judge where the cause was tried.' Miller v. Highland D. Co., 91 Cal. 103, 27 P. 536."

In Southern California Collection Co. v. Napkie, 106 Cal.App.2d 565, 572, 235 P.2d 434, 438, cited by the trial judge in his ruling on costs, the court held that "In a proceeding under section 689 * * * to determine a third party's claim to property seized on execution, the judgment carries costs as a matter of course." That case cites Exchange Nat'l Bank v. Ransom, 52 Cal.App.2d 544, 546, 126 P.2d 620, where the third-party claimant prevailed. Under those authorities it follows that had appellant prevailed here, the $90.75 storage bill would have been taxable against respondents. Turn about is fair play.

Moss v. Underwriters' Report, Inc., 12 Cal.2d 266, 83 P.2d 503, cited by appellant, involving the premium on an attachment bond claimed as costs, is not at all in point. There is no merit to appellant's contentions respecting costs.

The orders appealed from are affirmed.

NOURSE, P. J., and DOOLING, J., concur.

ERICKSON v. GOSPEL FOUNDATION OF CALIFORNIA et al.*

Civ. 19346.

District Court of Appeal, Second District, Division 3, California.

June 22, 1953.

Rehearing Denied July 13, 1953.

Hearing Granted Aug. 20, 1953.

Action for declaratory relief concerning validity of by-law of nonprofit, charitable corporation which provided that each member should be given an additional vote in management of corporation for each $1,000 contributed to the corporation, and which provided that gifts to the corporation were subject to approval of members. The Superior Court, Los Angeles County, entered judgment upholding the validity of the by-law, and plaintiff appealed. The District Court of Appeal, Wood, J., held, inter alia, that the by-law was in conflict with provision of corporate articles and statute to effect that affairs of corporation should be governed by at least three directors, and was invalid.

Reversed with directions.

1. Corporations 🔑55

The power to make corporate by-laws, even where unrestricted by statute, is subject to condition that they must not be unreasonable in their practical application, and that they must not contravene or be inconsistent with provisions of corporate charter or articles or with the law, and that they must not contravene public policy.

2. Charities 🔑39

By-law of charitable corporation that each member should have one vote for each $1,000 given to the corporation and that each gift should be subject to approval of majority of votes of members of corporation was in conflict with provision of corporate articles and statute to effect that affairs of corporation should be governed by at least three directors, and was invalid. Corporations Code, §§ 9500, 9601, 9602.

---

* Subsequent opinion 275 P.2d 474.

3. Charities ⚿39

A charitable corporation by-law which is opposed to public policy is void.

4. Contracts ⚿138(4)

A contract which is opposed to public policy cannot be treated as valid by invoking doctrine of estoppel or waiver.

5. Charities ⚿39

It is policy of law that member of nonprofit, charitable corporation, with only one class of membership, shall have only one vote, that such corporation shall be directed and governed by board of directors of not less than three directors, and that a by-law must not be unreasonable in its application and must operate equally upon members and must not contravene provisions of articles of incorporation. Corporations Code, §§ 9500, 9601, 9602.

6. Charities ⚿39

Where articles of incorporation of nonprofit, charitable corporation provided in effect that directors and members of corporation should be the same persons, and the only object or purpose of the corporation was to operate certain property and to contribute income therefrom for purpose of aiding and promoting Christian missions, there was only one class of membership, and therefore, under applicable statute, the rights and interests of each member were equal. Corporations Code, § 9602.

7. Charities ⚿39

Where by-law of nonprofit, charitable corporation providing that each member thereof should have an additional vote for each $1,000 given to the corporation was against public policy, doctrines of waiver, ratification and estoppel were not applicable to preclude member and director, who had joined other directors in approving minutes of meeting wherein one director's contribution of $2,000 was accepted and who had acted as a member and director without protesting provision of by-law and action taken pursuant thereto, which vested other member with two additional votes, from contesting validity of such by-law. Corporations Code, §§ 9500, 9601, 9602.

◆

John W. Preston, Los Angeles, for appellant.

Gibson, Dunn & Crutcher, Sherman Welpton, Jr., Los Angeles, for respondents.

WOOD, Justice.

Action for declaratory relief. Plaintiff appeals from judgment in favor of defendants.

Mr. A. M. Johnson was the owner of the Death Valley Ranch known as "Scotty's Castle" (located in Inyo County), the Shadelands Ranch (about 335 acres in Contra Costa County), a large residence at 7333 Franklin Avenue (in Los Angeles), and the Lake Harbor Conference Grounds (in Michigan). Those properties were of a value in excess of a million dollars. In 1946, he formed a corporation known as the Gospel Foundation of California. The persons who signed the articles of incorporation, and who were the first directors, were A. M. Johnson, Mary Liddecoat, and Norman E. Johnson.

The articles of incorporation provided, in part:

> "That the purposes for which said Corporation is formed are as follows:
>
> "1. To foster, promote and operate Christian religious, charitable, educational, home and foreign missions, evangelistic and mission enterprises.
>
> "2. * * *
>
> "3. This Corporation is one which does not contemplate pecuniary gain or profit to the members thereof and shall have no capital stock.
>
> "4. Upon dissolution of this Corporation, voluntary or otherwise, no member or director of this Corporation shall receive any portion of any distribution of the real or personal property of this Corporation. In event of dissolution, voluntary or otherwise, the real and personal property of this

> Corporation shall be divided in equal parts between the following:
>
> "The Bible Institute of Los Angeles, Incorporated
>
> "The Christian and Missionary Alliance
>
> "Wycliffe Bible Translators, Inc."

It was also provided in said articles that the number of directors should be three but the number thereof might be changed by a bylaw, but in no event should the number exceed five; that the number of members of the corporation should be the same as the number of directors; that any member ceasing to be a member should cease to be a director, and any director ceasing to be a director should cease to be a member; that when any director votes in favor of any action it shall be deemed that he consents to the action as a member.

The bylaws provide that the board of directors shall consist of three members. Section 6 of article II of the bylaws provides:

> "At all meetings of members, every member entitled to vote shall have the right to one vote in person or by proxy issued only to another member of the Gospel Foundation of California.
>
> "In addition to the one vote hereinabove provided, each member shall have one vote for each One Thousand Dollars ($1,000.00), either in money, real or personal property conveyed to and accepted by the Corporation. Any and all contributions of money, real or personal property proffered or tendered, by any member of the Corporation to the Corporation, shall be subject to approval and acceptance by a majority of the votes of the members of the Corporation before receipt of such contribution by the Corporation * * * except that anything to the contrary herein contained notwithstanding, A. M. Johnson shall have the right to make contributions of $1,000.00 or more in money, real or personal property, without the approval or acceptance as stipulated in this Section Six hereof and to forthwith acquire the right to one additional vote for each $1,000.00 of such contribution as he may make hereunder. * * *"

The bylaws also provide that vacancies on the board of directors may be filled by a majority of the remaining directors; and that any elective officer may be removed by the board of directors.

Mr. Johnson died on January 7, 1948. In May, 1947, he caused his secretary to prepare grant deeds which recited that he conveyed the above-mentioned properties to the Gospel Foundation of California. He signed the deeds on May 29, 1947, and acknowledged them on June 4, 1947. Thereafter, and until a few days before his death, the deeds were kept in his office (which was in his home at 7333 Franklin Avenue).

On December 12, 1947, at 11:30 p. m. (after he had discovered that he had an incurable affliction), a special meeting of the board of directors was held at his home, and the three directors were present. The minutes of that meeting recite that a resolution was adopted whereby the corporation accepted $2,000 as a donation to the corporation from Mary Liddecoat and that said sum shall entitle her to an additional two votes in the "Gospel Foundation of California" according to the bylaws, article II, section 6. Those minutes were signed by Mary Liddecoat, secretary, and by Norman E. Johnson, director, but were not signed by A. M. Johnson.

On December 16, 1947, at 1:30 p. m., a special meeting of the board of directors was held at the hospital, and the three directors were present. The minutes of that meeting recite that a resolution was adopted whereby the corporation accepted $2,000 as a donation to the corporation from Mary Liddecoat and that said sum shall entitle her to an additional two votes in the "Gospel Foundation of California" according to the bylaws, article II, section 6. Those minutes were signed by the three directors. On (the same day) December 16, 1947, at 5:30 p. m., a special meeting of the board of directors was held at the hospital, and the three directors were present. The minutes of that meeting recite that a resolution was adopted whereby the corporation accepted $2,000 as a donation to the Gospel Foundation of California from Mary Liddecoat and that said sum shall entitle her to an additional two votes which, together with the one vote she already has as a member and a director of the corporation, will entitle her to a total of three votes in all according to the bylaws, article II, section 6. Those minutes were signed by the three directors.

About December 26, 1947, while Mr. A. M. Johnson was in the hospital, he instructed his secretary (Miss Downey) to have the said deeds, above referred to, taken to the proper county offices to be recorded. The deeds were recorded in December, 1947. Some months before Mr. Johnson died, he signed two statements, which will be referred to herein as statements of intention.[1] He recited therein, among other things, that he requested that Clarence Erickson be elected a director so that in case of Mr. Johnson's death the directors would be Miss Liddecoat, Mr. Erickson, and Norman Johnson; and in case of the death of Miss Liddecoat, he desired that Mr. Erickson have active management of the Foundation. Defendant Mary Liddecoat signed said statements, as shown thereon, under the

---

[1] "Gospel Foundation of California
"Attention: Mary Liddecoat, Director
"Gentlemen:

"I have executed deeds to the Gospel Foundation of California conveying all of my right, title and interest in and to Shadelands Ranch, consisting of 335 acres more or less, located in Contra Costa County, California, and the Death Valley Ranch commonly known as Scotty's Castle, located in Inyo County, California and consisting of about 1500 acres more or less; and a residence at 7333 Franklin Ave., N.E. Corner of Camino Palmero and Franklin Avenue, located in Los Angeles County, and some vacant property located in Lake County, Illinois and all of my right, title and interest in a tract or tracts of land, commonly known as the Lake Harbor Conference Grounds or Maranatha Conference Grounds;

"Now, in consideration of my deeding these properties, and delivering to you the title of these properties, I would like it to be understood as follows:

"That my mother's sister, Elizabeth M. Jenkins, and myself are to have the use of the property and residence located on the northeast corner of Franklin Avenue and Camino Palmero Street, Hollywood, California, for as long a period of time as we shall live and that the Gospel Foundation of California shall supply and furnish Elizabeth M. Jenkins with the necessary monies, not exceeding $6,000.00 a year, out of which shall be provided a nurse, medical care and incidental expenses including burial expenses.

"Yours very truly,
"A. M. Johnson

"Accepted:
"Mary Liddecoat, Vice President and Director
"A. M. Downey, Assistant Secretary and Treasurer
"Witness:
"H. M. Harding

"Now, in consideration of my having deeded (above properties) to the Gospel Foundation of California, I desire the right and privilege of having the Gospel Foundation of California pay me up to, but not exceeding, $50,000.00 upon my demand each and every year as long as I may live.

"Now, in consideration of the above, it is my desire that the affairs of the Gospel Foundation of California be conducted primarily by Mary Liddecoat with the assistance of Norman E. Johnson as he is able to; and, if Clarence Erickson has not already been elected a Director of the Gospel Foundation of California, I request that he be elected a Director so that, in the case of my death, the directors will consist of Mary Liddecoat, Clarence Erickson and Norman E. Johnson. In the case of the death of Mary Liddecoat, it is my desire that Clarence Erickson have the active management of the Gospel Foundation.

"It is also my desire that Mary Liddecoat, as long as she lives, and in the event of my death, be the active head of the Gospel Foundation of California with a salary, depending upon her sole judgment as to the amount of services she is rendering, at not less than $3,000.00 per year and not more than $5,000.00 per year.

"It is also may desire that, in the event of my death, Mary Liddecoat, as the head of the Gospel Foundation of California shall employ Norman E. Johnson at a salary of not less than $3,000.00 per year and not more than $5,000.00 per year.

"In the event of the death of Mary Liddecoat and the succession of Clarence Erickson to the active management of the Gospel Foundation of California, I would like to have him draw a salary of not less than $3,000.00 per year and not more than $5,000.00 per year.

"In the event of my death, it is my desire that Mary Liddecoat, in her sole word "Accepted." All the signatures on those documents were placed thereon "at the same time." After those statements were signed, they were kept in Mr. A. M. Johnson's office until the time of his death. There was evidence that the statements of intention were in existence at the time the deeds were signed and acknowledged.

At a meeting of the board of directors held on January 12, 1948 (directors Liddecoat and Norman E. Johnson being present), said statements of intention were made a part of the minutes of said meeting. The minutes of said January 12th recite that vice-president Liddecoat stated that she had a writing from Mr. A. M. Johnson outlining the terms and conditions under which he had executed the said deeds, and that she had acknowledged the offer to convey upon the terms outlined on behalf of the Foundation. Also at said meeting, the plaintiff Clarence Erickson, who resided in Chicago, was elected a director—each director casting one vote for him; Mary Liddecoat was elected president and treasurer; and Norman E. Johnson was elected vice-president and secretary.

At an annual meeting of members held on April 13, 1948, the three members, Liddecoat, Johnson and Erickson, were present. At that meeting the minutes of the meeting held on December 12, 1947, and the minutes of the two meetings held on December 16, 1947, were approved. (Those meetings in December were the ones wherein Mary Liddecoat allegedly was accorded two additional votes.)

At the annual meeting of the directors on April 4, 1950 (the three directors being present), the plaintiff, upon motion of Mary Liddecoat was re-elected a director. The day following that meeting, Miss Liddecoat and Mr. Erickson had a conversation regarding the duties of the directors. Plaintiff testified that he told Miss Liddecoat that he thought that the directors could operate the castle without the services of Walter Webb (the manager) "at that high price" ($10,000 per year), because he (plaintiff) thought that Mr. A. M. Johnson wished to have the corporation operated by the directors; and that he (plaintiff) told her that Webb's services should be discontinued as soon as possible in order to save the funds. After the conversation, Mr. Erickson returned to Chicago. He is pastor of the Chicago Gospel Tabernacle. He first met Mr. A. M. Johnson about 1930. Mr. Johnson had supported the Tabernacle financially to a great extent.

On April 26, 1950, in the office of the corporation at the Franklin Avenue house, defendant Liddecoat typed and signed a document[2] which stated, in part, that "The membership of Clarence Erickson is cancelled and annulled by a majority of the votes which the other members are entitled to cast at any time," and the action has been recorded in the minutes. Webb, the manager, helped her in the preparation of that document. She did not communicate with Mr. Norman E. Johnson, the director who resided about one block from the office, concerning the cancellation of the membership of Mr. Erickson, and he had no knowledge of her contemplated action. On said April 26th, after she had allegedly cancelled his membership, she left Los An-

---

judgment, place Carrie Lee Johnson Pagenta on the payroll of the Gospel Foundation of California for such an amount and for such a period as in her judgment should be wise and suitable.

"A. M. Johnson

"Witness:
"H. M. Harding
"Accepted:
"Mary Liddecoat, Vice President and Director
"A. M. Downey, Assistant Secretary and Treasurer
"Witness:
"H. M. Harding"

[2] "April 26, 1950

"The membership of Clarence Erickson is cancelled and annulled by a majority of the votes which the other members are entitled to cast at any time.

"This cancellation and annulment is signed and the action is here recorded in the Minutes of the Gospel Foundation of California; all as provided in the Foundation By-Laws Article II Section 11.

"Member Voting	Number of Votes
"Mary Liddecoat	3"

geles by train to go to Chicago. Upon her arrival there, she telephoned to Mr. Erickson and told him that she wanted to talk to him. She had not notified him that she would be in Chicago. He went to the hotel where she was, and she had a conversation with him to see if his "attitude" regarding the Foundation had changed. She decided that his attitude had not changed, and then she gave to him a letter,[3] informing him that his membership was cancelled. He told her that the cancellation was illegal. Before she left Los Angeles to go to Chicago, she conferred with Webb as to the available time for him (Webb) to tell Norman Johnson about the cancellation. It was prearranged between her and Webb that at a certain time, as she was arriving in Chicago, Webb would tell Norman Johnson regarding her action and also tell him that, if he wanted to discuss the matter, he could telephone to her in Chicago. She testified that she did not notify Mr. Johnson about the cancellation and the proposed trip to Chicago, because it was her impression that he might disapprove; that she took upon herself the full responsibility of making the decision and carrying it out for the reason she had the additional votes. At the time she gave Mr. Erickson the said letter she also gave him another letter which stated, in part, that his call on April 5th, the day after the directors' meeting, has been a source of great concern to her, and that his statements on that day had been disturbing for several reasons. The letter is set forth below.[4] She testified that there was a lot of self-interest in what Mr. Erickson wanted to do as far as the Foundation was concerned. He testified that he had talked to her, before his membership was cancelled, about trips to South America for the purpose of working on or founding missions; they discussed the possibilities of missionary activities, but the Foundation was not to pay anything on it; the money used would be his own funds which are now channeled through his Chicago church,

[3] "April 26, 1950

"Mr. Clarence Erickson
"825 Barry Avenue
"Chicago 14, Ill.
"My dear Mr. Erickson:

"You are hereby informed that, pursuant to Articles of Incorporation, and By-Laws (Article II, Section 11), your membership in the Gospel Foundation of California is cancelled and annulled by a majority of the votes which the other members are entitled to cast at any time.

"Co-incident with this action, I am writing you the enclosed letter pertaining to the subject.

"The cancellation has been signed and the action has been recorded in the minutes of the Foundation, as provided.

"Regretfully yours,
"Mary Liddecoat
"President"

[4] "April 26, 1950

"Mr. Clarence Erickson
"825 Barry Avenue
"Chicago 14, Ill.
"Dear Mr. Erickson:

"Your call on me (April 5th) the day after our Foundation meetings has been the source of great concern to me the past three weeks.

"I shall not here recite all you said. Your memory should serve you in that respect.

"Your expressed views and opinions were in sharp contrast to the actions agreeably formalized in our Foundation meetings of the previous two days.

"From January 1948, when you were first elected a member-director, to and including the 1950 April Annual Meetings, during which you were re-elected on my nomination, you have unrestrainedly participated in all discussions and debate of subjects pertinent to the business of the Foundation. All member-director conclusions have been embodied in formal resolutions, and/or motions, which received your recorded voice of approval.

"Your statements the day following our meetings have been disturbing for several reasons. One reason is the incompatibility of your expressed opinions of procedure when viewed in the light of your suggestion to me in January 1948. You will recall you then proposed making a personal contribution to acquire additional votes, by which to create for you a control factor in your Foundation association.

"It is deeply regrettable that the action of today became inevitable after considering the attitude you expressed, against the background of events.

"Regretfully yours,
"Mary Liddecoat"

but if he moved to the Coast, the funds would be channeled through the Gospel Foundation; he told defendant Liddecoat that the three directors could operate the Foundation and save the $10,000 per year that was being paid to Webb; he (Erickson) spoke to her about coming here and doing some work in connection with the board of directors and getting $5,000 a year; he told her that he would give $100 an acre for some of the land at Shadelands Ranch, but he said that as a jest; he asked her why she had to pay six per cent interest on the $25,000 loan which was placed against the Franklin Avenue house, and then told her that he would have liked to have that loan himself; he told her that he was willing to put up $2,000 so that each of them would have three votes; and she did not say anything in reply.

Defendant Liddecoat testified that she did not like Mr. Erickson's attitude because: He was one way in the meetings, but outside the meetings he took a contrary position; he urged that Webb be removed, stating that the directors could carry on, that he (Erickson) would be free to come from Chicago and take over, and he could use the Foundation headquarters as his office; he asked if he could draw $5,000 per year—that he would go to the castle but would come to Los Angeles on weekends and conduct services so that he could get additional money; he wanted to purchase some of the ranch property (in Contra Costa County) for $100 per acre; he showed considerable interest in acquiring the $25,000 mortgage for himself; he wanted to bring his radio program here from Chicago and then solicit funds for the Foundation, which solicitation was contrary to Mr. A. M. Johnson's plan.

A special meeting of the directors was held on August 21, 1950. Notice of the meeting was given. After receiving the notice, Mr. Erickson asked if his expenses in coming from Chicago to the meeting would be paid. It was agreed that the Foundation would pay his expenses. Miss Liddecoat, Mr. Johnson and Mr. Erickson were present at the meeting. At 10 a.m., she called the meeting to order, read a prepared statement which recited that at a previous membership meeting she had cancelled the membership of Clarence Erickson by certificate recorded in the minutes of April 26, 1950. Then, according to the minutes of August 21st, she recessed the meeting, explaining that "she would reconvene at 4 P.M."

When the meeting was resumed at 4 p. m., she stated (according to the minutes) that the first matter before the meeting was the voting upon the cancellation of the membership of Clarence Erickson "by the other member who has not previously voted thereon." She asked Mr. Johnson to state his vote, and he voted "No." She stated that her three votes, recorded on April 26, 1950, in favor of the cancellation, still stood—"three votes, yes." (She testified that she asked Mr. Erickson how he voted, and he did not vote—he remained silent.) Then at 4:20 p. m., she stated the meeting was dismissed.

After that meeting there was discussion regarding the legality of the alleged dismissal of Mr. Erickson, and thereupon, at 4:30 p. m., she reopened the meeting. She testified that she said that the cancellation "was in order, to vote"; she called for the vote of Mr. Johnson and he voted "No," and she voted "Yes." The minutes show, with reference to the meeting at 4:30 p. m., that "Clarence Erickson was not allowed to vote." (She testified that she did not call the name of Mr. Erickson because she "considered that there was no vote there, since I [she] had taken action in April.") The meeting was then recessed until the following morning.

At the meeting held (the following morning) on August 22, 1950, directors Liddecoat and Johnson were present. Miss Liddecoat made a motion that Selma C. Abnot be elected a member to fill a vacancy. Miss Liddecoat cast three votes for her. Mr. Johnson did not vote. Mr. Johnson nominated Selma C. Abnot to fill a vacancy in the position of secretary. Miss Liddecoat and Mr. Johnson voted for the nominee.

Miss Liddecoat testified that at meetings of members she never "mentioned" the casting of three votes until the meeting when she cast three votes for the cancellation of Mr. Erickson's membership.

Mr. Norman E. Johnson, a cousin of Mr. A. M. Johnson, testified that he had lived in Mr. A. M. Johnson's home most of his lifetime, and that he and his wife were living there when Mr. A. M. Johnson died; Miss Liddecoat did not notify him that she was going to Chicago to see Mr. Erickson; on April 28, 1950 (two days after she left for Chicago), Webb called him by telephone and said that he would like to see him; he (Johnson) went to the Foundation office; Webb showed him two papers—one of which was to the effect that Mr. Erickson had been dismissed; Webb said that Miss Liddecoat was "at this very moment" in Chicago presenting the papers to Mr. Erickson; Webb asked him to sign the paper; he replied that he would have nothing to do with it, he did not agree with it, and he did not think it was honest; Webb said that he (Johnson) could talk with her by telephone; he replied that she did not see fit to discuss it with him before she went, and he would not try to call her by telephone; three meetings of directors were held on August 21, 1950, and at one or all of those meetings Miss. Liddecoat said to Mr. Erickson: "You can't vote"; "Well, you are out"; and "You are through."

The court found that A. M. Johnson executed conveyances dated May 29, 1947, and filed of record between December 27 and December 30, 1947, whereby he conveyed to the Gospel Foundation of California his said properties hereinabove described; said instrument, referred to in the trial as a statement of intention, was signed by A. M. Johnson about December 15, 1947, and remained in his files until after his death, when it was presented to the directors of said corporation on January 12, 1948; said statement was received by the corporation subsequent to the conveyance and cannot limit said conveyance, and contains only precatory words which do not impose a charge against the assets of the corporation, and its terms cannot be enforced by Erickson who is a third party and not a beneficiary of said trust; said statement could not obligate the trustees to elect Erickson a member and director; the provisions of the articles of incorporation and the bylaws, and the action taken pursuant thereto, vesting in Miss Liddecoat three votes as a member are valid and were accepted by Erickson to create a binding contract on him; the action of Miss Liddecoat in casting three votes on April 26, 1950, for the cancellation of Erickson's membership was of no force and effect, but at the meeting held on August 21, 1950, the cancellation of his membership was properly voted and is valid, and that Selma C. Abnot was properly elected; Erickson has no further rights in regard to the corporation and no further obligation as a member or director; Erickson waived any objection to Liddecoat being vested with three votes, by approving the minutes of prior meetings and by acting as a director without protesting the provisions of the articles and bylaws and the action taken pursuant thereto; Erickson ratified and approved the articles and bylaws, and is estopped to contest the validity thereof; and Erickson was not prevented by laches from contesting the validity of the articles and bylaws. Judgment was rendered in accordance with the findings.

A question here is whether the second paragraph of section 6 of article II of the bylaws is valid, which paragraph allows a member an additional vote for each $1,000 "conveyed" to the corporation and accepted by a majority vote of the members of the corporation.

This is a nonprofit and charitable corporation. As above stated, the articles of incorporation provide that the number of directors shall be three, but the number may be changed by bylaw, but in no event shall the number exceed five; the number of members shall be the same as the directors, not less than three nor more than five; a person, upon being elected a director, thereby becomes a member; when he ceases to be a member, he ceases to be a director. There is no bylaw changing the number of directors. Therefore, under the articles, a basic principle or provision, with respect to directing or governing the affairs of the corporation, is that there shall be three directors. Also, since the articles provide that there shall be as many members as there are directors, and since a director is a member and a member is a director, a basic principle or provision, under the articles, with respect to membership in the corporation, is that there shall be three members. It is also a basic principle, under statutory provision except as otherwise provided in the articles or bylaws, that the affairs of a nonprofit corporation shall be conducted by "a board of not less than three directors." Corp. Code, § 9500. Therefore, since such provisions are in the articles and the statute, it appears that a fundamental principle of the corporation is that its affairs shall be controlled and governed by a board of at least three directors.

Section 600 of the Civil Code, in effect in 1946 when the corporation herein was formed, provided in part: "A nonprofit corporation shall have such memberships or classes thereof as may be specified in the articles or bylaws, but unless otherwise provided there shall be but one class of members whose rights and interests shall be equal." Section 603 of the Civil Code, in effect when the corporation was formed, provided: "Unless otherwise provided in the articles or by-laws every member of a nonprofit corporation shall be entitled to one vote and may vote or act by proxy. The manner of voting may be by ballot, mail or any reasonable means provided in the articles or by-laws. No member may cumulate his votes unless it is so provided in the articles or by-laws."

In 1947 the Corporations Code was adopted and the provisions of said Civil Code sections 600 and 603, just referred to, were incorporated in substance therein as sections 9602 and 9601 respectively. Said section 9602 of the Corporations Code was amended in 1949. That section, as amended, provides: "A nonprofit corporation shall have such memberships or classes thereof as the articles or by-laws specify, but no member may hold more than one membership, and in the absence of any such classification of members there shall be deemed to be but one class. Unless the articles or by-laws set forth the rule or rules fixing the respective voting, property and other rights and interests of each member or class of members, the rights and interests of members shall be equal as to any right or interest not so fixed." Section 9601 of the Corporations Code provides: "Unless the articles or by-laws provide otherwise, every member of a nonprofit corporation is entitled to one vote and may vote or act by proxy. The manner of voting may be by ballot, mail, or any reasonable means provided in the articles or by-laws. No member may cumulate his votes unless the articles or by-laws so provide."

[1, 2] The articles or bylaws herein do not provide for more than one class of membership. The provision in the bylaws which allowed a member an additional vote for each $1,000 contributed to the corporation was not a provision creating a different class of membership. Upon dissolution of the Gospel Foundation the members would not be entitled to any of the assets of the corporation. They had no property interest in the assets. Upon dissolution, the assets are to be distributed to three certain religious organizations named as beneficiaries in the articles. The only object or purpose of the corporation was to operate the ranches and other property, which were assets of the corporation, and to contribute the income therefrom for the purpose of aiding and promoting Christian missions. In view of such object or purpose of the corporation, there was no reason or basis for creating different kinds or classes of membership which would entitle the members to varying privileges or rights as members of the corporation. There being only one class of membership, a member was entitled to only one vote, under said statutory provisions, unless it can be said, under the last sentence of said section 9602 of the Corporations Code,[5] that said provision of the bylaw (§ 6, art. II) sets forth a valid rule "fixing the respective

---

[5] The last sentence of section 9602 of the Corporations Code is: "Unless the articles or by-laws set forth the rule or rules fixing the respective voting, property and other rights and interests of each member or class of members, the rights and interests of members shall be equal as to any right or interest not so fixed."

voting * * * rights * * * of each member or class of members * * *." The bylaw awarded a member, whose contribution of $1,000 was *accepted* by a majority vote of the members, more voting power than another member of the same and only class of membership, whose proffered contribution of $1,000 was not accepted. In practical effect, that bylaw permits the member, who first contributes $2,000 that is accepted and who thereby has a total of three votes, to control and govern all the affairs of the corporation—including the decision as to whether other members may likewise acquire additional votes by making contributions. In other words, the first member whose contribution of $2,000 is accepted could refuse to accept contributions from other members and thereby prevent them from having equal voting power with the first member whose contribution was accepted. The result under such a bylaw could be (and the result herein is) that the corporation would be, in effect, a corporation sole instead of a corporation governed by three directors, as contemplated under the above-mentioned basic principle (of the articles and the statute) with respect to governing the affairs of the corporation. The said bylaw is in conflict with the above-mentioned basic principle or provision of the articles and the statute, to the effect that the affairs of the corporation shall be governed by three directors. Under the bylaw the member-directors were not accorded equal rights in the matter of making contributions to the corporation and acquiring equal voting power. It might be argued, in alleged justification of the bylaw, that the bylaw was intended to encourage the making of contributions to further the financial position of the corporation, and that a member who contributes the more money would be the more interested or determined in successfully promoting the charitable interests of the corporation, and therefore should have more voting power than those members who do not contribute money to the corporation. The bylaw itself, however, refutes a suggestion that general contributions of money were desired. The bylaw pertains to the making of contributions by members, as distinguished from contributions generally, and further restricts the making of contributions by providing that the proposed contributions from members must be accepted by a majority vote of the members. Such restrictions indicate that the bylaw was not calculated to promote the general financial welfare of the corporation, and they also indicate that it was not based upon a theory that a member who had made a contribution would be a better and more interested member and therefore should have increased voting power in proportion to the amount of his contribution. Here, the practical application of the bylaw reveals that defendant Liddecoat contributed $2,000 to a corporation of the value of more than $1,000,000 and thereafter by refusing to accept a similar offer made by plaintiff Erickson she gained complete and arbitrary control of the corporation. The provision of the bylaw requiring that contributions be accepted by a majority vote of the members was arbitrary and unreasonable in its application to all three members, and it does not operate uniformly and equally upon all the members who are of the same and only class of membership of the corporation. "The power to make by-laws, even where unrestricted by statute, is subject to the condition that they must not be unreasonable in their practical application; and they must not contravene or be inconsistent with the provisions of the charter, or articles or with the law, or with the constitution. Moreover, a by-law must not contravene public policy; nor, it has been said, may a by-law be inconsistent with the general principles of the law of the land * * *." 6A Cal.Jur., pp. 319–320, § 166. In the Fletcher Cyclopedia of the Law of Corporations (Permanent Edition), Vol. 8, section 4192, at page 734, it is said: "As a general rule, by-laws must be general and uniform in their operation and effect upon all persons or subjects of the classes affected by them; that is, they must affect all alike, and operate equally as to all persons or matters standing in equal status or circumstances and without unreasonable discrimination as to any particular person or thing of the class." In Lindsay Strathmore Irrigation District v. Wutchumna W. Co., 111 Cal.App. 688, at page 701, 296 P. 933, at page 939, it was said: "Not only must by-laws be reasonable (citations), but they must also operate equally upon all persons of the same class." The second paragraph of section 6 of article II of the bylaws, which provides for such additional votes, is invalid.

[3-7] Respondents assert that appellant Erickson affirmed and acquiesced in the bylaw and that under the doctrines of waiver and ratification he is estopped to contest its validity. This contention is based upon the fact that Mr. Erickson, as a member and director, joined the other directors in approving the minutes of meetings wherein defendant Liddecoat's contribution of $2,000 was accepted; and upon the further fact that he acted as a member and director without protesting the provision of the bylaw and the action taken pursuant thereto which vested her with two additional votes. A bylaw which is opposed to public policy is void. Wells v. Black, 117 Cal. 157, 162, 163, 48 P. 1090, 37 L.R.A. 619. A contract which is opposed to public policy cannot be treated as valid by invoking the doctrine of estoppel or waiver. Woods v. Kern County Mut. etc. Ass'n, 34 Cal.App.2d 468, 473, 93 P.2d 837. As above shown, it is the policy of the law of California (1) that a member of a nonprofit and charitable corporation, with only one class of membership, shall have only one vote; (2) that such a corporation shall be directed and governed by a board of directors of not less than three directors; and (3) that a bylaw must not be unreasonable in its application, nor operate unequally upon the members, nor contravene the provisions of the articles of incorporation. As above stated, there was only one class of membership in the Gospel Foundation; the bylaw, in its application, permitted the corporation to be governed by one member. Said bylaw is against public policy, and the doctrines of waiver, ratification, and estoppel are not applicable herein.

By reason of the above conclusions, it is not necessary to discuss other contentions on appeal.

The judgment is reversed, and the superior court is directed to enter a judgment declaring that the second paragraph of section 6 of article II of the articles of incorporation (allowing additional votes) is invalid, and that the action of Mary Liddecoat in casting three votes allegedly cancelling and annulling the membership and directorship of Clarence Erickson is invalid.

SHINN, P. J., and VALLÉE, J., concur.

41 Cal.2d 235

THOMPSON v. CITY OF LONG BEACH et al.

L. A. 22656.

Supreme Court of California, in Bank.
July 7, 1953.

Rehearing Denied July 28, 1953.

Discharged stenographer of civil service board of city brought mandamus proceedings to compel board to reinstate her. The Superior Court of Los Angeles County, Percy Hight, Judge pro tem., entered judgment adverse to discharged stenographer, and she appealed. The Supreme Court, Spence, J., held that evidence sustained board's finding that stenographer should be dismissed on ground that she was unable to perform duties of stenographer because of defective vision.

Judgment affirmed.

Prior opinion, App., 250 P.2d 312.

Schauer, J., dissented.

1. Municipal Corporations ⚷218(8)

Where power to suspend or dismiss a person in classified civil service of city was vested by city charter in either the head of the department or the city manager, and any qualified elector could file written charges, civil service board did not lack authority to proceed with hearing on question whether stenographer of the board should be dismissed, on ground that she was unable to perform duties of stenographer because of defective vision, because chairman of board, rather than city manager, preferred charges against stenographer. St. 1923, p. 1628, § 106.

2. Mandamus ⚷173

In mandamus proceedings by discharged stenographer of civil service board of city, who was dismissed by board, on ground that she was unable to perform duties of stenographer because of defective vision, discharged stenographer was not entitled to trial de novo in superior court but only to review of full proceedings before board acting as a quasi-judicial body empowered to make final adjudications of fact in connection with matters properly submitted to it.

3. Mandamus ⚷172

In mandamus proceedings by discharged stenographer of civil service board of city, who was dismissed by board, on ground that she was unable to perform duties of stenographer because of defective vision, superior court did not have right to judge of intrinsic value of evidence or to weigh it, and its power was confined to determining whether there was substantial evidence before board to support its findings.

4. Mandamus ⚷168(4)

In mandamus proceedings by discharged stenographer of civil service board of city, who was dismissed by board, on ground that she was unable to perform duties of stenographer because of defective vision, superior court was bound to disregard medical evidence contrary to medical evidence received by board in support of its findings.

5. Evidence ⚷537

Fact that doctors, on whose evidence civil service board of city based its findings that stenographer was unable to perform duties of stenographer because of defective vision, were general practitioners rather than eye specialists, did not affect their competency but only went to weight to be accorded their testimony.

6. Municipal Corporations ⚷218(8)

Evidence sustained finding of civil service board of city that board's stenographer should be dismissed on ground that she was unable to perform duties of stenographer because of defective vision. Code Civ.Proc. § 1094.5(c).

7. Municipal Corporations ⚷218(8)

Where civil service board of city consisted of five members, and four of the members voted unamimously to dismiss board's stenographer on ground that she was unable to perform duties of stenographer because of defective vision, and fifth member of board did not participate, stenographer was not prejudiced because board's chairman, who had instituted charges against stenographer, participated in the proceedings and voted for dismissal of stenographer.

8. Mandamus ⚷107

Regardless of any civil service status obtained under city charter by stenographer employed by civil service board of city and in absence of grant of sick or vacation leave, stenographer was not entitled to writ of mandate to compel payment to her of compensation as an employable person unless she was able to perform services required in discharge of her assigned duties.

9. Appeal and Error ⚷989, 994(3), 996

Questions as to weight and sufficiency of evidence, construction to be put on it, inferences to be drawn therefrom, credibility of witnesses commensurate with their conduct and manner of testifying, and determination of conflicts and inconsistencies in their testimony were matters for trial court to resolve.

◆

Kenneth Sperry, Long Beach, for appellant.

Irving M. Smith, City Atty., Clifford E. Hayes and John R. Nimocks, Dep. City Atty., Long Beach, for respondents.

SPENCE, Justice.

This is an appeal from a judgment in favor of respondents in a mandamus proceeding brought by appellant to compel respondents to permit appellant to resume her duties as a stenographer in the classified civil service of the respondent city, to revoke an order discharging her from the service, and to pay her salary claims. Appellant challenges the sufficiency of the evidence to sustain the trial court's determination that she is not entitled to the relief sought, but she cannot prevail in the light of the record.

Appellant worked for the civil service board as a stenographer from 1929 until August, 1947, when she was granted a leave of absence because of an impairment of her vision. One year later, August, 1948, she was given an indefinite suspension. In March, 1949, she had an operation for the removal of a cataract from her right eye, and thereafter she wore corrective glasses. On September 6, 1949, the board terminated the suspension and ordered her to report for a physical examination as required of all employees by rule of the board following a leave of absence of six months or more. The rule provides that failure to pass the examination shall constitute ground for suspension or dismissal. (Rule V, sec. 13.) The examination was made on September 8, 1949. According to the report of the examining physicians, appellant's general physical condition was normal but because of particular visual defects she was declared "not employable at present." On September 15, 1949, the board by resolution approved the medical report and denied appellant re-employment.

On May 15, 1950, a notice of discharge was served on appellant. Following appellant's objection to the sufficiency of the charges and on June 1, 1950, an amended notice was served on appellant and filed with the board (Rule XIV, secs. 2–5) stating: "That the medical examination given you by the Board of Physicians of the City of Long Beach on the 8th day of September, 1949, establishes that you have contracted a physical ailment or defect which incapacitates you for the proper performance of the duties of your position, namely, practically no vision in the right eye but this is corrected through use of lenses and no vision in the left eye due to immature cataract * * *; that during a period is excess of two and one-half (2½) years your vision has not been restored to the extent that you are able to perform the duties of Stenographer * * *;" and that within five days she could file an answer with the board. (Rule XIV, sec. 6.) Appellant duly filed an answer denying that she failed to pass a physical examination based on her ability to perform the duties of a stenographer, and denying that she had contracted any physical ailment or defect.

On June 29, 1950, the board held a hearing at which appellant and her counsel were present, and evidence was taken. Thereafter, by agreement with appellant, an eye specialist was appointed to examine her, and at a second hearing on September 5, 1950, his report and that of an assistant health officer for the city were considered. Neither appellant nor her counsel was present at this latter hearing, which concluded with the board's adoption of a resolution sustaining the charges filed against appellant and removing her from her employment. On January 29, 1951, after the alternative writ of mandamus was issued in this proceeding, the board vacated its order of dismissal of September 5, 1950, and restored the matter to the calendar for further hearing. See English v. City of Long Beach, 35 Cal.2d 155, 160, 217 P.2d 22, 18 A.L.R.2d 547. Following notice to appellant and her counsel and two continuances, at which neither appeared, the board on February 28, 1951, again sustained the charges dismissing appellant as a stenographer.

At the trial the record before the board was received in evidence; appellant and other witnesses testified without objection; and pertinent rules of the board as above cited were introduced in evidence. The trial court found that appellant was not, after September 7, 1949, ready, able and willing to perform the duties of a stenographer in the classified service of the city; that she was accorded a full, fair and complete hearing upon the charges of dismissal; and that there was substantial evidence offered and received to support the findings of the board. These findings are not open to successful challenge by appellant.

[1] Preliminarily, appellant questions the authority of the board to proceed with the hearing because its chairman, rather than the city manager, preferred the charges against her. There is no merit to this objection. Under the city charter, the power to suspend or dismiss a person in the classified civil service appears to be vested in either the head of the department *or* the city manager (section 107), and any qualified elector may file written charges. (Section 106, see Stats.1923, p. 1628).

[2, 3] Appellant was not entitled to a trial de novo in the superior court but only to a review of the full proceedings before the local board acting as a quasi-judicial body empowered "to make final adjudications of fact in connection with matters properly submitted to it." English v. City of Long Beach, supra, 35 Cal.2d 155, 158, 217 P.2d 22, 24. Upon such review the "court does not have a right to judge of the intrisic value of evidence nor to weigh it" but its "power * * * is confined to determining whether there was substantial evidence before the board to support its findings." Odden v. County Foresters, etc., Board, 108 Cal.App.2d 48, 49, 238 P.2d 23, 24; see, also, Code Civ.Proc. § 1094.5, Subdivision (c); Bank of America Nat. Trust & Savings Ass'n v. Mundo, 37 Cal.2d 1, 5, 229 P.2d 345. No question is raised here as to the validity of the board's rule requiring an employee to take and pass a physical examination before resuming work after an extended absence, and providing that failure to pass the examination shall constitute grounds for suspension or dismissal. English v. City of Long Beach, 77 Cal.App.2d 894, 901, 176 P.2d 940. But appellant does question the evidentiary basis for the board's determination that appellant was not physically qualified to resume her stenographic duties and was so justifiably dismissed from the city's service.

All the doctors who testified or whose reports were read in evidence before the board either in behalf of appellant or respondents were in substantial agreement as to appellant's physical condition and its cause: That following the operation on her right eye for the removal of a cataract, appellant still had a marked visual defect in that eye with correction to near normal vision only through the use of glasses; and that the vision in her left eye was practically nil, permitting only the perception of light, due to an immature cataract. With regard to appellant's right eye, the examining doctors for the city described appellant's vision in relation to the standard eye chart used for testing visual distances—20/400 without glasses, meaning that she could read the largest letter on the chart at a distance of 20 feet instead of the normal 400 feet, and 20/20–3 as corrected with glasses, meaning that in reading the letters on the chart at the standard distance of 20 feet, she missed 3 of the 6 or 7 on the line.

The divergence of opinion in the medical testimony before the board centered on whether appellant's defective vision constituted an ailment which incapacitated her from performing her stenographic duties.

Appellant was examined by three doctors on behalf of the city and their report was then reviewed by the city's health officer. With their attention directed to the tasks of a stenographer as commonly understood, all four doctors, who were general practitioners, agreed that appellant's impaired vision precluded her from doing such work satisfactorily and that she was not, in their opinion, an acceptable employee for such rating in the city's service. In testing appellant's visual acuity, they relied principally on her ability to read distance charts accurately and without strain. They particularly noted the difficult adjustments for distance accommodation which would be required of a stenographer having vision in one eye instead of two, with the necessary change of vision from scanning shorthand notes to transcription on the typewriter and the doing of other things involving a shift of vision back and forth, inevitably resulting in general strain. They stated that such situation would be that much more aggravated in appellant's case where there was not only an absence of binocular vision but also a deficiency even in her one good eye.

[4, 5] Appellant cites the opposing medical testimony of eye specialists in her behalf indicating that despite her visual defects, she nevertheless could satisfactorily perform normal stenographic duties. However, this merely created a conflict in the record, and in reviewing the proceedings before the board the court was bound to disregard the evidence contrary to that received in support of the findings of the board. Nider v. City Commission, 36 Cal.App.2d 14, 20, 97 P.2d 293; Nunes v. Board of Civil Service Com'rs, 88 Cal.App.2d 632, 636, 199 P.2d 311; Fickeisen v. Civil Service Comm., 98 Cal.App.2d 419, 421, 220 P.2d 605. Appellant made no objection to the competency of the four doctors who testified at the board proceedings on behalf of the city. Their experience in the medical profession ranged from 12 to 50 years. While they were general practitioners rather than eye specialists, this fact did not affect their competency but only went to the weight to be accorded their testimony. Cases anno: 54 A.L.R. 860, 861. Manifestly, the qualification of the general practitioners to testify as expert witnesses concerning appellant's admitted visual defects and the effect of such defects an appellant's ability to satisfactorily perform her work had no relation to their familiarity with the standards of care required in the treatment of eye conditions. So distinguishable is the situation in Huffman v. Lindquist, 37 Cal.2d 465, where at page 476, 234 P.2d 34, 41, it was declared that the trial court had not abused its discretion in sustaining an objection to the qualification of an autopsy surgeon to "testify as an expert with regard to the *question of whether defendant doctor had exercised the proper and requisite degree of skill and care.*" (Emphasis added.)

[6] Here the opinions of the four doctors in question rested on an undisputed statement of physical facts—not on erroneous assumptions, Brant v. Retirement Board of San Francisco, 57 Cal.App.2d 721, 733, 135 P.2d 396; improper hypothetical factors, Thoreau v. Industrial Accident Comm., 120 Cal.App. 67, 72–73, 7 P.2d 767; a contradiction of the obvious laws of nature, Hendricks v. Industrial Accident Comm., 25 Cal.App.2d 534, 537, 78 P.2d 189; an inaccurate medical history of the case, Blankenfeld v. Industrial Accident Comm., 36 Cal.App.2d 690, 697, 98 P.2d 584; or weak evidentiary considerations, In re Guardianship of Waite, 14 Cal.2d 727, 731, 97 P.2d 238. In visual specifications established for workmen's compensation cases the "loss of both eyes or the sight thereof" is "conclusively presumed" a permanent total disability, Labor Code, § 4662, with a reduction in vision to 20/200 or less rated as complete loss of sight under the Industrial Accident Commission's authorized "schedule for the determination of the percentage of permanent disabilities." Labor Code, § 4660. Under the circumstances, the testimony of the general practitioners on the question of the effect of appellant's admittedly defective vision upon her capacity to do stenographic work was not without evidentiary weight. In accepting such testimony and rejecting the contrary opinions of the specialists, the board exercised its fact-finding powers in the de-

termination of conflicting evidence. Accordingly, its decision that appellant's defective vision precluded her satisfactory performance of her stenographic duties and constituted ground for her dismissal from the service cannot be disturbed. Greif v. Dullea, 66 Cal.App.2d 986, 1009, 153 P.2d 581.

Appellant challenges the fairness of the proceedings before the board on the ground of alleged prejudice. The record is not entirely clear with respect to appellant's precise position as to wherein "personal bias and prejudice" on the part of the board or any particular members thereof affected the proceeding. At the board hearing appellant did raise the question of its authority to proceed with the dismissal charges as preferred by the board's chairman, an objection without merit as above discussed. However, it does not appear that she then argued the distinctly separate issue of any prejudice that might arise by reason of his sitting as a member of the board empowered to hear the charges. Sec. 107; see Nider v. Homan, 32 Cal.App.2d 11, 13, 89 P.2d 136. In the trial court appellant's counsel alluded to the possible impropriety of the chairman's hearing and resolving the evidence relating to the charges which he had preferred, but her counsel at the same time recognized that an "unusual situation" was involved in that appellant was an employee of the board which, according to the city charter, must determine the sufficiency of the "evidence * * * to warrant her dismissal." With this observation, appellant's counsel failed to press the objection further.

[7] Now on this appeal appellant urges that the trial court erred in rejecting certain offers of evidence purportedly relating to prejudice on the part of the board. These offers of proof appear quite vague and it is not clear as to whom such proof was to be directed in relation to any claim of "fraud, malice or arbitrary conduct". Cf. Saks & Co. v. City of Beverly Hills, 107 Cal.App.2d 260, 265, 237 P.2d 32, 36. The board consisted of five members, with four voting unanimously to sustain the dismissal charges and the other "having no familiarity with the proceedings, did not participate." Even were it to be conceded that the chairman should not have acted on the hearing of this matter, nevertheless a majority of the board, consisting of three participating members in addition to the chairman, unanimously approved the dismissal charges. Moreover, if it is appellant's position that the rejected evidence in the trial court would show the existence of prejudice on the part of some member of the board in the disposition of her case, the record fails to shows that she made appropriate objection at the board hearing. See Nider v. Homan, supra, 32 Cal.App.2d 11, 13, 89 P.2d 136. It must be remembered that the board was confronted with a difficult situation involving an employee whose physical faculties were admittedly impaired and who apparently had been given every opportunity over a long period of time to seek relief from such impairment. It is natural that the members of the board should have gained some knowledge concerning appellant's condition as the result of previous dealings with the case and prior to the actual hearing of the dismissal charges. But still the board was the only body empowered to accord appellant a hearing on the dismissal charges, English v. City of Long Beach, supra, 35 Cal.2d 155, 158, 217 P.2d 22, and the necessities of the case would sustain the board's right to act in determination of appellant's appeal. 42 Am.Jur. sec. 22, p. 312; Cammetti v. Pacific Mutual Life Ins. Co., 22 Cal.2d 344, 366, 139 P.2d 908; Scannell v. Wolff, 86 Cal.App.2d 489, 493, 195 P.2d 536. In this state of the record, with appellant's position so uncertainly defined, it must be concluded that the court properly rejected her claim of prejudice in challenge of the board's authorized procedure.

It is true, as above noted, that the board made its first order of dismissal at the conclusion of a hearing at which neither appellant nor her counsel was present, but this order was set aside because of "apparent irregularities" in such procedure, notice to appellant and her counsel was given of the matter's restoration to the calendar, two further hearings were scheduled at which neither appellant nor her counsel appeared, and only then did the board again make its order approving the charges of dismissal against appellant. The board manifestly undertook to reconsider appellant's case so that she might have the opportunity to refute any evidence submitted at the previous hearings. See English v. City of Long Beach, supra, 35 Cal.2d 155, 159–160, 217 P.2d 22. Having failed to avail herself of such opportunity, appellant cannot now successfully urge the point here. Cf. Fascination, Inc., v. Hoover, 39 Cal.2d 260, 264, 246 P.2d 656. Appellant also argues that the board acted arbitrarily in accepting the medical testimony which would sustain the findings of the city's health officer to the effect that appellant's defective vision prevented her satisfactory performance of stenographic duties. But as the opposing medical opinions have been reviewed, it was for the board, in the exercise of its adjudicatory functions, to determine the conflict and it cannot be said that its decision is "not supported by substantial evidence in the light of the whole record." Code Civ.Proc., § 1094.5, Subdivision (c).

[8] Nor is there merit to appellant's challenge of the sufficiency of the evidence to support the trial court's finding that appellant was not, after September 7, 1949, ready, able and willing to perform stenographic duties in the classified service of the city as the basis for her salary claims. Regardless of any civil service status attained by appellant under the city charter and in the absence of a grant of sick or vacation leave, appellant would not be entitled to a writ of mandate to compel the payment to her of compensation as an employable person unless she were able to perform the services required in the discharge of her assigned duties.

The court had before it the complete record of the proceedings before the board as well as direct testimony from appellant at the trial. The city's doctors, following their examination of appellant on September 8, 1949, reported her health to be "such as to make her unemployable pending correction of the visual defects," and in pursuance thereof the board by letter of September 15, 1949, denied appellant re-employment. However, her civil service status had not yet been terminated pending the service and filing of written charges of dismissal and the opportunity for a hearing before the board. City Charter, secs. 106–107; English v. City of Long Beach, supra, 35 Cal.2d 155, 158, 217 P.2d 22. For the purpose of clearing its records, the board in early April, 1950, unsuccessfully attempted by telephone to communicate with appellant. Having received a message of the board's inquiry for her, appellant by letter of April 17, 1950, notified the secretary of the board that she was "at present attending Long Beach City College, but [would] either telephone * * * or drop into the office in a day or two." The board's minutes of May 11, 1950, "the first meeting at which any discussion was held concerning proposed dismissal of" appellant, show that she had not up to that time "complied with her letter of April 17, 1950, in reporting to the office the condition of her eyes." Thereafter a notice of discharge and an amended notice were served on appellant and filed—May 15 and June 1, 1950, respectively—and after several hearings, as above noted, the board ordered her dismissal from the service. Appellant offered no explanation or excuse either at the board hearing or at the trial as to why she had failed to make the desired report to the board.

As appears further from the record before the board, appellant on February 17, 1950, enrolled in typing and shorthand classes at the city college. At the board hearing appellant stated her purpose in taking such instruction was for review and to "prepare" herself so as to "be capable of performing the duties of a stenographer." In response to the question of whether appellant appeared to have any difficulty with her vision, her shorthand instructor testified: "Not so far as the letters were concerned—they were mailable, and they were judged fair work whether they had to be returned to be rewritten or whether they were mailable when first turned in." In addition on this point of appellant's ability to resume her stenographic duties, the court had the medical testimony before the board and that body's findings as to her unemployable status. There is no contention that appellant's vision had in anywise changed from the condition existing at the time of her medical examination and her dismissal from the city's service—20/20-3 vision in her right eye as corrected with glasses and practically no vision in her left eye.

[9] In her testimony at the trial as at the board hearing, appellant maintained that she was at all times ready, able and willing to resume her stenographic duties as of September, 1949, and she cites various parts of the record favorable to her position. But again that merely presented a conflict in the evidence for the trial court's consideration. As had so often been said, questions as to the weight and sufficiency of the evidence, the construction to be put upon it, the inferences to be drawn therefrom, the credibility of witnesses commensurate with their conduct and manner of testifying, and the determination of conflicts and inconsistencies in their testimony are matters for the trial court to resolve. Dillard v. McKnight, 34 Cal.2d 209, 223-224, 209 P.2d 387, 11 A.L.R. 2d 835. The court was not bound to accept appellant's evidence or her conclusion as to her readiness, ability and willingness to perform satisfactory stenographic work in the city's service as of September 7, 1949, and its contrary finding based on substantial evidence is final and conclusive on appeal. Hansen v. Bear Film Company, Inc., 28 Cal.2d 154, 184, 168 P.2d 946. Under the circumstances, appellant was not entitled to compensation from the mentioned date, and the parties' arguments as to the effective date of her discharge need not be here considered.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS and TRAYNOR, JJ., concur.

CARTER, Justice.

I concur.

I agree that this case presents, primarily, a question concerning conflicting evidence and that the resolution of that conflict was a matter for the trier of fact whose determination must be upheld on appeal if there is substantial evidence in support thereof, and that there is here sufficient evidence to support that determination. This is a well established rule in our jurisprudence and one which I firmly believe should be followed although a majority of this Court has not always seen fit to do so, preferring, instead, oftentimes to reweigh the evidence and make its own determination. See, among others: Rodabaugh v. Tekus, 39 Cal.2d 290, 246 P.2d 663; Hawaiian Pineapple Co. v. Industrial Accident Comm., 40 Cal.2d 656, 255 P.2d 431; Better Food Markets v. American District Telegraph Co., 40 Cal.2d 179, 253 P.2d 10; Atkinson v. Pacific Fire Extinguisher Co., 40 Cal.2d 192, 253 P.2d 18; Sutter Butte Canal Co. v. Industrial Accident Comm., 40 Cal.2d 139, 251 P.2d 975; Mercer-Fraser Co. v. Industrial Accident Comm., 40 Cal.2d 102, 251 P.2d 955; Gill v. Hearst Publishing Co., 40 Cal.2d 224, 253 P.2d 441; Goodman v. Harris, 40 Cal.2d 254, 253 P.2d 447; Pirkle v. Oakdale Union, etc., School Dist., 40 Cal.2d 207, 253 P.2d 1; Burtis v. Universal Pictures Co., Inc., 40 Cal.2d 823, 256 P.2d 933; Kurlan v. Columbia Broadcasting System, 40 Cal.2d 799, 256 P.2d 962; Weitzenkorn v. Lesser, 40 Cal.2d 778, 256 P.2d 947; Turner v. Mellon, 41 Cal.2d 45, 257 P.2d 15; Barrett v. City of Claremont, 41 Cal.2d 70, 256 P.2d 977.

It is my opinion that the rule here announced with reference to the medical testimony is inconsistent with that announced in Huffman v. Lindquist, 37 Cal.2d 465, 476, 234 P.2d 34. We are here concerned with a malady of the eyes. The majority says "Appellant made no objection to the competency of the four doctors who testified at the board proceedings on behalf of the city. Their experience in the medical profession ranged from 12 to 50 years. While they were general practitioners rather than eye specialists, this fact did not affect their competency but only went to the weight to be accorded their testimony. (Cases anno.: 54 A.L.R. 860, 861.) Manifestly, the qualification of the general practitioners to testify as expert witnesses concerning appellant's admitted visual defects and the effect of such defects on appellant's ability to satisfactorily perform her work had no relation to their familiarity with the standards of care required in the treatment of eye conditions." In the Huffman case, a majority of this Court said: "A medical expert is not qualified as a witness unless it is shown that he is familiar with the standards required of physicians under similar circumstances." Huffman v. Lindquist, 37 Cal.2d 465, 478, 234 P.2d 34, 41. A majority of this Court now seek to distinguish the Huffman case by stating that it was there declared that the trial court had not abused its discretion in sustaining an objection to the qualification of an autopsy surgeon to "testify as an expert with regard to the question of whether defendant doctor had exercised the proper and requisite degree of skill and care." As I understand it, no question was raised concerning the treatment of eye conditions; the question centers upon appellant's ability to do her work with her limited eyesight. Surely, the standards applied by eye specialists in making such a determination would be a major factor in determining the competency of expert witnesses and so it was said in the Huffman case: *"A medical expert is not qualified as a witness unless it is shown that he is familiar with the standards required of physicians under similar circumstances."* (Emphasis added.) The majority makes no attempt to distinguish this holding in the Huffman case from its contrary holding here. Certainly the eyes are considered in the medical profession as a matter for specialization. The loss of vision, or percentage of loss, is within the specialized medical field of eye, ear, nose and throat diseases and maladies. But the majority here holds that in accepting the testimony of the general practitioners "and rejecting the contrary opinions of the specialists, the board exercised its fact-finding powers in the determination of conflicting evidence." Inasmuch as appellant made no objection to the general practitioners testifying as experts in an expert's field, probably that statement is correct. However, the statement in the majority opinion here to the effect that the familiarity of the general practitioners with the standards of care required of specialists had no relation to their qualification as expert witnesses is most certainly not in accord with the statement made in the majority opinion in Huffman v. Lindquist, supra, 37 Cal.2d 465, 234 P.2d 34. Of course, the holding in the Huffman case barred plaintiff from recovering and the holding here, although in conflict with Huffman, does the same thing.

SCHAUER, Justice (dissenting).

It is my view that the findings of the local board are not supported "by substantial evidence in the light of the whole record", Code Civ.Proc. § 1094.5, subd. (c), that petitioner was not legally discharged, and that consequently she retains her civil service status and the right to receive salary until such time as she resigns or a legal discharge is effected.

For further discussion, which to me appears adequate and impelling to the conclusions reached, reference is made to the opinion of the District Court of Appeal (reported at 250 P.2d 312, 319–323), authored by Justice Vallee and concurred in by Presiding Justice Shinn and Justice Wood (Parker). For the reasons therein and hereinabove stated I would reverse the judgment with directions as stated by the District Court of Appeal.

---

41 Cal.2d 202

GUDELJ v. GUDELJ.

S. F. 18447.

Supreme Court of California, in Bank.
July 3, 1953.

As Modified on Denial of Rehearing
July 28, 1953.

Action by wife for separate maintenance and support, wherein husband cross-complained for divorce. The Superior Court, San Francisco County, on an amended complaint, entered interlocutory decree of divorce in favor of wife and granted wife physical custody of minor child, support payments for child, and monthly alimony payments for two years, and $2,375 in lieu of her community interest in home, and wife appealed from portions of such decree. The Supreme Court, Edmonds, J., held that, where, during marriage, husband had paid $1,500 cash, which was his separate property, and executed note for $10,000 in purchase of cleaning establishment, evidence, which failed to prove that seller had primarily relied upon husband's property in extending credit, was not sufficient to sustain trial court's conclusion that balance of purchase price was paid from husband's separate property.

Decree reversed in part and affirmed in part, and cause remanded for new trial upon certain issues.

Prior opinion 249 P.2d 892.

1. Divorce 🔑298(1), 312.6(5)

In divorce proceeding involving custody of minor children, primary consideration must be given to child's welfare, and court's wide discretion in such matters will not be disturbed on appeal in absence of manifest showing of abuse.

2. Divorce 🔑296

Where wife had threatened to remove son from state and change his name for purpose of defeating husband's visitation rights under divorce decree, restrictions, which prevented wife from removing son from county for any period in excess of five days, except for period not exceeding three weeks once each calendar year, did not amount to an abuse of trial court's discretion in divorce proceeding.

3. Divorce 🔑303(1)

Trial court maintains continuing jurisdiction of matter of custody of child of divorced parents, and, if need arises in future, modifications of custody provisions may be made.

4. Divorce 🔑235, 296

In divorce proceedings, amounts to be allowed for alimony and support of parties' children are matters lying within sound discretion of the trial court.

5. Divorce 🔑235

Where parties had been married in 1938, husband owned one-fourth interest in cleaning establishment and had paid $4,000 or $5,000 on $15,000 home, award to wife of alimony amounting to $100 per month for two years and of an insurance business producing about $700 per year did not constitute an abuse of trial court's discretion in divorce proceeding.

6. Divorce 🔑296

In divorce proceeding, award of $50 per month for support of child, whose physical custody was granted mother, was not so inadequate as to constitute an abuse of trial court's discretion.

7. Husband and Wife 🔑264

In divorce action, evidence was sufficient to sustain finding that down payment made by husband on purchase of one-fourth interest in cleaning establishment was derived from husband's separate property. Civ.Code, § 164.

8. Husband and Wife 🔑262(1)

Presumption that business acquired during marriage is community property controls only when it is impossible to trace source of such property. Civ.Code, § 164.

9. Husband and Wife 🔑264

In divorce action, where husband had acquired one-fourth interest in cleaning establishment during existence of marriage, husband's testimony that establishment had been purchased with funds acquired from sale of his separate property and from bank account held jointly by husband with his mother in which was deposited proceeds from sale of realty owned by them prior to husband's marriage, rebutted presumption that such establishment was community property. Civ.Code, § 164.

10. Husband and Wife 🔑264

In divorce action, where, during marriage, husband had paid $1,500 cash, which was his separate property, and executed note for $10,000 in purchase of one-quarter interest in cleaning establishment, evidence, which failed to prove that seller had primarily relied upon husband's property in extending credit, was not sufficient to sustain trial court's conclusion that balance of purchase price was paid from husband's separate property. Civ.Code, § 164.

11. Husband and Wife 🔑262(1)

Property acquired on credit during marriage and proceeds of loan made on credit of separate property are presumed to be community property, but such presumption is rebuttable. Civ.Code, § 164.

12. Husband and Wife 🔑254

Character of property acquired by sale upon credit during marriage is determined according to intent of seller to rely upon separate property of purchaser or upon a community asset. Civ.Code, § 164.

13. Husband and Wife 🔑264

In divorce action, evidence was sufficient to sustain trial court's finding that $3,600 withdrawn per year from partnership of which husband was member constituted reasonable wages for his services and that an additional $4,000 withdrawn constituted a reasonable return for two years on his $11,500 investment.

14. Divorce 🔑249(3)

Where husband received $4,000 from partnership, in which he had, during marriage, purchased a one-quarter interest by making $1,500 cash down payment from his separate property and executing $10,000 note, which was not paid from his separate property, $4,000 received as return on his investment had to be apportioned between husband and wife in subsequent divorce action.

15. Husband and Wife 🔑254, 257, 262(1)

In divorce action, where there was no evidence of present value of one-fourth interest purchased in cleaning establishment during marriage, it would be presumed that it was worth the $11,500 paid, and husband, having contributed three twenty-thirds of purchase price, was entitled to such proportion of $4,000 paid as return upon such investment, and community would be credited with balance. Civ.Code, §§ 164, 172.

16. Pleading 🔑388

Question whether variance between pleading and proof in given case is material must be determined from the circumstances.

17. Appeal and Error 🔑1039(13)

A variance is immaterial and may be disregarded on appeal where case has been fully and fairly tried upon merits as though such variance had not existed.

18. Divorce 🔑253

In divorce action, wherein wife had asserted that home, to which parties had title by joint tenancy deed, belonged to community, but husband did not claim that he had been misled by pleadings, and issue whether parties held home as joint tenants was fairly tried, wife was entitled to claim interest in property as joint tenant.

19. Evidence 🔑426

Form of instrument under which husband and wife hold title was not conclusive upon status of property, and property acquired under joint tenancy deed may be shown to be actually community property or separate property of one spouse, according to intention, understanding, or agreement of parties.

20. Husband and Wife 🔑14(3)

Where husband and wife took title to home by joint tenancy deed, question whether evidence was sufficient to overthrow presumption that husband and wife were joint tenants was one of fact but could not be rebutted solely by evidence concerning source of funds used to purchase home nor by testimony of hidden intention not disclosed to other grantee at time of execution of conveyance.

21. Evidence 🔑461(4)

Parol evidence is admissible to establish absence of intention to make gift of either separate or community property even though instrument of conveyance is made by husband to wife alone or as joint tenant with him or is from third person to wife or to both as joint tenants at husband's direction.

22. Evidence 🔑461(4)

Parol evidence is always admissible when it tends to prove a mutual understanding or agreement that other spouse was not to receive present gift under conveyance of realty to both spouses as joint tenants.

23. Husband and Wife 🔑264

Where husband and wife took title to home by joint tenancy deed, basis for inference of mutual understanding between husband and wife that separate and community nature of funds used in purchase of home was to be preserved could not be established even if husband did have undisclosed intention not to make gift of present interest in property to wife and even though husband was unaware of legal effect of deed, and wife knew that home was being purchased primarily from husband's separate funds, and therefore, presumption that property was owned by husband and wife in joint tenancy was not rebutted.

24. Divorce ⚷254

Immediately effective division of community property made by interlocutory divorce decree was erroneous.

25. Appeal and Error ⚷161

Voluntary acceptance of benefit of judgment or order is bar to prosecution of appeal therefrom, but acts relied upon to create bar must clearly and unmistakably show acquiescence and be unconditional, voluntary, and absolute.

26. Appeal and Error ⚷161

Only where appellant is shown to have received and accepted advantages from judgment to which appellant would not be entitled in event of reversal of judgment does his acceptance of judgment defeat his right to appeal.

27. Appeal and Error ⚷161

Where different portions of judgment are severable, party who voluntarily accepts fruits of one portion does not necessarily estop himself from attacking other and several portions thereof on appeal.

28. Appeal and Error ⚷122

Test whether portion of judgment appealed from is so interwoven with its other provisions as to preclude an independent examination of part challenged by appellant is whether matters or issues embraced therein are same as, or interdependent upon, matters or issues which have not been attacked.

29. Divorce ⚷169

In divorce action, interlocutory decree of divorce which was rendered for wife, which gave wife physical custody of child, $50 per month support for child, $100 per month alimony for two years, and $2,375 in lieu of her community interest in home, which was held by parties under joint tenancy deed, and which provided for division of furniture, was clearly severable.

30. Divorce ⚷281

Where, under severable interlocutory decree in divorce action, wife had not clearly and unmistakably acquiesced in trial court's division of property interests, her occupancy of home was consistent with her position that it was owned by her and husband as joint tenants, and there had not been an unconditional, voluntary, and absolute acceptance of benefits to which wife was not entitled, and, therefore, wife was not barred from prosecuting appeal from such decree.

◆

Leo R. Friedman, San Francisco, for appellant.

Jefferson E. Peyser, San Francisco, for respondent.

EDMONDS, Justice.

Catherine Gudelj was awarded an interlocutory decree of divorce from John Gudelj on the ground of extreme cruelty. She has appealed from those portions of the decree relating to support, custody of the minor child, and the disposition of the property of the spouses.

The parties were married in 1938. Prior to that time, John was owner and operator of the Pacific Avenue Cleaners. He continued this business until 1943. In 1946, after his discharge from military service, he operated the Owl Cleaners in partnership with one Grinton. They dissolved the partnership in the following year, and John purchased a one-fourth interest in the Helene French Cleaners where he began to work as a "benzine man".

In 1948, John made the first payment on a new home, the total purchase price of which was $15,000. Title was taken by a deed which described John and Catherine as joint tenants. The down payment was made in part from community funds and partly from John's separate funds. All subsequent payments were made from his separate property. At the time this action was commenced, some $10,000 or $11,000 remained unpaid on a mortgage against the property.

Catherine commenced an action for separate maintenance and support, and John cross-complained for a divorce. An interlocutory decree of divorce was rendered in favor of Catherine on an amended complaint and against John on his cross-complaint. Physical custody of the minor son was given to Catherine, subject to certain restrictions against removing the boy from the county. In addition, Catherine was awarded $50 per month for support of the child and alimony of $100 per month for a period of two years.

The court found that an undivided one-fourth interest in the Helene French Cleaners was the separate property of John. It also declared that a one-sixth interest in the home is community property, the remainder being John's separate property. In lieu of her community interest in the home, Catherine was awarded $2,375, to be paid within one year from the date of entry of the decree. For a period of 60 days, she was given undisturbed possession of the premises, subject to the condition that if she did not vacate them at the end of that period all payments made by John on the mortgage against the property were to be deducted from the $2,375 mentioned in the decree.

Catherine contends that the provisions of the interlocutory decree which do not allow her to remove the child from the county amount to an abuse of discretion. She argues, also, that the amounts allowed to her for alimony and for support of the child are insufficient. Another contention is that the evidence does not support the findings that a one-fourth interest in the Helene French Cleaners is the separate property of John and that his interest in the home is other than that of a joint tenant. Finally, she says, it was error for the trial court, by an interlocutory decree, to dispose of the property of the spouses.

In reply, John denies that the decree is erroneous in any respect. Furthermore, he asserts, Catherine has accepted benefits from the decree and, by doing so, she has waived any right she might have had to appeal from it.

According to the terms of the decree, Catherine may not remove the child from the territorial limits of the City and County of San Francisco for any period in excess of five days, except that once in each calendar year she may do so for a single continuous period not exceeding three weeks. She asserts that this restriction is arbitrary and unreasonable, in that it fails to provide for the possibility of her being compelled to move to another county for the health of the child or for her personal convenience.

[1] In a divorce proceeding involving the custody of a minor, primary consideration must be given to the welfare of the child. The court is given a wide discretion in such matters, and its determination will not be disturbed upon appeal in the absence of a manifest showing of abuse. Gantner v. Gantner, 39 Cal.2d 272, 275, 246 P.2d 923; Taber v. Taber, 209 Cal. 755, 757, 290 P. 36. "Every presumption supports the reasonableness of a decree." Runsvold v. Runsvold, 61 Cal.App.2d 731, 733, 143 P.2d 746.

[2, 3] Custody of the child was given jointly to Catherine and John, with physical custody in Catherine. John was given the right to visit the boy at reasonable times and to have him for at least one day each week. Presumably, such visits are for the best interests of the child. The record includes testimony to the effect that Catherine had threatened to remove the boy from the state and to change his name, thus defeating John's visitation rights. Under such circumstances, it cannot be said that the restrictions imposed upon removal of the child amount to an abuse of discretion. The trial court maintains continuing jurisdiction of the matter and, in the future, if circumstances should arise of the kind suggested by Catherine, appropriate modifications of the custody provisions may be made.

[4–6] The amount to be allowed for alimony and support of a child are matters which also lie within the sound discretion of the trial court. Brockmiller v. Brockmiller, 57 Cal.App.2d 623, 625, 135 P.2d 184. No abuse of that discretion is shown here. Catherine was given alimony amounting to $100 per month for two years. In addition, she was given some money which was community property and an insurance business producing income of about $700 per year. Prior to 1947, Catherine earned from $280 to $300 per month as a bookkeeper and there is evidence that she is physically able to resume employment. An award of $50 per month for the support of the child, although not overly generous, cannot be said to be so inadequate as to amount to an abuse of discretion.

According to the record, the undivided one-fourth interest in the Helene French Cleaners was purchased by John for $11,500. John paid $1,500 of that amount in cash and executed a note for $10,000. No specific finding was made concerning the status of the note, but the trial court found that the cash payment was made from John's separate funds and concluded that the entire partnership interest is his separate property. Catherine contends that the evidence does not support these findings.

[7–9] The evidence concerning the source of the $1,500, although confused and conflicting, is sufficient to support a finding that it was derived from John's separate property. John testified that the money came from the Owl Cleaners and, although he further stated that the equipment and fixtures of the business had been sold at a loss, apparently at least $1,500 was obtained from that source. Catherine claims that the Owl Cleaners must be presumed to have been community property because the business was acquired during the existence of the marriage. Civ.Code, Sec. 164. But that presumption is controlling only when it is impossible to trace the source of specific property. Falk v. Falk, 48 Cal.App.2d 762, 768, 120 P.2d 714. Here the presumption is rebutted by the testimony of John that the Owl Cleaners was purchased with funds acquired from the sale of the equipment of the Pacific Avenue Cleaners, admittedly his separate property, and from a bank account held jointly by John with his mother in which was deposited the proceeds from the sale of real property owned by them prior to John's marriage.

[10–12] However, the record does not support the conclusion that the balance of the purchase price of the partnership interest was made from John's separate property. That part of the payment was represented by a note signed by John. There is a rebuttable presumption that property acquired on credit during marriage is community property. Civ.Code, Sec. 164; Hogevoll v. Hogevoll, 59 Cal.App.2d 188, 193–194, 138 P.2d 693. But "funds procured by the hypothecation of separate property of a spouse are separate property of that spouse". In re Estate of Abdale, 28 Cal.2d 587, 592, 170 P.2d 918, 922. The proceeds of a loan made on the credit of separate property are governed by the same rule. In re Estate of Ellis, 203 Cal. 414, 416–417, 264 P. 743. In accordance with this general principle, the character of property acquired by a sale upon credit is determined according to the intent of the seller to rely upon the separate property of the purchaser or upon a community asset. In re Estate of Ellis, supra, 203 Cal. 414, 416, 264 P. 743; Hogevoll v. Hogevoll, supra, 59 Cal.App.2d 188, 193–194, 138 P.2d 693; and see Schuyler v. Broughton, 70 Cal. 282, 285, 11 P. 719; Vandervort v. Godfrey, 58 Cal.App. 578, 582, 208 P. 1017 In the absence of evidence tending to prove that the seller primarily relied upon the purchaser's separate property in extending credit, the trial court must find in accordance with the presumption. See Falk v. Falk, supra, 48 Cal.App.2d 762, 767, 120 P.2d 714.

No testimony was offered concerning the intent of the seller in extending credit to John. John asserts, however, that shortly before the credit transaction, he and his mother sold real property for some $30,000, and the seller must have relied upon John's interest in the proceeds. Furthermore, he contends, his previous failures in attempts to operate cleaning businesses demonstrate that the basis for credit could not have been his personal ability and capacity. However, even if these facts be accepted as true, there is no evidence that the seller had knowledge of their existence. There being no satisfactory evidence to contradict the presumption, it must prevail.

[13] Between the date of purchase of the partnership interest and the commence-

ment of the present action, John withdrew from the profits of the business $3,600 per year. In addition, during that period a sum of $4,000 was withdrawn from the profits and credited upon his note. The trial court found $3,600 per year to be a reasonable wage for John's services to the partnership and that $4,000 was a reasonable return for two years on the $11,500 investment. These findings are supported by substantial evidence.

[14] The trial court having concluded that the entire one-fourth interest in the partnership was John's separate property, no problem concerning an apportionment between the community and the separate property of John was presented. However, the $4,000 received by John as profit must be apportioned between the parties.

[15] The husband has the management of the community personal property, Civ. Code, Sec. 172, and therefore, John properly could apply the community's share of the profits as well as his own toward the reduction of the debt incurred in purchasing the interest in the business. There being no evidence as to the present value of the one-fourth interest, it must be presumed that at the commencement of the suit it was worth $11,500, the amount he paid for it. John, having contributed $1,500, or 3⁄23 of the purchase price, is entitled to the same proportion of the $4,000, or $521.74. The community must be credited with the balance.

[16–18] Despite the taking of title to the home by a joint tenancy deed, it was found that John did not intend to make a gift of any present interest to Catherine. The respective interests of John and Catherine in the property were determined according to the sources of the funds used to purchase it. John asserts that Catherine may not now urge that they own the property in joint tenancy because by her pleadings she alleged that it belongs to the community. "It has been repeatedly held that the question whether a variance between pleading and proof in a given case is material must be determined from the circumstances (citations) and that a variance is immaterial and may be disregarded where the case was as fully and fairly tried upon the merits as though the variance had not existed." Chelini v. Nieri, 32 Cal.2d 480, 486, 196 P.2d 915, 918. In other words, "a variance to be fatal must have misled or served to mislead the adverse party". Short v. Orland Oil Syndicate, Ltd., 29 Cal.App.2d 326, 329, 84 P.2d 324, 325. The joint tenancy deed was placed in evidence and the issue was fairly argued and presented for determination. Moreover, John does not claim that he was misled by the pleadings.

[19, 20] On the merits of the issue as to the ownership of the home, "it is well settled in this state that the form of the instrument under which a husband and wife hold title is not conclusive as to the status of the property and that property acquired under a joint tenancy deed may be shown to be actually community property or the separate property of one spouse according to the intention, understanding or agreement of the parties". Socol v. King, 36 Cal.2d 342, 345, 223 P.2d 627, 629. "Whether the evidence against the presumption is sufficient to overthrow it, is a question of fact." DeBoer v. DeBoer, 111 Cal.App.2d 500, 504, 244 P.2d 953, 956. However, the presumption arising from the form of the deed may not be rebutted solely by evidence as to the source of the funds used to purchase the property. Siberell v. Siberell, 214 Cal. 767, 773, 7 P.2d 1003; In re Rauer's Collection Co., 87 Cal.App.2d 248, 257, 196 P.2d 803; and see Cash v. Cash, 110 Cal.App.2d 534, 538, 243 P.2d 115. Nor can the presumption be overcome by testimony of a hidden intention not disclosed to the other grantee at the time of the execution of the conveyance. Socol v. King, supra, 36 Cal.2d 342, 346, 223 P.2d 627; Watson v. Peyton, 10 Cal.2d 156, 158, 73 P.2d 906; Shaver v. Canfield, 21 Cal.App.2d 734, 741, 70 P.2d 507.

[21, 22] This principle is not contrary to the general rule that "parol evidence is admissible to establish the absence of an intention to make a gift of either separate or community property, although the instrument of conveyance is made by the husband to the wife alone or as joint tenants with

him or is from a third person to the wife or to both as joint tenants at the husband's direction". Huber v. Huber, 27 Cal.2d 784, 788, 167 P.2d 708, 711. Such evidence always is admissible when it tends to prove a mutual understanding or agreement that the other spouse was not to receive a present gift under a conveyance of property to both spouses as joint tenants. Huber v. Huber, supra, 27 Cal.2d 784, 789, 167 P.2d 708.

In the Socol case, Parachiva King purchased certain real and personal property with funds which came partly from the sale of the "joint property" owned by her and her husband and partly from her separate property. Title was taken in the names of Mrs. King and her husband as joint tenants. Upon the death of Mrs. King, her executrix sought to show that she had a mistaken opinion of the law as to the legal effect of a conveyance in joint tenancy. It was held that unless there is an oral or written agreement as to the ownership of property, or such an understanding may be inferred from the conduct or declarations of the spouses, "a true joint tenancy is created by a conveyance to husband and wife in that form, although the property is purchased with community funds * * *, or with the separate funds of the husband. * * * When property is purchased with community funds and title is taken in joint tenancy at the request of the wife, the secret intention of the wife that the property shall remain a part of the community is not effective. 'She cannot defeat her act by testimony of a hidden intention not disclosed to the other party at the time of the execution of the document.' * * * The same rule should be applied where joint funds are used to buy the property. It follows that the trial court properly held that decedent's secret belief as to the legal result of procuring title to the California property in joint tenancy could not affect its actual status". 36 Cal.2d at pages 346–347, 223 P.2d at page 630.

[23] Applying the rule of the Socol case to the facts here shown, John's testimony as to his undisclosed intention not to make a gift of a present interest in the property is not evidence of a mutual understanding or agreement negativing the express terms in the deed. It is of no significance that John was unaware of the legal effect of the deed. Nor is it material that the home was purchased primarily from John's separate funds, Catherine being aware of their source. All of these facts, taken together, provide no basis for an inference of a mutual understanding or agreement between John and Catherine that the separate and community nature of the funds used in the purchase was to be preserved. Therefore, there being no substantial evidence tending to rebut the presumption created by the joint tenancy deed, the property is owned by the parties in joint tenancy.

[24] Catherine correctly contends that the portions of the interlocutory decree purporting to make an immediate disposition of property are erroneous. Dowd v. Dowd, 111 Cal.App.2d 760, 765, 245 P.2d 339; Slavich v. Slavich, 108 Cal.App.2d 451, 457, 239 P.2d 100; Wilson v. Wilson, 76 Cal.App.2d 119, 129, 172 P.2d 568. No sound reason appears for distinguishing between community and separate property in this regard.

John argues that the appeal should be dismissed because Catherine has accepted benefits under the interlocutory decree. He asserts that Catherine "has remained in the premises until this time, and has paid no rent". Therefore, he concludes, "Except for the decree there would be no $2,375 against which deductions could be made. In effect appellant has accepted the $2,375 or at least the greater part thereof". It is asserted also, that even if it be true that the home is owned by himself and Catherine in joint tenancy, her occupancy to his exclusion is inconsistent with that form of ownership and can be accounted for only upon the theory that she is doing so in accordance with the terms of the decree.

[25–28] "It is the settled rule that the voluntary acceptance of the benefit of a judgment or order is a bar to the prosecution of an appeal therefrom." Schubert v. Reich, 36 Cal.2d 298, 299, 223 P.2d 242, 243. However, "[i]n order to bar the right of appeal on the ground of acquiescence, 'the acts relied upon must be such as to clearly and unmistakably show acquiescence, and it must be unconditional, voluntary, and absolute'". Duncan v. Duncan, 175 Cal. 693, 695, 167 P. 141, 142. "It is only in cases where an appellant is shown to have received and accepted advantages from a judgment to which such appellant would not be entitled in the event of a reversal of the judgment that her acceptance thereof has been held to operate to defeat the appeal." Browning v. Browning, 208 Cal. 518, 525, 282 P. 503, 505. Otherwise stated, "(w)here the different portions of a judgment are severable, a party by voluntarily accepting the fruits of one portion thereof does not necessarily estop himself to attack other and severable portions thereof upon appeal". Preluzsky v. Pacific Cooperative Cafeteria Co., 195 Cal. 290, 293, 232 P. 970, 971; People v. Roath, 62 Cal.App.2d 241, 246, 144 P.2d 648. As to severability, "(t)he test of whether a portion of a judgment appealed from is so interwoven with its other provisions as to preclude an independent examination of the part challenged by the appellant is whether the matters or isues embraced therein are the same as, or inter-dependent upon, the matters or issues which have not been attacked". American Enterprise, Inc. v. Van Winkle, 39 Cal.2d 210, 217, 246 P.2d 935, 938.

[29, 30] In the present case the determinative portions of the interlocutory decree clearly are severable. There is no appeal from that part of it which provides for the division of the furniture. And it does not appear that any question concerning the furniture was "the same as, or interdependent upon" the order fixing the interests of the parties in the home. In lieu of a community interest in the real property Catherine was awarded money. There is nothing in the record which shows that Catherine has clearly and unmistakably acquiesced in the trial court's division of property interests. Her occupancy of the home is consistent with her position that it is owned by her and John as joint tenants. It does not appear that Catherine has excluded John from the premises or prevented him from asserting his rights as a joint tenant. Nor may it be successfully urged that by reason of payments on the mortgage claimed to have been made by John, Catherine has voluntarily accepted a portion of the money awarded her "in lieu of any * * * interest" in the home. For these reasons there has not been an "unconditional, voluntary and absolute" acceptance of benefits to which Catherine is not entitled.

Insofar as the interlocutory decree disposes of the real property and concerns the rights and obligations of the parties with respect thereto, and disposes of the partnership interest in Helene Cleaners, it is reversed and the cause is remanded for a new trial upon the issues relating thereto; in all other respects the decree is affirmed, appellant to recover her costs on appeal.

GIBSON, C. J., and CARTER, TRAYNOR and SPENCE, JJ., concur.

SHENK and SCHAUER, JJ., concur in the judgment.

PRICE v. ATCHISON, T. & S. F. RY. CO.*

Civ. 19614.

District Court of Appeal, Second District, Division 3, California.

July 27, 1953.

Hearing Granted Sept. 25, 1953.

Action for damages for personal injuries under Federal Employers' Liability Act. The Superior Court of Los Angeles County granted motion of defendant to dismiss on ground of forum non conveniens, and plaintiff appealed. The District Court of Appeal, Vallée, J., held the California Court could not refuse jurisdiction when corporate defendant was authorized to do business within the State of California.

Reversed.

Constitutional Law 🔑207(3)

The California Court could not, consistent with federal Constitution, decline, on basis of forum non conveniens, to take jurisdiction of an action under Federal Employers' Liability Act founded on a cause of action which arose without state, brought by a noncitizen and a nonresident against a foreign corporation doing business within the state. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

---

* Subsequent opinion 268 P.2d 457.

◆

Hildebrand, Bills & McLeod, D. W. Brobst, Oakland, for appellant.

Robert W. Walker and Frederic A. Jacobus, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by plaintiff from a judgment of dismissal entered on the granting of a motion of defendant to dismiss on the ground of *forum non conveniens* in an action for damages for personal injuries brought under the Federal Employers' Liability Act.[1]

Plaintiff, a citizen and resident of the state of New Mexico, was injured in New Mexico while in the employ of defendant. Defendant is a Kansas corporation, engaged in interstate commerce, authorized to and doing business in New Mexico and California. Plaintiff commenced the action in the superior court of Los Angeles County and obtained service on defendant in that county. Defendant answered and as a special defense pleaded *forum non conveniens.* It then filed a motion, supported by affidavits, to dismiss the action on that ground. The answer and the affidavits stated facts showing harassment, inconvenience, and expense, sufficient to have warranted the granting of the motion if the doctrine of *forum non conveniens* may be applied. The motion was granted and a judgment of dismissal entered. Plaintiff appeals.

In the recent case of Schultz v. Union Pacific R. R. Co., 118 Cal.App.2d 169, 257 P.2d 1003, all of the points made on this appeal were decided. We held in Schultz that the courts of California may not, consistently with the Constitution of the United States, decline on the basis of *forum non conveniens* to take jurisdiction of an action under the Federal Employers' Liability Act, founded on a cause of action which arose without the state, brought by a noncitizen and a nonresident against a foreign corporation doing business within the state. That decision is controlling here and compels a reversal of the judgment.

Reversed.

SHINN, P. J., and PARKER WOOD, J., concur.

LOS ANGELES COUNTY v. SOUTHERN COUNTIES GAS CO. OF CALIFORNIA.*

Civ. 19370.

District Court of Appeal, Second District, Division 2, California.

July 3, 1953.

Rehearing Denied July 30, 1953.

Hearing Granted Aug. 27, 1953.

Action for tollage alleged to be due county for franchise held by gas company to lay its pipes under county highways for purpose of delivering its gas to its patrons. The Superior Court, Los Angeles County, rendered adverse judgment, and county appealed. The District Court of Appeals, Moore, P. J., held that where gas company computed two per cent annual toll by basing computation upon gross receipts of gas company distribution facilities, after deducting therefrom capital invested in distribution facilities located on private rights of way, computation was illegal.

Reversed with directions.

McComb, J., dissented.

1. Gas ⟹7(1)

Purpose of Broughton Act formula under which franchise holder is required to pay county two per cent of franchise holder's annual gross earnings for franchise for use, occupation, or possession of municipal or county streets is to allow franchise holder to retain 98 per cent of its gross receipts, as the percentage applicable to the use of its private property, while two per cent is payable to county or municipality for use of public property. St.1905, p. 777.

---

[1] 45 U.S.C.A. § 51 et seq.

* Subsequent opinion 266 P.2d 27.

2. Gas 🔑7(1)

Under the Broughton Act, compensation payable to county for franchises held by gas company to lay its pipes under county highways for purpose of delivering its gas to its patrons is based solely on gross distribution receipts, and not upon the physical location of the gas company's facilities. St.1905, p. 777.

3. Gas 🔑7(1)

Where gas company computed two per cent annual toll payable to county for franchises held by gas company to lay its pipes under county highways for purpose of delivering its gas to its patrons by basing computation upon gross receipts of gas company distribution property, after deducting therefrom capital invested in distribution facilities located on private rights of way, computation was illegal, in view of Broughton Act requirement that computation be based upon gross distribution receipts. St.1905, p. 777.

4. Gas 🔑7(1)

To compute two per cent annual tollage due county for franchises held by gas company to lay its pipes under county highways for purpose of delivering its gas to its patrons, gas company was required to use all the gross receipts of gas company, minus share ascribed to production, as its multiplicand, and two per cent as its multiplier, and to multiply the resulting product by the fraction whose numerator is the mileage of the public franchise rights of way and whose denominator is the aggregate mileage of company's entire distribution system. Statute 1905, p. 777, § 3.

5. Gas 🔑7(1)

Term "gross receipts" within statute requiring franchise holder to pay county two per cent of gross annual receipts of franchise holder arising from use of franchise means all receipts arising from or growing out of the employment of franchise holder's capital in its designated business. St.1905, p. 777.

See publication Words and Phrases, for other judicial constructions and definitions of "Gross Receipts".

6. Corporations 🔑372
Franchises 🔑2

Generally, franchises granted by state to private persons or corporations must be construed most strongly in favor of public, and if doubt arises nothing is to be taken by implication as against public rights.

On Petition for Rehearing

7. Statutes 🔑219

Construction of statute by administrative officials is entitled to weight, but is not conclusive.

Harold W. Kennedy, County Counsel, Gerald G. Kelly, A. Curtis Smith, Asst. County Counsel, John H. Larson, Deputy County Counsel, Los Angeles, for appellant.

Le Roy M. Edwards, Oscar C. Sattinger, Frank P. Doherty, Los Angeles for respondent.

MOORE, Presiding Justice.

Pursuant to ordinances duly enacted by the Board of Supervisors of Los Angeles County and in conformance with the Broughton Act, Stats.1905, p. 777, now embodied in sections 6001–6006 of the Public Utilities Code, the County granted the Southern Counties Gas Company a series[1]

---

[1] Four franchises granted by Supervisors to Gas Company:

Date Adopted	Ordinance Number (New Series)	Expiration Date
February 25, 1918	500	March 23, 1958
September 26, 1919	574	October 26, 1959
June 8, 1925	1300	July 8, 1965
February 17, 1930	1797	March 17, 1970

of franchises to lay its pipes under the public highways for the purpose of delivering gas to its patrons. Each franchise ordinance required the Gas Company to pay annually as a toll to the County, after the first five years, a sum equal to two per cent of the gross annual receipts of the grantee arising from the use, operation, or possession of the franchises. In 1939 and previous years the Gas Company had filed its statements of the amount of its tolls and had made payments for those years according to the statements. In 1940 when the matter was brought to their attention, the Board of Supervisors concluded that the statements previously filed by the Company were incorrect, and ordered this action to be filed for declaratory relief and for an accounting. Subsequently, pursuant to an agreement of the parties an amended complaint was filed in 1943 framing the issues to which the Gas Company filed its answer. With the issues thus joined, the action came on for trial in 1951 when the trial court made findings and entered judgment favorable to the Gas Company and denied the relief demanded. The County contends on appeal that the conclusions of the court below do not accord with a reasonable and fair construction of the statute or with the decision in County of Tulare v. City of Dinuba, 188 Cal. 664, 206 P. 983 (herein called Dinuba), which, it insists, "must be followed by a franchise holder under the Broughton Act."

The importance of the Dinuba decision (May 1922) cannot be exaggerated. Since both parties maintain that it lays down the guiding rule or formula for computing payments due under the franchise, it will be discussed later in detail. Suffice it to say at this point that the court construed section 3 of the Broughton Act, Ibid., 188 Cal. at page 666, 206 P. 983, and derived a mileage formula for the allocation of the two per cent franchise toll among the various counties or municipalities covered by the franchise.

The Gas Company adopted a method of accounting in 1926 which it has applied to date. The County auditor's office objected to such accounting method in 1927 but after a reply from the Gas Company's attorney, no further action was taken until 1940 when the Board of Supervisors moved to effect a collection of tolls in conformance with their conclusion as to the amounts due. Complaints were filed, not only against the Southern Counties Gas Company, but also against the Southern California Gas Company and the Southern California Edison Company in related actions. It was agreed that the latter two suits should remain in *statu quo* until determination of the instant cause and that applicable portions of section 583 of the Code of Civil Procedure should not be operative.

The sole issue on appeal, as at the trial, is the legality of the Gas Company's accounting methods in computing the charges for the four franchises. The Gas Company insists that it stands squarely upon the formula derived by the Supreme Court in the Dinuba decision. On this appeal the County presents two formulas for computing the charges, but primarily stresses what it assert to be the correct Dinuba computation. Its contention is that the Dinuba decision does not authorize any deduction from the gross receipts, except as hereinafter more fully explained. On the contrary, it insists that the Dinuba opinion clearly implies the correctness of, and that the statute emphatically provides for, the annual payment by a utility of "two per cent of the gross receipts of the company arising from the use, operation or possession of the franchise." The Gas Company proceeds to develop a formula based upon the capital investment of the Company and of the County. It then conceives that before the toll is computed, it should deduct from the total receipts such a pro rata share of the gross collections as may be determined by dividing the mileage of its own private rights of way by the total mileage of the pipes on both private and public property under the franchise. A comparative study of the respective formulas will be hereafter set forth.

Dinuba Decision

In view of the wide divergence of the parties as to the formula declared in the Dinuba case, it is imperative that the basic decision upon which both parties rely as precedent be examined with care. The

County of Tulare had recovered judgment against the San Joaquin Light and Power Company for two per cent of the latter's gross receipts arising from its use, operation or possession of it franchise from the County. The Company attacked the judgment on appeal on three grounds. The conclusions reached as to the first and second contentions are not material to this discussion but the court's response to the claim, 188 Cal. at page 667, 206 P. at page 984, that "*if the gross receipts from any given part of an electric distributing system extending through several counties can be ascertained as arising from the use of the franchise in one of the counties, it should be confined to the part of the system occupying the streets and avenues in use under the franchise from such county, and not include receipts arising from the part of the system over and upon private easements*" is of great importance. (Italics added.) It is seen from the italicized passage that neither by the complaint nor from the contentions of the power company was any such elaborate formula contemplated by the parties to the Dinuba action as now symbolizes the controversy at bar.

In that action, the principal problem was the allocation of the two per cent charge among the various counties and municipalities covered by the franchise. Hence it was necessary to construe the meaning of a provision of section 3 of the Broughton Act which was then substantially the same as the following portion of present section 6006, Public Utilities Code: "* * * the successful bidder and his assigns shall during the life of the franchise pay to the county or municipality two percent (2%) of the gross annual receipts of the grantee *arising from the use, operation, or possession of the franchise.*" (Italics added.)

With reference to such statute the court said, 188 Cal. at pages 675 and 676, 206 P. at page 987: "* * * the purpose of the act was to impose only a two per cent. charge upon the gross receipts arising from the entire franchise rights enjoyed in all the highways covered by the system, whether in one or several counties or municipalities. When the company or corporation has paid two per cent. of all its earnings properly attributable to all its franchises, whether covering one or more counties, it has fulfilled its obligation. It, of course, cannot concern such corporation how this amount is distributed to the various municipalities, so long as it is released from further liability. The real issue is as to the several rights of the municipalities in sharing the payments. The state is at liberty to make this distribution upon any reasonable basis it sees fit to adopt. * * * The reasonable construction of the language used, is that each county or municipality is entitled to its percentage of the gross earnings arising from the use of its highway, in the proportion that the receipts arising from the use of such highways bears to the receipts attributable to all the rights of way of the entire system.

"We see no reason why this cannot be estimated on a mileage basis. It may be assumed that the distributing system covers 600 miles of easements. The proportion of the gross receipts derived from and chargeable to the use of the distributing system should be credited to this entire mileage. One-third of this mileage may extend over private rights of way, which are not subject to any franchise liability. The remaining two-thirds of the mileage covered by county franchises is entitled to two-thirds of the two per cent. of the gross amount, and each county is entitled to the percentage of this two-thirds, in the proportion that the mileage of its franchise bears to the total mileage covered by all the franchises."

Neither the Gas Company nor the County disputes in the least the propriety of such "mileage apportionment." The controversy is with respect to the meaning of the following extract from the same opinion, 188 Cal. at page 681, 206 P. at page 989, where an additional point as to accounting method is made:

"The first step in this accounting should be to determine, as a question of fact, what proportion of the total annual gross receipts of the public utility should be justly accredited to its distributing system over various rights of way, as distinguished from its power plants or other producing agencies. This will establish the fund from which the percentage of earnings 'arising from the use, operation, or possession' of the various franchise easements shall be ascertained.

"The percentage of this fund, to be apportioned to the respective public franchises, will not include the proportion of such gross receipts of the distributing system as are attributable to the use of private rights of way occupied by the utility, as such part of the system is not subject to franchise charge. Each municipal franchise will be entitled to its two per cent. of whatever portion of such fund can be shown to arise wholly from the use of the easements under such franchise, and such portion of the remaining fund, as the mileage of the given franchise easement bears to the entire mileage of the distributing system contributing to such gross earnings."

In interpreting the foregoing passage, the conflicting theories of appellant and respondent are brought into sharp focus. The County contends that the Supreme Court had in mind only the essential distinction between the activities of production and distribution, and hence, in the utilization of the "capital investment" theory of accounting, only those receipts attributable to *production capital* can properly be excluded from the computation of the two per cent charge. The Gas Company, however, asserts that the use of "production" and "distribution" terminology was merely illustrative of such receipts as arise "from the use, operation or possession" of the franchise and which do not arise therefrom and hence that it is proper to exclude, as it has since 1926, those *receipts attributable to distribution capital situated on nonfranchise rights of way.*

County's Computation

In order to make the differences of the parties stand out more clearly, the computations of both appellant and respondent for the year 1939 are explained and compared below. Computations for subsequent years were made in the identical manner. The County's interpretation of the Dinuba decision will be delineated first:

1. As a preliminary step, the County determines the capital invested in distribution as distinguished from capital invested in production. The Gas Company's total capital is conceded to be $31,216,087.13. The value of intangibles is $152,351.98; of capital in general facilities and office, $2,264,991.95. These latter two amounts are excluded from the amount of total capital, which has the effect of prorating them between distribution and production capital, and leaves $28,798,743.20 as the remaining capital in production and distribution.

2. To determine the capital in distribution, the County then deducts the production capital from the above sum. There is $134,111.96 capital in manufactured gas on private property and $116,251.07 capital in natural gas on rights of way, or a total of $250,363.03 in production capital. Deducting those amounts, the remaining capital in distribution is $28,548,380.17.

3. The capital investment of the Gas Company in production and distribution is $28,798,743.20 (step 1). The capital investment in distribution is $28,548,380.17 (step 2) or 99.1306% of the total capital investment; the capital investment in production is $250,363.03 (step 2) or .8694% of the total capital investment.

4. The Gas Company's gross revenue in 1939 was $9,620,838.45. Multiplying that amount by 99.1306% (step 3), the county derives the total of $9,537,137.16 attributable to distribution capital.

5. The Gas Company has 3,249.225 miles of pipeline, of which 2,969.673 miles, or 91.3963% is in public streets and highways. Multiplying that percentage by $9,537,137.16 (step 4) the County arrives at the sum of $8,716,590.49 of receipts arising from the use, operation or possession of public franchises.

6. The Gas Company has 456.829 miles of pipeline on Los Angeles County public highways, which is 15.3831% of the Gas Company's total system of pipelines on public highways (step 5).

7. Multiplying $8,716,590.49, receipts arising from the use, operation or possession of all public franchises (step 5), by 15.3831%, Los Angeles County percentage of Gas Company's total public-franchise pipelines (step 6), the County obtains $1,340,-

881.83 as the portion of the Gas Company's annual gross receipts subject to the 2% charge due Los Angeles County.

8. The County multiplies $1,340,881.83 times 2% and obtains a total charge for 1939 of $26,817.64.[2]

Gas Company's Computation

The parties are in accord in applying the steps 5, 6, 7 and 8 as used by the County. The same initial figures are utilized for invested capital and gross receipts; the same proportions hold true. The only real difference is that the Gas Company excludes certain amounts prior to applying County steps 5 through 8, while the County contends that such exclusion is unauthorized by and improper under the Dinuba decision. The following formula is proposed by the Gas Company as in conformance with the Dinuba decision:

1. Taking the total capital, $31,216,087.13, the Gas Company excludes the value of intangibles, $152,351.98, which has the effect of prorating the latter sum between production and distribution. The remaining capital in production and distribution, as in the County's computation is $31,063,735.15.

2. The Gas Company then deducts $134,111.96, that portion of production capital in manufactured gas on private property, leaving $30,929,623.19 as the remainder capital in distribution. The capital in natural gas on rights of way, $116,251.17 (County's step 2), is not deducted at this point.

3. All distribution capital on consumers' property and leased property, $7,556,603.15, is deducted from the remainder capital in step 2 leaving a balance of $23,373,020.04.

4. All distribution capital including office facilities on private property, $2,264,991.95, is deducted from the remainder capital in step 3, leaving a balance of $21,108,028.09 as the remainder capital for step 4. This figure includes $116,251.17 of production capital in natural gas on rights of way, as the portion of capital in distribution on all rights of way.

5. The Gas Company's total gross receipts in 1939, $9,620,838.45, are divided by the total capital investment, $31,063,735.15, to determine that 30.9713 cents of revenue were received per dollar of capital investment.

6. The amount in step 4, $21,108,028.09—the portion of the Gas Company's capital in distribution on rights of way—is then multiplied by 30.9713% to obtain $6,537,430.70 arising from the Gas Company's system on rights of way.

7. The last amount stated is then treated to the same procedures as in County steps 5 through 8. $6,537,430.70 is multiplied by 91.3963%; its product by 15.3831% and the last product by 2% which gives the $18,382.60, the amount of tolls the Company claims to be due the County for 1939.

The Approved Method

A study of the two formulas urged by the adversaries leaves no doubt that one of the two is not consistent with the holding of the Dinuba decision and it is equally clear that the formula used by the Gas Company is not in accord with the Supreme Court's pronouncement.

In deriving the Dinuba Formula, the Supreme Court did not indulge in any theory of ownership of property on which the facilities were located. That formula was predicated upon the premise that the two per cent toll is a charge for the use of the County's property, as both parties emphatically concede. Those gross receipts attributable to production capital are not considered by either the County or the Gas Company in calculating the franchise charge. The County receives only a proportionate share of the two per cent of the gross receipts attributable to distribution capital, based on mileage of the public property used under the franchises. In no event can the total amount payable by the Gas Company exceed the mileage of public rights of way divided by the mileage of all rights of way multiplied by two per cent of "distribution-capital gross receipts."

---

[2] The County submitted also a series of computations, similar to that outlined above, in which it ignored that portion of the Dinuba opinion that prorated between production and distribution. The entire gross receipts in 1939 of $9,620,838.45 were multiplied by the same factors as in steps 5 through 8 to reach the sum of $27,053.

In view of the fact that the Dinuba case must control the outcome of this controversy, the alternate method presented by the County need not be discussed further.

The Gas Company contends that the value of the use of the County's property should not be the real basis for computing the sums due under the statute, but that respondent can fully meet its obligation to the County by prorating two per cent of an amount *less* than the total gross receipts attributable to distribution capital. It does this by *deducting over seven and a half million dollars* ($7,556,603.13) representing *distribution capital not located on public-franchise rights of way*. And, as if resolved to erase all receipts from the base of computation, it deducts over *two and a quarter million dollars* ($2,264,991.95) representing *general and office facilities not located on public-franchise rights of way*. But the climax of the Gas Company's accounting procedure is reached by applying the Dinuba formula's private-right-of-way credit *by prorating the two per cent in the same manner as done by the County*.

[1] The purpose of the Broughton Act formula is to allow the Gas Company to retain *98 per cent* of its gross receipts, as the percentage applicable to the use of its *private* property, while *two per cent* is payable to counties and municipalities for the use of public property. The Dinuba case held that only those gross receipts attributable to *distribution* activities are subject to the two per cent charge. It is thus seen that in spite of both the statute and the cited case, the Gas Company asserts that nearly ten million dollars of invested capital may be entirely excluded from its distribution system and accordingly from consideration, in the earning of revenue subject to the statutory two per cent factor, simply because of its geographical location on private rather than public property. It does so by utilizing a flimsy legal non sequitur: its claim that the phrase "arising from the use, operation, or possession of the franchise" necessarily excludes receipts attributable to distribution capital physically located on private property. The Broughton Act recognized the justice of allowing a public utility a credit for its private property by exempting 98 per cent of the gross receipts from the franchise charge. The Dinuba case went a step further in allowing an apportionment of the two per cent toll so as to eliminate any charge for that proportion of the mileage over private rights of way. The Gas Company is not satisfied to accept the benefits granted by both the Broughton Act and the Dinuba decision, but in addition thereto it takes the additional deduction for the facilities located on private property by the utilization of the so-called "capital investment method" of accounting.

In the instant case, the Gas Company applies the "capital investment method" to ownership of the real property on which the distribution equipment is situated. The County says there is no justification for this and no authorization in the Dinuba decision. But this resort to the "capital investment method" is a mere technical disguise for a double deduction of the same factor. The Gas Company first relies on the arbitrary valuation of the earning capacity of the County's property at two per cent of the gross receipts, reduced by the Dinuba decision's mileage factor. It then further reduces the amount payable to the County by taking an additional credit for that portion of its capital investment in distribution facilities located on private property. After the two per cent deduction has been taken out of the total or gross receipts for the year, why should the "capital investment method"[3] be imported? While the Gas Company would concede the County's right to two per cent of the gross, it insists upon first deducting from the gross receipts all earnings attributable to its own property or to other privately owned property because, it asserts, revenues produced by their private property do not arise "from the use, operation or possession of the franchise."

---

[3] That method is based on the idea that each dollar of invested capital is presumed to earn an identical amount of receipts. Then if certain receipts must be apportioned, the apportionment is made in the same proportion as the capital investment.

A scrutiny of the statute fails to disclose any language that in the remotest degree suggests that the utility may make any such deduction. It says the price of the franchise is to be 2% of the gross receipts. Such charge is for the Company's use of public highways and its requirement is stated in clear and forthright language. Nothing is said in the statute about capital investment. The immensity of the Company's capital invested in the system is not mentioned and it is wholly immaterial. The Legislature had in mind the value of the public highways to any private utility operating its business by fixing two per cent of the gross receipts as a fair compensation. While the Dinuba decision limited the amount of the charge to two per cent of the gross receipts of the distribution system that item is taken care of by the formula proposed by the County. By deducting additional credits from the gross receipts for that portion of its capital invested in the distribution system located on private property respondent goes beyond the intention of the Legislature evidenced by its act in authorizing the utility to take 98 per cent of the gross receipts and the County to take two per cent.

To illustrate by statistical facts the seriousness of the Gas Company's claim: As shown above, in 1939 the total gross receipts were $9,620,838.45. The portion thereof attributable to the Company's production system is $83,701.29. But, of its total capital investment of $31,216,087.13, only $250,363 is invested in production. Now the $83,701.29 is all that can be deducted under the Dinuba decision. Subtract that sum from the total gross receipts, to wit, $9,620,838.45, and we have $9,537,137.16, the total of the Company's revenues attributable to its distribution system. Inasmuch as the County is, under the statute, entitled to two per cent and the Gas Company to 98 per cent of such gross receipts attributable to the distribution system, and since 91.3963 per cent of the entire mileage system is on public highways, all counties concerned are, under the Dinuba decision, entitled to two per cent of 91.3963 per cent of $9,537,137.16. That product is $8,716,590.49. Multiplying that sum by 15.3831 per cent, appellant's percentage of the total mileage of the distribution system, the new product is $1,340,881.85. Two per cent thereof is the arbitrary portion fixed by the statute as the earning capacity of the public property in use in 1939 and is $26,817.64. But the Gas Company is not satisfied with such arithmetic. It demands the right to deduct from the $8,716,590.49 the percentage of its gross receipts which it asserts has been earned by its capital invested in its own properties, its leased lands and in its general office and by its installations on consumers' property, a total of $9,821,595.10. That sum is almost one third of the Company's total capital investment of $31,216,087.13. The Dinuba decision determines that the Company is entitled to 98 per cent of the gross receipts for its capital investment, or for 1939, 98 per cent of $8,716,590.49. But the Company demands, also, the right to deduct from the County's two per cent of $8,716,590.49 such portion of the gross receipts which it ascribes to the total of $9,821,595.10 invested in its office and installations on owned and leased premises. To do this would reduce the total gross receipts earned by the public's portion of the distribution system to two per cent of $5,974,969.77 instead of two per cent of $8,716,590.49. By such an accounting method the Gas Company exacts a double credit for that portion of the gross receipts attributable to almost $10,000,000 of its capital investment in the distribution system. Thereby it deducts 98 per cent for the use of its own property as provided by statute but with respect to more than a third of its total assets it makes a complete deduction for the use of the Company's property. Despite the statute's authorization for the Gas Company to deduct 98 per cent of the gross receipts for all its property, including nearly ten million dollars invested in general office and installations on its own lands and leased properties, it first deducts $9,821,595.10, an insupportable conclusion.

[2, 3] The Gas Company's contention cannot be sustained. The amount of its money invested in facilities on private rights of way bears no direct relation to the use of the County's highways. The proper

allocation between conflicting interests is most reasonably and practically made by the Supreme Court's augmentation of the Broughton Act formula. The compensation for use of the County's property is by the statute based on the gross distribution receipts, not upon the physical location of the Gas Company's facilities. The proper allocation should be based on the extent to which the streets are used for pipelines, as the County maintains, in conformity with the Dinuba decision.

Gross Receipts

There is little room for doubt that the tolls payable to the County should be two per cent of respondent's total annual receipts attributable to distribution. Not only does the statute, Public Utilities Code, § 6006, require the holder of the franchise to "pay to the county * * * two percent (2%) of the gross annual receipts of the grantee" arising from the use of the franchise, but the Supreme Court clearly discerned that under a distribution franchise the grantee must pay two per cent of the gross receipts earned by the distributing portion of its system on public property. See Dinuba Case, 188 Cal. at page 676, 206 P. 983. While the court acknowledged a distinction between the productive and distributive properties, it emphasized that there was but one system of distribution, tht it was a single unit and that the two per cent payable to the County should be reckoned upon all the gross receipts attributable to distribution to be prorated according to the mileage of its pipes on public highways.

[4] In computing the tollage due the County, therefore, the Gas Company should use as its multiplicand all the gross receipts, minus the share ascribed to production and as its multiplier, two per cent. The resulting product must be multiplied by the fraction whose numerator is the mileage of the public franchise rights of way and whose denominator is the aggregate mileage of the entire distribution system. There is no more reason for deducting any sum from the gross receipts of respondent earned by the pipe lines laid on privately owned lands then there would be for a Broadway merchant to deduct the factory costs from the retail sales price of his expensive merchandise in calculating his sales tax. In the Dinuba decision the Court held that the fund from which the two per cent of the receipts of the Light and Power Company was to be computed was the fund comprised of all the gross receipts attributable to the "distribution system" and that the only receipts deductible from the total gross receipts were those earned by the production system. The public must be paid for its contribution of public property to the extent of two per cent of the gross receipts arising from the Gas Company's distribution system prorated according to the mileage of the public and private property used in distributing the gas.

[5] The foregoing conclusions are reinforced by a brief study in semantics. No authority has been found to define the term "gross receipts" to mean anything other than the total without deduction; it means "'all receipts on business beginning and ending within this state'". Pacific Gas & Electric Co. v. Roberts, 176 Cal. 183, 189, 167 P. 845, 847. The phrase is "plain language which, requires no interpretation * * * 'perfectly plain, unequivocal language,' * * * [it] must be taken in its plain sense without limitation or deduction save as expressly modified by the Legislature." Bekins Van Lines, Inc. v. Johnson, 21 Cal.2d 135, 140, 130 P.2d 421, 424. Gross receipts means all receipts arising from or growing out of the employment of the corporation's capital in its designated business. Robertson v. Johnson, 55 Cal.App.2d 610, 131 P.2d 388. Is there any doubt then that the Legislature intended for the utility to pay as a toll for the use of public highways on which to lay its pipes, tracks or cables, two per cent of its gross receipts?

[6] These conclusions are fortified by the doctrine of strict construction. The basic franchise ordinance (No. 1107, New Series, 1924) provides that "the franchise is granted upon each and every condition contained herein, and in the ordinance granting the same and shall ever be strictly construed against the grantee." When a franchise provides for the protection of the public interests, it is a fair assumption that the Board of Supervisors endeavored to

perform its duty as trustees for the public and that the provisions were inserted for the purpose of securing for the public all substantial advantages. 38 Am.Jur. 214. It is a general principle of construction that franchises granted by the state to private persons or corporations must be construed most strongly in favor of the public. If a doubt arises, nothing is to be taken by implication as against public rights. Clark v. City of Los Angeles, 160 Cal. 30, 38, 116 P. 722; Sacramento v. Pacific Gas & Water Company, 173 Cal. 787, 791, 161 P. 978.

From all that is said above it is unavoidable that the franchise must be construed strictly in favor of the County and as so construed respondent should pay its full two per cent of its gross receipts each year of the life of its franchise with no deductions except that attributable to production capital and the proportion of the distribution system belonging to the utility.

Additional Arguments by Respondent

[7] Ocean Park Pier Amusement Corporation v. City of Santa Monica, 40 Cal. App.2d 76, 104 P.2d 668, 879, cited by the Gas Company in support of its position, is readily distinguishable. In that case the city exacted the full statutory toll for the use of its own property and in addition sought to exact a charge for the use of the corporation's property. It was therefore properly held that no franchise payment need be made for the use of private property with respect to which no public property was contributed or used. In the case at bar, however, the Gas Company has consistently utilized public property in its operations and of course could not operate for an instant without public franchises, but the record discloses no attempt by appellant "to include in the grant, land over which it had no proprietary interest", as was true of the City of Santa Monica in the last cited authority, 40 Cal.App.2d page 86, 104 P.2d at page 674.

Respondent cites also City of Monrovia v. Southern Counties Gas Company, 111 Cal.App. 659, 296 P. 117, as authority for its contention. The court said, 111 Cal. App. at page 660, 296 P. at page 118, "In accordance with this method [from the Dinuba decision] the defendant * * * [eliminated] that portion of its earnings attributable to the use of its properties located on private property." The context of the above sentence, a portion of which respondent quotes, makes it clear that the mileage allocation formula of the Dinuba decision, under no dispute in the instant case, is referred to. But in any event, the only issue involved in the Monrovia action was whether or not the city was entitled to two per cent of the gross receipts collected within the city, a point not at all involved in the instant controversy.

The Superior Court cases cited by respondent did not decide the issues involved herein; hence a discussion of them would be futile. Neither do the other arguments raised by respondent merit further discussion.

It is the conclusion of this court that the Gas Company's accounting procedures are unauthorized and improper and that the conclusions of the trial court were erroneous.

Throughout the foregoing discussion only the computations for 1939 toll are mentioned. The identical methods were used by the Gas Company for the subsequent years, 1940 through 1951. Based upon its own calculations, the Company paid the County a total of $436,358.04 for the thirteen years in question; the County claims under the rules of the Dinuba decision and the court finds from the record that the sum of the accumulated tolls for the twelve years is $627,719.24. The difference of $191,361.20 is unpaid.

It is therefore ordered that the judgment be and it is reversed with directions to the trial court to enter judgment for appellant in the amount of $191,361.20 and for costs. Code Civ.Proc. sec. 956a; Pereira v. Pereira, 156 Cal. 1, 12, 103 P. 488, 23 L.R.A.,N.S., 880.

FOX, J., concurs.

McCOMB, Justice.

I dissent. I am in accord with the views expressed by the learned trial judge, The Honorable Paul Nourse. His opinion is as follows:

"By this action the plaintiff seeks a judgment establishing the basis upon which the defendant must calculate the toll or charge under the franchises for pipe lines which have from time to time been granted it by the plaintiff.

"By the amended complaint as framed, plaintiff further seeks an accounting and for judgment in the amount found due under the accounting for the years 1936 to 1939 both inclusive. At the trial of the action, however, it was stipulated that a supplemental complaint might be filed covering the years 1940 to 1951 inclusive, and that if the Court declared that the basis upon which plaintiff had calculated and paid the tolls due under its franchise was an improper one and declared a basis which would result in a higher toll being due, that the parties would calculate the additional amounts due without the necessity of an accounting being had and that the Court might then render judgment for the additional amount fixed by the stipulation.

"There is no conflict in the evidence. The material facts shown by the admissions made in the pleadings and the evidence are:

"The defendant is and at all relevant times has been engaged in business as a public utility, in selling and distributing illuminating gas, both at retail and at wholesale. Its system is an integrated one and serves, either at wholesale or at retail, consumers or customers in six counties in Southern California and holds franchises not only in those counties but from many of the cities situate therein. It produces a small amount of the gas it sells.

"There have been granted to the defendant by the plaintiff four franchises. Each franchise was granted by a separate ordinance, each ordinance apparently having been adopted pursuant to the provisions of what is commonly known as the Broughton Act, Deering's General Laws, Act 2720, Public Utilities Code, Sections 6001–6006, inclusive. The language of the provisions of the Broughton Act and of each ordinance which affects the obligation of the defendant to pay an annual toll, are substantially the same. The language used in Ordinance 500 (new series) is typical. It provides:

" '* * * the said grantee and his or its successors or assigns shall, during the life of said franchise, pay to the county of Los Angeles * * * two per cent (2%) of the gross annual receipts of such grantee, and his or its successors or assigns, arising from the use, operation or possession of said franchise.'

"Each ordinance requires the defendant to at the end of each franchise year (after the first five years) file with the Clerk of the Board of Supervisors a verified statement showing in detail the total gross receipts of the grantee during the preceding twelve months for the furnishing and distribution of gas 'through any part of the *system* for the construction and operation of which the franchise is granted.' (Certain of the ordinances require that the statement be filed with the Auditor and a copy delivered to the Board of Supervisors.)

"Prior to 1926 the defendant calculated the amount due under all Broughton Act franchises then held by it under grants from plaintiff and other counties and municipalities upon the basis of the gross revenue received by it from the sale of gas within the territory covered by the franchise. In 1926 it changed its methods of accounting and for that year and for each year thereafter has accounted to the County and all other grantors on what has been denominated in the arguments here as the 'capital investment theory'. (The details of this accounting and the theory on which it is based will be discussed later.)

"Upon receiving the 1926 statement and the check in payment of the amount due the County in accordance therewith, the Auditor wrote to the defendant objecting to the method of accounting used, suggesting that a conference be had between the representatives of the defendant and the County Counsel in order that a satisfactory basis might be determined for the making of returns under the franchises. To this letter the defendant replied, suggesting a conference between the legal representatives of the County and the defendant's counsel, and enclosing an opinion rendered to the defendant by its counsel relative to the proper basis for accounting under the decision of the Supreme Court in the case of County of Tulare v. City of Dinuba. The plaintiff did not reply to this letter. The defendant continued to account and pay its tolls in accordance with the method of accounting used by it in 1926.

"The plaintiff made no objection to this method of accounting and accepted the tolls paid in accordance therewith until 1940 when it again objected to the defendant's method of accounting and in 1941 commenced this action.

"No question is raised here as to the good faith of the defendant or as to the accuracy of its accounts. The sole question here is as to whether or not the method of accounting used by the defendant is a proper one. The plaintiff asserts that the defendant's method is not proper and that under it plaintiff does not receive the amount to which it is entitled under the payment clauses of the franchise which I have hereinbefore quoted.

"Plaintiff asserts that the proper method of accounting is as follows:

"(a) Prorate on a mileage basis the entire annual gross receipts of the defendant between the pipelines located upon private rights of way held by the defendant and pipelines located in and upon public highways under franchise;

"(b) Prorate the part of gross revenues allotted to public franchise mileage under step (a) above, between the public bodies granting franchise to the defendant upon the basis which the number of miles covered by the franchise of each bears to the total number of miles covered by public franchises;

"(c) Pay to the County 2% of that part of gross receipts allotted to the mileage under its franchises under step (b) above.

"Under this theory of accounting the defendant would attribute to pipelines, facilities and equipment placed upon pipeline rights of way, the entire revenues received by the defendant from its operations.

"Plaintiff further contends that if the foregoing theory or method of accounting is not the proper method, that then the following method should be used:

"(a) That the gross receipts of defendant from its operations should be prorated between production facilities and distribution facilities on the basis of the ratio which the capital invested in each bears to the total invested capital of the defendant, excluding that invested in intangibles and general capital;

"(b) That the share of gross revenues allotted to transmission or distribution facilities under step (a) should then be prorated on a mileage basis between pipelines on private and public rights of way;

"(c) That the amount allotted to the public franchise mileage under step (b) should then be prorated between the different public bodies granting franchises on the basis of mileage, and the County paid 2% of the gross revenues to which it thus becomes entitled.

"Under this second theory, the County concedes that capital invested in production or manufacture of gas is a source of defendant's gross receipts and concedes that inasmuch as gross receipts cannot be prorated between production facilities and rights of way on the basis of mileage, it must be prorated between them on the basis of invested capital. It excludes from invested capital both the amounts invested in intangibles and that invested in what is termed general capital (this includes general office land, general office structures, general shop, transportation, construction, communication and laboratory equipment) and thus prorates these items of capital between production and distribution facilities. It credits to rights of way (public and private) all the remainder of invested capital except that invested in production facilities.

"While stoutly maintaining that a theory of accounting based on the theory of invested capital is not proper, the plaintiff has advanced two theories of accounting which are based upon invested capital. One is set forth in the amended complaint and the other was advanced in the oral argument. As no argument was made in support of the theory set forth in the complaint, I mention here only the theory advanced in the oral argument. Under this theory, the plaintiff assumes that 2% of gross earnings are set aside as attributable to the value of the property covered by franchise and other easements, and that the remaining 98% is attributable to the value of all other property, and they would thus divide between public and private rights of way on a mileage basis an amount equal to 2% of the total gross receipts of the defendant and then they give to each grantor of a franchise its proportion on a mileage basis of the amount attributable to the total public rights of way.

"Under the theory adopted in 1926 by the defendant and under which it has since acounted for and paid its toll, each dollar of invested capital, excluding intangibles, is credited with its share of defendant's gross receipts. Its process is as follows: It first deducts from total invested capital the amount invested in intangibles. It treats the remainder as productive capital. It then divides the total gross receipts by the total amount of productive capital, arriving at the amount produced by each dollar of productive capital. It then determines the amount invested in both public and private rights of way, including all improvements and equipment situated thereon,—without respect to what proportion of that investment is in public rights of way and what proportion is in private rights of way,—and multiplies this amount by the earnings per dollar and arrives at the share of total gross receipts attributable to both public and private rights of way. It then prorates the amount thus arrived at between public and private rights of way on a mileage basis. From this point on, the accounting steps taken are the same as those taken in the first two methods advocated by the plaintiff and above described.

"The chief point of difference between plaintiff and defendant is that the defendant treats and the plaintiff does not treat certain properties or assets which are admittedly 'used or useful' for the conduct of the defendant's business in producing, manfacturing and distributing gas to the public but which are not located upon rights of way, either public or private, as a source from which a part of the total gross receipts arise.

"It seems to me self-evident that if each grantor of a franchise is only entitled to that portion of gross receipts which in the words of the statute arise from the 'use, operation or possession' of the franchise granted by it, that the defendant's method of accounting is fair and is the only practicable method of determining that portion.

"Defendant's operation is composed of many factors, each of which is essential to the production of income. Without office buildings to accommodate engineers, accountants, officers, and an administrative staff, it could no more operate than if it had no pipeline to transport the product it sells. Without storage facilities, repair equipment, metering devices and pressuring devices, it could not operate.

"Each factor produces its share of income. The only feasible method of measuring its share of total income (receipts) is the dollars invested in it.

"It is no more logical to say that a franchise produces all or any part of the income which is derived from a storage tank or a pressure station, each of which is a part of the distribution system, than it is to say that it produces the share derived from a pipeline on a private right of way. Yet, under each of the theories advanced by plaintiff, it is conceded that the franchises cannot share in that portion of the income that may be attributed to private right of way pipelines. It is true that both plaintiff and defendant divide gross receipts (that is, a portion of them) between franchise and private rights of way on a mileage basis, but this is because each have adopted that as a practical solution not because anything in the statute directs it.

"But it is not practicable to so prorate gross receipts between pipelines (public and private) and other income producing properties, for these other properties cannot be measured by the mile. Plaintiff recognized this when in two of the accounting methods advanced by it, it prorated gross receipts between production and distribution on the basis of invested capital. It is, of course, forced to do so, for, in order for there to be proration, the factors to participate in proration must be measured in the same terms as the thing to be prorated and in this case that is dollars.

"Plaintiff would, seemingly, read the payment clause as if it read: 'The grantee shall pay that proportion of 2% of its *entire* gross receipts which the number of miles covered by the franchise granted, bears to the total number of miles of all pipeline laid by it.'

"In other words, it would measure the toll to be paid not by the gross receipts arising from the franchise granted but by the entire gross receipts, irrespective of their source.

"This is not what the statute provides for. It designates as the source of the gross receipts by which the grantor's toll is to be measured as those arising from the use, operation or possession of the franchise. There is no more warrant for the prorating of the *entire* gross receipts of the defendant between rights of way, public and private, on a mileage basis, than there would be in assigning the benefit of the entire gross receipts to each franchise granted. That is to say, that looking to the language of the statute itself, it would be just as logical to say that each franchise was the source of the entire gross receipts of the defendant and entitled to 2% thereof as a toll, as it is to say that the source of those receipts were the rights of way, public and private, held by the defendant.

"While the language used in the statute is unambiguous, insofar as it designates the source of the gross receipts upon which the toll under each franchise is to be measured, its application presents practical difficulties. But, as I have pointed out, the method used by the defendant is the only practical method by which the entire gross receipts may be allocated among the factors that produce it.

"It may very well be that defendant could have applied its method further and determined as to each separate franchise the amount invested in it rather than have determined as it did the entire amount invested in all rights of way, both public and private, prorating this amount upon a mileage basis. It is evident, however, from the evidence here, that the plaintiff is better off under the method used by the defendant.

"I have so far approached the question presented from the standpoint of the wording of the payment clause alone. My conclusion, however, is supported by the decision of the Supreme Court in the County of Tulare v. Dinuba, 188 Cal. 664 [206 P. 983], and by the interpretation placed upon the clause by the parties.

"The cited case involved an action brought by the County of Tulare to recover from the San Joaquin Light and Power Company the toll charges which it claimed to be due under a franchise granted to the defendant power company pursuant to the provisions of the Broughton Act. The defendant power company was engaged in the business of producing, transmitting and selling electricity in Tulare, Fresno and Kern Counties. Its transmission system extended over all three counties and was located both upon easements covered by franchise and private rights of way. Its generating plants were distributed over the counties to which its transmission system extended. The plaintiff sought and recovered judgment for 2% of the gross receipts derived from the sale of electricity in Tulare County.

"The Supreme Court, after holding that the 2% of gross receipts fixed as a charge under the Act was neither a tax nor a license, but a toll for the use of the highways covered by the franchise and after disposing of the contention that the Act was so uncertain as to be invalid and unenforceable, laid out a general scheme for the application of the payment clause, and, in so doing, said, in part, as follows:

" 'We are not concerned, however, in this case with any feature of the act other than that which attempts to determine the measure *for computing the source* and amount of gross receipts from which the two per cent payment is to be made. The defendant here admittedly holds and uses a franchise over 189.8 miles of the public highways of Tulare County; and is obligated to pay a certain per cent of its annual gross income to such county, if we can ascertain under the statute *what the gross income referred* *to is, and how it is to be estimated.'* ([188 Cal. at] page 672 [206 P. 983].)

* * * * * *

" 'The corporation's gross receipts, to refer to the language of the act, *arise* from "the use, operation or possession", not alone of these franchises over the streets and highways, but likewise from the use, operation, or possession of the powerhouses and private rights of way. *The two last named are not subject to any franchise charges and the county or municipality is not entitled under the law to any part of the gross receipts attributable to these privately owned parts of the system.* The percentage payment is not a tax upon the property of the corporation, nor a license charge for the privilege of operating its business. It is a compensation for the use of the portions of the highway covered by the franchise easement, *and it is limited to such percentage of the total gross receipts as can be shown to have arisen from the use of the franchise.* * * *

" 'The absurdity of the position that any integral part of an electric distributing system like this is entitled to credit for the whole of the earnings from deliveries and sales in a given county or municipality when a large part of such service is over parts of the system not subject to such franchise permit may be shown by various illustrations.' ([188 P. at] pages 673–674 [206 P. 983].)

"(Note: The word 'arise' in the foregoing quotation was italicized by the Court.)

" 'Notwithstanding the difficulties suggested we are of the opinion that there is an entirely practicable and consistent interpretation of this provision of the act which will permit a fair *determination* and distribution of the prescribed percentage of receipts arising from the use, operation, or possession of each franchise utilized by the distributing system.' ([188 P. at] page 675 [206 P. 983].)

* * * * * *

" 'When the company or corporation has paid two per cent of all its earnings properly *attributable* to all its franchises whether covering one or more counties, it has fulfilled its obligation. It, of course, cannot concern such corporation how this amount is distributed to the various municipalities, * * * The state is at liberty to make this distribution upon any reasonable basis it sees fit to adopt. * * The reasonable construction of the language used is that each county or municipality is entitled to its percentage of the gross earnings arising from the use of its highway, in the proportion that the receipts arising from the use of such highways bears to the receipts attributable to all the rights of way of the entire system.

" 'We see no reason why this cannot be estimated on a mileage basis. It may be assumed that the distributing system covers six hundred miles of easements. The proportion of the gross receipts *derived from and chargeable to the use of the distributing system* should be credited to this entire mileage. One-third of this mileage may extend over private rights of way which are *not subject to any franchise liability.* The remaining two-thirds of the mileage covered by county franchises is entitled to two-thirds of the two per cent of the gross amount, and each county is entitled to the percentage of this two-thirds in the proportion that the mileage of its franchises bears to the total mileage covered by all the franchises.' ([188 Cal. at] pages 675–676 [206 P. 983].)

" 'Under the conclusions herein reached the proper action against the defendant corporation is by way of an accounting, to which the defendant and all municipalities under whose franchises this distributing system is operated are necessary parties, in order to determine *the entire liability of the defendant,* and the proportion of the two per cent payment to which each franchise is entitled.

" 'The first step in this accounting should be to determine as a question of fact what proportion of the total annual gross receipts of the public utility should be justly accredited to its distributing system over various rights of way, as distinguished from its power plants *or other producing agencies.*

" 'This will establish the fund from which the percentage of earnings "arising from the use, operation or possession" of the various franchise easements shall be ascertained.

"'The percentage of this fund to be apportioned to the respective public franchises will not include the proportion of such gross receipts of the distributing system as are attributable to the use of private rights of way occupied by the utility, *as such part of the system is not subject to franchise charge.* Each municipal franchise will be entitled to its two per cent of whatever portion of such fund can be shown to arise wholly from the use of the easements under such franchise, and such portion of the remaining fund as the mileage of the given franchise easement bears to the entire mileage of the distributing system contributing to such gross earnings.

"'We have adopted this appropriation, to the various rights of way, according to mileage, not necessarily as an exclusive method of distribution of the gross receipts, but as a practicable one where the contribution of the various franchise easements to the gross earnings cannot be otherwise determined. * * *' ([188 Cal. at] page 681 [206 P. 983].

"(All italics furnished, unless otherwise noted.)

"The quoted portions of the decision make it clear that there cannot be included in the gross receipts of which the grantors of franchises are entitled to 2%, any part of the income derived from or attributable to those portions of operating properties which are not subject to franchise.

"Plaintiff directs attention, however, to the fact that the Supreme Court in its decision only mentions three classes of assets, to-wit: Public rights of way (franchises), private rights of way, and power plants or other producing agencies, and that it approved the proration of a portion of the annual gross receipts between public and private rights of way upon a mileage basis. From this they argue that the Supreme Court in effect held that there were only two factors contributing to gross receipts, to-wit: Rights of way and powerhouses (which in this case would be natural gas wells or manufacturing plants), and that therefore all other capital investments should be ignored as a source of gross receipts if the decision of the Supreme Court is to be applied here, which, for reasons hereinafter mentioned, they insist it should not be.

"I think the plaintiff's argument looks more to the words of the decision than as to the reasons stated by the Court for it.

"The reason given by the Court for excluding gross receips attributable to private rights of way and powerhouses from the gross receipts to which the 2% franchise tolls might be applied, was that these assets were not subject to franchise and that therefore the revenues arising from them could not be considered as arising from the use, operation or possession of franchises.

"This reasoning is just as applicable to other assets, not subject to franchise, used by the defendant in its operations and which contributed to its gross receipts. If the portion of the receipts attributable to a power plant or a private right of way are to be excluded for the reasons given, then certainly the receipts attributable to the portion of a pressure plant or a storage tank or an office building must, for the reasons given, be excluded.

"The fact that the Court approved and, in fact, suggested the proration of 'the receipts *attributable* to all of the rights of way of the entire system' between public and private rights of way on a mileage basis, does not show, or tend to show, that the Supreme Court intended to exclude from consideration as the producer of a part of gross receipts the capital invested in properties which are not included in either generating plants or rights of way.

"It is clear from the decision that the Supreme Court only suggested this method as a practicable one for the solution of a difficult part of the entire problem involved in applying the statute and that it did not intend to hold that that portion of gross receipts attributable to operating properties not included in either generating plants or rights of way should not be excluded in determining the portion of total annual gross receipts which arose from franchise properties.

"Plaintiff asserts that since its decision in the cited case, the Supreme Court has placed a different meaning upon the words 'gross receipts' than there applied by it. It cites three cases: Bekins Van Lines v. Johnson, 21 Cal.2d 135 [130 P.2d 421]; Pacific Greyhound Lines, etc. v. Johnson, 54 Cal.App.2d 297 [129 P.2d 32]; Robertson v. Johnson, 55 Cal.App.2d 610 [131 P.2d 388].

"All of these cases are readily distinguishable. All of them involve an interpretation of taxing statutes. In the present case neither the statute nor the ordinances involve taxation. In the cited cases, it was the gross receipts of the taxpayer from its operations upon the highways of the state which were taxed and in each of them the taxpayer sought, for varying reasons, to exclude a part of the receipts arising from that operation. That is not the situation here. The present case would be analogous to the cited cases if the defendant were attempting to exclude as a part of the capital invested in public rights of way the portion thereof invested in pipelines or equipment placed thereon. This the defendant has not done but on the contrary, through its method of accounting gives the plaintiff the advantage of several million dollars of capital invested in equipment situated upon private rights of way as well as that situated upon public right of way.

"It may be also noted that the courts, in each of the cases cited by plaintiff, in holding that 'gross receipts from operations' was plain language which required no interpretation, (and that is plaintiff's contention here), relied upon the decision in the case of Pacific Gas & Electric Co. v. Roberts, 176 Cal. 183 [167 P. 845]. This was decided long before the Dinuba case and it must be assumed that the Court in the cited cases would have applied that decision had it thought it applicable. It may be further noted that in none of the cases cited is there any reference to the Dinuba case. I cannot assume that the Court by its decision in the tax cases intended to overrule its decision in the Dinuba case.

"For fourteen years the defendant has rendered its accounting and paid its tolls under the method of accounting which is now attacked by the plaintiff. There is no contention that its reports did not, and in fact it is admitted that they do, show the basis upon which it was rendering its account. Exhibit K further conclusively shows that the defendant was seeking, by its method of accounting, to adapt itself to the decision of the Supreme Court in the Dinuba case.

"These facts demonstrate a contemporaneous and practical construction placed by the parties themselves upon their contract and while, in a case such as this, such a construction perhaps may not operate as an estoppel against the plaintiff, it is quite persuasive in arriving at the interpretation which should be now placed upon the statute and the Supreme Court decision construing it.

"Plaintiff argues that the canon of contemporaneous construction of a contract does not apply to municipalities. It has, however, been repeatedly held that the canon of contemporaneous construction does apply as against a public body. See: Notle [Nolte] v. Hudson Navigation Co., 2 Cir., 16 F.2d 182; Commissioner of Internal Revenue v. Leasing, etc., Co., 6 Cir., 46 F.2d [2], 4; Old Colony Trust Co. v. Omaha, 230 U.S. 100 [33 S.Ct. 967, 57 L.Ed. 1410]; City of South St. Paul v. Northern States Power Co., [189 Minn. 26], 248 N.W. 288; State, ex rel., etc. v. Kansas City, [319 Mo. 386], 4 S.W.2d 427.

"Plaintiff insists that it is only the Board of Supervisors which can contract for the county; that therefore it is only that Board that can interpret its contracts, and that as it is stipulated here that none of the correspondence contained in Exhibit K was called to the attention of the Board, the plaintiff cannot be held to have acquiesced in defendant's construction of the statute.

"Plaintiff overlooks, however, the fact that under the terms of some of the franchises the defendant has annually filed with the Board of Supervisors its accounting and that under the remainder of the ordinances it has filed with the Board a copy of its accounting. It overlooks the fact, also, that it is the statutory duty of the Auditor, as an executive officer of the county, to "examine and settle the accounts of all persons indebted to the county or holding moneys payable into the county treasury', and to 'certify the amount to the treasurer'. (Pol.

Code, § 4093). It is presumed that the Board of Supervisors and the Auditor performed their duty. If they did perform it they must have been cognizant of the method used by the defendant in computing the tolls due from it and it can only be assumed for a period of fourteen years they acquiesced in plaintiff's interpretation.

"Even if it be assumed that the Board of Supervisors are not charged with knowledge of the accounts filed with it pursuant to the statute, it still cannot be said that the plaintiff has not acquiesced and by its acquiescence joined in defendant's interpretation of the statute and the Supreme Court's decision in the Dinuba case. The Auditor, as I have pointed out above, is the officer of the county charged with the duty of determining the amount due to the county from persons indebted to it. He could only perform this duty by construing the instrument upon which the indetedness is based. It being his duty to do this, it must follow that he had the power to do it and, having that power, was expressly authorized so to do by Section 2 of the Los Angeles County Charter, which provides: 'The powers mentioned in the preceding section can be exercised * * * by officers acting * * * by authority of law * * *'

"I admitted into evidence certain exhibits which tended to prove that all public utilities holding Broughton Act franchises have since 1926 reported and paid tolls under those franchises under the same system of accounting used by the defendant and that with but one exception no objection has been made thereto.

"I also admitted into evidence the findings and judgment in actions subsequent to the decision of the Supreme Court in the Dinuba case but which directly involve the same questions and rights that were involved in that case.

"None of this evidence bears upon the question of contemporaneous construction. While it may be argued with much force that under the circumstances here, where each of the agencies acquiesced in the system of accounting in question, is an agency of the state, and each is governed by the same basic statute, that their action constitutes an administrative interpretation of the law, I have not taken any of such evidence into consideration in arriving at my conclusions. I do not strike it from the record, however, as it is clearly relevant, under the allegations of the amended complaint, as additional proof of the contentions made by the defendant as therein alleged."

On Petition for Rehearing

PER CURIAM.

[7] The Gas Company's repetition of its argument in support of the doctrine of contemporaneous construction after this court has followed the Supreme Court's pronouncement of thirty-one years ago is without avail. The Broughton Act was construed by the Dinuba decision in 1922 and the courts have at no time veered from that construction. Interpretations of the statute, contradictory of court decisions, by treasurers, auditors and the utilities have no sacramental significance. In fact, they are irrevelant. Why should administrative interpretations prevail if they are erroneous? Whether a legislative enactment shall be maintained as the law of the land, despite the views of individual executives, depends upon the conclusions of the court of last resort. "'At most, administrative practice is a weight in the scale, to be considered, but not to be inevitably followed.'" Whitcomb Hotel, Inc. v. California Employment Commission, 24 Cal.2d 753, 757, 151 P.2d 233, 235, 155 A.L.R. 405.

However long administrative construction of a statute has continued, it does not for that reason become decisive. The Constitution empowers no entity other than the courts to invalidate a statute or to declare its meaning. When, by reason of its uncertainty, public agencies have given it a nonjudicial construction they are set aright by the final judgment of a court. An erroneous administrative construction does not control the courts in their interpretation of a statute. Ibidem.

Respondent says that following the Dinuba decision, "a method of applying the principles of that case were worked out by gas and electric companies and by other utilities with various public agencies * *.

It will thus be seen that the formula which the Gas Company has used to compute its payments to the County of Los Angeles is based on a long recognized interpretation of the Broughton Act and has been used by various other utilities throughout the State." Such statement does not square with the record. Aside from the definite pronouncement by the Dinuba decision in 1922, Los Angeles County has since 1940 been engaged in a continuous controversy with respondent and other utilities with respect to the construction of the statute. This suit was authorized in 1939. Moreover, the action of City of San Diego v. Southern California Telephone Company, Cal.App., 251 P.2d 739, shows anything but a unanimity of public agencies in accepting the program of the utilities. The Telephone Company, from 1914 to 1944, paid on a formula wholly dissimilar from that urged here as lawful by respondent.

All other points are covered in the opinion.

Rehearing denied.

McCOMB, J., dissents.

PEOPLE v. ROBINSON.*

Cr. 4977.

District Court of Appeal, Second District, Division 2, California.

Aug. 6, 1953.

Hearing Granted Sept. 4, 1953.

Defendant was convicted of robbery. The Superior Court, Los Angeles County, Benjamin J. Scheinman, J., rendered judgment on the verdict, and defendant appealed. The District Court of Appeal, Moore, P. J., held that there was no diversity of interests of defendant and a codefendant, both of whom were represented by the same attorney, where each of them presented his own alibi, neither implicated the other in participation in the crimes charged by the information, their testimony as to their arrests was substantially identical, and the evidence showed a close alliance between them, so that defendant was not prejudiced by the trial court's denial of his motion on the day of trial for continuance because he wanted to get another attorney.

Judgment affirmed.

1. Criminal Law 🔑603

Where both prosecutor and defendant's attorney announced their readiness for trial and waived reading of information when court session was resumed following recess and conference by trial judge with both counsel in chambers concerning defendant's motion for continuance because he wanted to get another attorney, and defendant said nothing about a continuance after such announcement, court reasonably construed such conduct as a withdrawal of motion.

2. Criminal Law 🔑589(1)

Where attorney representing two defendants, charged with robbery, at preliminary hearing and every stage of proceeding until day set for trial of case over month after filing of information, advised court on such day for first time that defendant had told attorney about two weeks before that he did not wish attorney to represent him and that attorney desired defendant to procure other counsel because of possible diversity of defendants' interests, trial judge was justified in finding that defendant's motion on such day for continuance because he wanted to get another attorney was made in bad faith as means of effecting delay, so as to require denial of motion in exercise of sound discretion.

3. Criminal Law 🔑1166(8)

Where each of two defendants, charged with robbery, presented his own alibi, neither implicated the other in participation in crimes charged, their testimony as to their arrests was substantially identical, and evidence showed close alliance between them, there was no diversity of their interests, so that one of them was not prejudiced by trial court's denial of his motion for continuance because he wanted to get another attorney than one employed and retained by him for over four weeks until day of trial, though such attorney also represented codefendant.

---

* Subsequent opinion 269 P.2d 6.

* * *

Howard S. Robinson, in pro. per.

Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Appellant and his codefendant Pratt were accused in two counts of robbery and of prior felony convictions. At the preliminary hearing they were represented by attorney Coviello. Following his conviction of the robbery of one Campbell, which occurred on June 22, 1952, appellant appealed from the judgment and from the order denying his motion for a new trial on the sole ground of the court's having abused its discretion in denying his motion for a continuance.

When the case came on for trial in the superior court, Coviello announced that he could not represent both defendants; that he wished to be relieved as counsel for appellant. The following colloquy discloses the entire proceeding with reference to the alleged error:

"Mr. Russell: The People are ready.

"Mr. Coviello: Your Honor, in this case, unfortunately, I am not quite ready here. Mr. Robinson at least 10 days ago, or two weeks ago, had consulted other attorneys. I don't want to go into a lot of detail, but he did tell me in the attorneys' room that he didn't want me to represent him. I indicated that I wanted him to secure counsel. I felt that there might be a diversity of interest between my client, Mr. Pratt, and Mr. Robinson. I have known Mr. Pratt for some time.

"He has told me this morning here that he hasn't made definite arrangements with any attorney. I don't know if he has consulted a public defender or not. I want to assure your Honor I can't represent him in court if he doesn't want me to. As far as I am concerned, I am ready to defend both these men, and I did go originally on the assumption that I would defend both of them, but I say again at least two weeks ago, or 10 days ago, I told him in the attorneys' room I thought it would be wise for him to get another attorney so there would be no question of diversity of interests here. In view of what he said, I think I would like to ask the Court to continue it for at least a week. I will leave it up to him here, if your Honor wants to interrogate him.

"Defendant Robinson: I would like to ask this case be continued for two weeks because I would like to get an attorney.

"The Court: What do you gentlemen want to do in this matter?

"Mr. Russell: Well, we have quite a few witnesses here. It seems to me that the matter should have been put on [sic] the calendar when some question arose between counsel and his client as to the situation. I haven't been advised prior to this time that there was any contemplation of continuance.

"The Court: Is the public defender here?

"Mr. Russell: No, your Honor. I might state, so far as our calendar is concerned, it will have to go at least to the latter part of September.

"The Court: In view of the large number of witnesses here, I prefer not to continue the matter. Perhaps we could get a public defender at the last moment.

"Mr. Russell: The public defender wouldn't accept the case, if they had to go to trial today. I don't think it would be fair to them. They would require some opportunity to prepare for trial in the matter.

"The Court: Under the circumstances, I will pass this case for the moment. I would like to talk to Mr. Russell and Mr. Coviello in this Robinson and Pratt case.

"(Conference in chambers off the record.)

"(Other matters heard.)

"The Court: People v. Robinson and Pratt.

"Mr. Russell: Ready, your Honor.

"Mr. Coviello: Ready, your Honor.

"(Whereupon, a jury was duly impaneled and sworn to try the cause.)

"The Court: Do you waive the reading of the information?

"Mr. Coviello: I will waive it.

"Mr. Russell: People waive it.

"Mr. Coviello: At this time, if your Honor please, I would like to ask that all witnesses on the part of the People be excused from the courtroom.

"Mr. Russell: I have no objection to that request, but I think it should apply to all witnesses; not merely the witnesses for the People.

"The Court: Do you want the police officers excluded also?

"Mr. Coviello: Yes, your Honor. I meant all witnesses, defendants' and People's."

The rule was enforced and all witnesses were excluded. Thereafter the trial proceeded smoothly, without dispute between defendants' counsel and either of them and without an adverse ruling. A search of the record discloses no diversity of interests of the accused and no divergence of their defenses.

Appellant grounds his contention for a reversal upon the hypothesis that his counsel informed the court of "a diversity of interest between the defendants"; that by reason of such statement it became the judge's duty to grant a continuance; that the refusal to do so violated the due process clause of Article I, § 13 of the state Constitution and the Fourteenth Amendment to the federal Constitution. In support of such argument he cites People v. Lanigan, 22 Cal.2d 569, 140 P.2d 24, 148 A.L.R. 176; Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680. Neither is pertinent. Lanigan and his companion, Giardano, were tried twice. At the first trial Lanigan was represented by attorney Cantillon, Giardano by attorney Lavine. When on January 28, the court set the case for retrial on March 9, 1942, Cantillon was, upon motion, released from further duty and Lanigan was instructed to employ other counsel and to be prepared to proceed on the date designated. When the cause came on for trial, Lanigan asked for a continuance until he could obtain counsel. The court cited its former admonition, denied the continuance and, over the objection of attorney Lavine that there "will be a conflict in the interests," appointed the latter to represent Lanigan as well as his own client Giardano. On appeal it was held that because Lavine had been employed by Giardano as his sole counsel, the "engagement required him to 'maintain inviolate the confidence and at every peril to himself to preserve the secrets, of his client'." [22Cal.2d 569, 140 P.2d 28.] Lavine's fidelity to his client, Giardano, foreclosed Lavine from voluntarily representing Lanigan. Therefore, since voluntary employment by Lanigan would have been improper, compelling him to accept Lavine was prejudicial. To force Giardano to share the attention and efforts of his counsel with Lanigan was unjust and the latter was prejudiced by being required to have as his advocate an attorney who felt that he could not properly represent the accused.

A similar situation is found in Glasser v. U. S., supra. When the case was called, McDonnell, the attorney for defendant Kretske, informed the court that Kretske did not wish to have him (McDonnell) as his attorney. The court forced Stewart, Glasser's attorney, to represent both defendants, contrary to Glasser's objection. On appeal, it was held that Glasser was entitled to the "undivided assistance" of counsel of his own choosing, and that the Sixth Amendment had been violated. It is important that a court "see that an accused has the assistance of counsel" [315 U.S. 60, 62 S.Ct. 467] and refrain from embarrassing the attorney so engaged by even suggesting that the latter "undertake to concurrently represent interests which might diverge from those of his first client, when the possibility of that divergence is brought home to the court."

[1] Appellant, in effect, withdrew his request for a continuance "for two weeks because I would like to get an attorney." After the deputy district attorney had resisted the continuance, the court recessed and the judge conferred with both counsel

in chambers. When the session was resumed, both the prosecutor and Mr. Coviello announced ready and waived the reading of the information. Notwithstanding appellant's assertion that he "was forced to trial without counsel of his own choice," not a chirp was heard from him about a continuance after the announcement of ready. Such conduct following the attorneys' conference with the judge in chambers was reasonably construed by the trial court as a withdrawal of the motion.

[2] Moreover, the circumstances of the motion for a continuance justified the court's finding that it was not made in good faith but was interposed as a means of effecting a delay. The information was filed July 17, 1952; the defendants were arraigned July 21 and the matter was set for trial on August 18, 1952. Prior to the latter date, Coviello had represented both defendants at the preliminary hearing and at every stage of the proceeding after the information was filed. On that day for the first time Coviello advised the court that about two weeks previously appellant had told him that he did not wish Coviello to represent appellant and that he (Coviello) indicated that he desired appellant to procure other counsel because he felt there might be a diversity of interest between the two accused. Not a word had been said to either the court or the district attorney by either appellant or Coviello of a desire to transfer the burden of defending appellant to another. Had there been such a conversation between the lawyer and his client as reported to Judge Scheinman, the fair, reasonable and logical act of the lawyer would have been to notify the court and the adversary party of the change in status. The reasonable and natural act of the client would have been to commence negotiation for new counsel immediately, at least to the extent of seeking aid from the court and the public defender, in view of the impending trial. Is it possible that appellant could not arrange suitable counsel in two weeks, if only for the purpose of entering a motion for a continuance? In the absence of any of this conduct, it was not irrational for the judge to believe the motion for a continuance was made in bad faith and that the exercise of a sound discretion required its denial.

[3] There was no diversity of the interests of the two accused. Viewing first their affirmative defenses, each man presented his own alibi. Neither implicated the other in a participation in the crimes charged. Their testimony as to their arrests was substantially identical. Appellant has not indicated the respect in which there was a diversity of interests. No claim is made that any other lawyer could have done more for appellant than was done by Coviello. Viewing the evidence introduced by the People, it was not possible for a diversity of interests to exist. Immediately after Pratt had assaulted and threatened Mr. Souhire in his market at 8:00 a. m. June 4, 1952, appellant entered, locked the door, struck the proprietor on the head and took the bag of money from his person. The two men departed together. At 4:45 a. m. of June 22, 1952, John Campbell, the second victim of the two men, saw Pratt driving down Twelfth Street, with appellant as his guest; saw them park the automobile. Thereupon, appellant approached, beat and robbed Campbell and left only after Pratt signalled by sounding his horn. At 5:00 a. m. they parked the same sedan in front of a cafe in which they consumed refreshments and in which both were arrested. From their car the officers took a bottle of wine which bore the right thumb print of Pratt.

From such incidents showing the close alliance of appellant and his confederate, it is inconceivable that their interests could have diverged in the slightest degree. Appellant was therefore not prejudiced by the fact that the attorney whom he had employed and retained for over four weeks and until the day of trial continued as his counsel. People v. Dorman, 28 Cal.2d 846, 852, 172 P.2d 686; People v. Shaw, 46 Cal. App.2d 768, 774, 117 P.2d 34.

Judgment affirmed.

FOX, J., concurs.

McCOMB, J., concurs in the judgment.

118 Cal.App.2d 733

SINGLETON v. FULLER et al.

Civ. 4526.

District Court of Appeal, Fourth District, California.

June 26, 1953.

Rehearing Denied July 23, 1953.

Hearing Denied Aug. 20, 1953.

Action to recover for defendants, who were allegedly partners, for an account stated and second cause for indebtedness for goods, wares, and merchandise furnished by plaintiff to defendants in like amount as stated in first cause of action. The Superior Court of San Diego County, Joe L. Shell, J., entered judgment from which one of the defendants appealed. The District Court of Appeal, Griffin, J., held that evidence supported finding that a partnership did in fact exist between the defendants, and that the appealing defendant had not merely made a loan to the other defendant.

Judgment affirmed.

1. Partnership 🔑22

An express stipulation in written articles of agreement respecting a business enterprise contemplated by the contracting parties, that the relationship between the parties is not one of partnership, is of no value if such is the actual nature of the business, since courts will not countenance contrivances for giving persons the advantages of a partnership, without subjecting them to the liabilities.

2. Partnership 🔑22

In determining whether a partnership has been created as between certain parties, courts are guided not only by the spoken or written words of the contracting parties, but also by their acts.

3. Partnership 🔑10

The existence of a partnership between contracting parties is not necessarily negatived by fact that no complete control of any part of the partnership venture is vested in each partner, or by fact that agreement between them is that only one party may share in the gross receipts.

4. Partnership 🔑6, 9(1)

Question of whether an agreement to share profits is merely to provide a measure of compensation for services or for use of money, or whether it extends beyond and bestows ownership and interest in the profits themselves so as to constitute the undertaking a partnership or joint adventure, presents primarily a question of fact.

5. Partnership 🔑55

In action for indebtedness due to plaintiff from defendants who were allegedly partners in business of remodeling and selling barracks, wherein one of the defendants denied existence of partnership and contended that he had merely loaned money to other defendant in accordance with a written agreement respecting repayment, evidence, including written agreement for payment in installments corresponding to sales of barracks, was sufficient to support finding that a partnership existed between the defendants.

6. Frauds, Statute of 🔑33(1)

Where defendant and another were alleged partners in business of remodeling and selling barracks, and amounts were owed to plaintiff and others for materials furnished, agreement by defendant to guarantee and assume for a consideration the obligations owing to plaintiff and such others in carrying the enterprise to its ultimate conclusion was not required to be in writing to be enforceable. Civ.Code, § 2794(2).

7. Appeal and Error 🔑197(3)

An objection of fatal variance between pleadings and proof could not be made for the first time on appeal, particularly where case was fully and fairly tried on its merits as though no such claimed variance had existed.

◆

Bertrand L. Comparet, San Diego, for appellant.

McInnis & Hamilton, John W. McInnis, San Diego, for respondent.

GRIFFIN, Justice.

Plaintiff and respondent brought this action against defendants Robert L. Fuller and Noel Tweed, alleging in the first cause of action that about July 1, 1948, an account was stated between plaintiff and defendants in the sum of $2,702.17. In a second cause of action it is alleged that defendants became indebted to plaintiff for goods, wares, and merchandise furnished by plaintiff to defendants in a like amount.

Appellant Tweed, by separate answer, denied generally the allegations of the complaint and the case proceeded to trial against him.

The court found generally that defendant Fuller and appellant Tweed were, prior to December 5, 1946, associated together in a business venture, for the purpose of purchasing, remodeling, and selling barracks, and that their relationship to each other was that of general partners; that they were in fact a partnership for this venture, which was terminated about August 1948; that in January, 1947, at the special request of Fuller, acting for said venture and partnership of Fuller and Tweed, and with appellant Tweed's full knowledge, plaintiff did commence to and continued to furnish labor and materials upon the buildings at a cost totaling $2,702.17; that appellant Tweed ratified all of the acts of his partner in the manner of conducting the business venture and in procuring the labor and materials furnished for said buildings; that in August, 1948, a count was stated between plaintiff and defendants, as a partnership, in said sum; that no part of that amount was paid and that it is due and owing. Judgment was entered against appellant accordingly.

The complaint on this appeal is that there is insufficient evidence to show an account stated or to support the finding of a partnership relationship.

Although the evidence is conflicting, it shows that plaintiff was a painting contractor; that appellant Tweed and others were in the planing mill and building material business as a partnership; that defendant Fuller, on December 5, 1946, entered into a written agreement with the Ed Fletcher Company, agreeing to purchase from it a number of wooden barracks buildings which were to be remodeled into residences and ultimately removed to lots obtained by purchasers. Fuller agreed to pay $21,000 for these barracks with a down payment of $4,000.

Fuller, in testifying as a witness for plaintiff under section 2055 of the Code of Civil Procedure, stated that he and appellant Tweed discussed this proposition of remodeling and selling these barracks, and about going "into this business of getting barracks and repainting and repairing and selling them"; that Fuller told Tweed he was without sufficient funds to finance the project; that Tweed agreed to assist him in this respect but Tweed insisted that the agreement between him and Fuller be drawn by his attorney, and he wanted it so drawn that "it would not show that it was legally a partnership, because of his business with the Walter & Tweed's Planing Mill, but it would be a partnership"; that they had the agreement written that way to please Tweed.

The written agreement between them recites that Fuller, on the 3rd day of December, entered into an agreement with the Ed Fletcher Company as above indicated; that Fuller was in need of financial assistance in the sum of $4,000 to carry out its provisions; that Tweed agreed to furnish that sum and Fuller agreed to pay Tweed $6,250 "from the proceeds of the sale of said barracks in twenty-four (24) equal installments of two hundred sixty and 42/100 dollars ($260.42) each" payable within five days after the sale by Fuller of the seventh of said barracks buildings, and a like sum for each building thereafter sold up to thirty. It then provided that in the event Fuller defaulted in his agreement to purchase said barracks from the Ed Fletcher Company or "for any reason is unable to carry out his agreement, Fuller agrees to assign all his rights of every nature in and to the said agreement with the Ed Fletcher Company to Noel Tweed."

Fuller then testified that appellant paid the $4,000 to him and he in turn paid the Ed Fletcher Company that amount in accordance with his contract; that he informed plaintiff that he and Tweed were "going to do this operation or do this business"; that he employed plaintiff and others in proceeding with the remodeling program; that many bills were contracted with different workmen; that things did not go "just the way we expected at the beginning and the barracks were not selling as we figured"; that he went over certain outstanding bills with appellant and discussed them with him such as plaintiff Singleton's bill for work he had done; that the payments to the Fletcher Company were in default, and appellant agreed to and did "put in" an additional $2,000 to pay off some of the bills with the understanding he was "to get $240 a house". However, Fuller signed an agreement to repay the $2,000, plus interest at one per cent per month, and to execute a chattel mortgage on certain property as security. (Apparently that mortgage was never executed.) A few of the barracks were sold. Appellant visited the property often and even went out on occasions to assist in selling them and did, in fact, negotiate the sale of one such remodeled barracks. Fuller also testified that one of the barracks was removed to a lot owned by Fuller's father; that the money obtained from that sale was used to complete that barracks with the preconceived plan of selling it and paying off the indebtedness due to plaintiff and the Helix Electric Company, to whom they owed money; that a meeting of all of the creditors and parties concerned was called to discuss their plans; that although plaintiff did not appear at the meeting he authorized them to make such disposition of his claim as was agreed upon at the meeting in reference to the others; that shorthand notes were taken of the several conversations; that appellant stated to those present that he and Fuller "were partners in this venture; that the reason there was no partnership papers made out was because of his agreement with his other partners at the lumber mill"; that he was asked what he proposed to do about the outstanding obligations to prevent liens being placed on the property and he stated: "We intend to move the buildings and sell them, then we can pay off the defendants, but we are not going to pay off the debts until we sell these buildings"; that one creditor asked for written security and appellant replied: "There need be nothing in writing, because I personally will see that these partnership debts are paid when the buildings are sold"; that he communicated that fact to plaintiff Singleton and told him that satisfactory arrangements had been made to carry the indebtedness over from one job to another and that he would be paid when a little more work was done; that plaintiff handed over a written release of his mechanics' liens to appellant; that thereafter he continued working and painting the buildings; that appellant then started paying the bills from his own bank account and deposited therein money from sales subsequently made; that Fuller, by agreement with Tweed, continued to work on the barracks moved to his father's lot and Tweed paid his grocery bills, etc., while so doing; that Singleton also worked thereon; that he and appellant went to the Fletcher Company and that company agreed to cancel the contract insofar as it affected the barracks remaining on its property; that appellant took over "running affairs" thereafter; that the barracks on one-half of the father's property were financed through appellant's bank account, completed and sold for approximately $11,500, and that a carpenter shop was financed and built on the other one-half of the lot, which shop was partially financed by Mr. Fuller and was later deeded back to him by Tweed. Excepting for plaintiff, most of the other creditors were paid by appellant.

Appellant's testimony is that originally Fuller asked him for a loan of $4,000 to obtain the right to remodel the barracks; that he required the agreement for the loan signed by them on December 5, 1946, to be in writing; that he then paid Fuller the money; that the agreement with Fletcher was signed the same day; that about January 8, 1947, Fuller came to him for more money and he loaned it to him as indicated by the written agreement; that Fuller never repaid any of this amount; that Fuller did report some sales to him and told him all bills had been paid; that Fuller requested him to go to the Fletcher Company and help him in securing a cancellation of the agreement; that he went but said nothing; that he discovered one of the buildings had been removed to the Fuller lot and he demanded some security for his $6,000 loan; that he bought the one-half acre lot only with the idea of obtaining some security for his indebtedness and to remodel the barracks and sell it so he could be repaid. He admitted going to the Fletcher Hills site and assisting in the sale of the property, but claimed it was only to help Fuller so appellant could be reimbursed for the money he loaned. He studiously maintained that at no time was there any partnership or joint venture agreed upon; that the writing was the only agreement made; that all evidence received at the trial in contravention of the intentions expressed in the written agreement was incompetent and inadmissible. He admitted that a meeting was had of some of the creditors and parties concerned but denied making any of the statements attributed to him by Fuller wherein he was supposed to have admitted that a partnership did exist between them and that he agreed to see that the creditors would be paid if they released thir liens. He admitted taking over operations after that day and using his own bank account and that he received and paid out money in furtherance of his efforts to pay the claims and to secure the return of his investment. However, he contends that by reason of the loan, the sale of the properties, the payment of $4,700 for support of Fuller's family, and by the entire venture, he stands to lose over $2,000, not including the judgment herein rendered.

The shorthand reporter read from her notes taken at the meeting of the creditors and it shows that someone asked appellant about the partnership and he "made the statement that he could not make partnership papers due to the fact that he was already in partnership at the mill and had promised not to do so", and that "if the men involved would give their releases that he would guarantee that they would all get their money". Appellant admitted that plaintiff called him on the phone just before the meeting and told him he could not be there and to go ahead even in his absence. Many cancelled checks in payment of labor and material, issued by appellant after the date of this meeting and drawn on his bank account, were received in evidence as well as cancelled checks paid to Fuller and his wife from July 30, 1947, to March 9, 1948, for claimed living expenses. Appellant, on the witness stand, admitted that some of this money, however, did go into the cost of remodeling the barracks on the Fuller property.

Plaintiff fully established that labor and materials were furnished by him on the premises involved and in the sum indicated. Some portion of it, approximately $145, was after the so-called creditors' meeting. Plaintiff rendered Fuller the statements of account as they became due and no objection was ever made as to their nature or the amount claimed. Fuller testified he received them; that "he went over the bills with Mr. Tweed, certain bills, I couldn't say for sure that those were the bills that were there". The question as to whether there was an account stated as between plaintiff and appellant becomes unimportant if the judgment can be sustained on the theory of a partnership venture. Nunneley v. Edgar Hotel, 36 Cal.2d 493, 500, 225 P.2d 497; Wells v. Brown, 97 Cal.App.2d 361, 217 P.2d 995.

It is appellant's position in this respect that all prior negotiations between plaintiff and appellant were merged in their written agreement; that by its terms their relationship was that of debtor and creditor; that thereunder appellant was given no right or title to share in the business profits, no right of management or control, and subjected Tweed to no liability for debts or losses; that the sum he was to receive was fixed and was payable out of the gross receipts and not from profits; that there was no intent between the parties to form a partnership; and that the Uniform Partnership Act makes the test of partnership the same, whether the action be one between the supposed partners or between a third party crditor and the supposed partners; that all of these elements must exist if the relation of partnership exists, citing such cases as Auditorium Company v. Barsotti, 40 Cal.App. 592, 596, 181 P. 413; Spier v. Lang, 4 Cal.2d 711, 53 P.2d 138; Smith v. Grove, 47 Cal.App.2d 456, 461, 118 P.2d 324; Corporations Code, sec. 15001 et seq; Martin v. Peyton, 246 N.Y. 213, 158 N.E. 77; Farris v. Farris Engineering Corp., 7 N.J. 487, 81 A.2d 731, 738–739.

In San Joaquin Light & Power Corp. v. Costaloupes, 96 Cal.App. 322, 334, 274 P. 84, 89, it was said:

> "The courts will not countenance contrivances for giving persons the whole of the advantage of a partnership, without subjecting them to the liabilities, and an agreement which attempts to carry out a joint venture for the mutual profit of the adventurers and evade their responsibility for losses may be enforced and construed as creating a partnership."

[1] It has been held that an express stipulation under written articles of agreement to the effect that the relationship is not one of partnership is of no value, if such is the actual nature of the business. Streeter & Riddell, Inc., v. Bacon, 49 Cal. App. 327, 193 P. 285.

In Associated Piping, etc., Company, Ltd. v. Jones, 17 Cal.App.2d 107, 61 P.2d 536, 538, an attempt was made by defendant to claim a debtor-creditor relationship, rather than a partnership which the court found to be the fact. The court there said:

> "We are of the opinion that, notwithstanding the provisions of the contract under which appellant 'agrees to loan to the parties of the second part, from time to time, various sums of money,' he was in fact a member of the partnership. * * * We may concede that a relationship of debtor and creditor is shown, and also that the contract expressly declares that appellant 'agrees to loan' various sums of money to the other parties. However, this does not establish the fact that the parties did not intend to create a partnership between themselves or as to a third person. The parties did intend to create exactly the relationship as shown by the contract, but did not intend that relationship to be called that of partnership. * * * It is the intent to do the things which constitute a partnership that usually determines whether or not that relationship exists between the parties." (Citing cases.)

[2-4] In determining whether a relationship such as that of partners has been created, the courts are guided not only by the spoken or written words of the contracting parties, but also by their acts. San Francisco Iron and Metal Company v. American Milling & Industrial Co., 115 Cal.App. 238, 1 P.2d 1008. The fact that no complete control of any part of a partnership venture is vested in each partner does not negative the existence of a partnership since, by agreement, one partner may be given the duty of management of the enterprise or any part thereof. Lyon v. MacQuarrie, 46 Cal.App.2d 119, 115 P.2d 594. The fact that the agreement between them is that only one party may share in the gross receipts does not necessarily negative the existence of a partnership. De Rigne v. Hart, 94 Cal.App. 209, 270 P. 1013. It is true that payments made from profits of the business do not constitute the parties partners where the relationship of debtor and creditor exists and such payment is in discharge of a debt. Whether an agreement to share profits is merely to provide a measure for compensation of services or for use of money, or whether it extends beyond and bestows ownership and interest in the profits themselves so as to constitute the undertaking a partnership or joint adventure, presents primarily a question of fact. Nelson v. Abraham, 29 Cal.2d 745, 177 P.2d 931. Although a partnership generally contemplates an equal sharing of profits and losses in the prosecution of a common purpose, the division may be left to agreement of the parties. Constans v. Ross, 106 Cal.App.2d 381, 235 P.2d 113.

Here the trial court was authorized to believe the evidence most favorable to plaintiff and from that evidence it appears that Fuller and appellant became mutually interested in purchasing, remodeling and selling the barracks as a joint enterprise or on a partnership basis; that appellant did not desire that it appear that he and Fuller were so operating and accordingly made it appear that the interest of appellant was only in loaning the money to Fuller, with the obligation of repayment of the principal, together with interest, being the only objective. The face of the instrument executed by them might so indicate. However, the prior and subsequent actions and conduct of appellant might well indicate that the trial court's finding was correct and that there was a secret intention between the parties that a partnership would be effected. This conclusion is fortified by the testimony of Fuller and the statements of appellant at the creditors' meeting. There is evidence that the true intention of the parties as to the existence of a partnership between Fuller and appellant was communicated to plaintiff at the time of his employment. Section 15009 of the Corporations Code provides in part that "Every partner is an agent of the partnership for the purpose of its business, * * *." It is true that the agreement provides for the repayment of $6,250 in consideration for the claimed loan of $4,000, and that said sum should be repaid in 24 equal installments "from the proceeds of the sale of such barracks * * * until all of said barracks are sold." It then provides for a compulsory assignment to appellant of all of Fuller's rights in and to the Fletcher agreement in case of default in any of its terms.

It therefore appears from the agreement between Fuller and appellant that more than the legal interest allowed is reflected in these arrangements and might well result in a division of the profits or in case of a failure to make a profit, an assumption of a loss by reason of the fact that the sums advanced were to be repaid only from the profits of the sale for, if there were no sales made there would naturally be no profits to pay the obligation. It does appear that on occasions appellant's interest in the business did appear to be more than that of a creditor. He examined the bills, habitually visited the property, assisted in the sales, and actually effected a sale of one of the barracks. At the meeting of the creditors he agreed to pay their claims if they would release their liens, which they did do, and most of the creditors were paid by appellant. It appears that appellant heavily financed Fuller by way of paying for the maintenance and support of his family and in sharing the proceeds of the project with him by these means.

[5, 6] There is sufficient evidence to support the court's finding as to the formation of a partnership. In addition, in support of the judgment, it appears that appellant subsequently agreed to guarantee and assume, for a consideration, the obligations of Fuller and the partnership in carrying out the enterprise to its ultimate conclusion. This court was presented with a somewhat similar question in Parrish v. Greco, 118 Cal.App.2d 556, 258 P.2d 566, in which it was contended that an agreement to answer for the debt, default or miscarriage of another must be in writing. There the exception to the rule set forth in Civil Code Section 2794 was applied, that is, "A promise to answer for the obligation of another, in any of the following cases, is deemed an original obligation of the promisor, and need not be in writing: * * * (2) Where the creditor parts with value, or enters into an obligation, in consideration of the obligation in respect to which the promise is made, in terms or under circumstances such as to render the party making the promise the principal debtor and the person in whose behalf it is made, his surety". The judgment in the amount indicated is sustained by the evidence.

[7] One other more technical claim is presented. It is argued that there was a fatal variance between the pleadings and proof because, under the common count for "*goods, wares and merchandise*" furnished, it appears that the portion of the amount allowed included labor to the extent of $1,781.90. He cites Cannon v. McKenzie, 3 Cal.App. 286, 85 P. 130, and Ward v. Stimson, 50 Cal.App. 336, 195 P. 67.

Apparently, no objection was made to the admission in evidence of the testimony relating to the services performed by plaintiff, nor to the copies of statements rendered to Fuller by him. No point was raised at the trial in relation to any claimed variance between the pleading and the proof, at which time the court might well have allowed an amendment to conform to the proof. No such point may now be raised for the first time on appeal, particularly where the case was fully and fairly tried on its merits as though no such

claimed variance existed. Grossetti v. Sweasey, 176 Cal. 793, 169 P. 687; Chelini v. Nieri, 32 Cal.2d 480, 196 P.2d 915; Gaffny v. Michaels, 73 Cal.App. 151, 238 P. 746; Gwinn v. Goldman, 57 Cal.App.2d 393, 134 P.2d 915.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

119 Cal.App.2d 612

PEOPLE v. ONE 1951 FORD V-8 CUSTOM CLUB COUPE, 1952 LICENSE NO. 1 S 81536, ENGINE NO. BILB 136813 et al.

Civ. 19609.

District Court of Appeal, Second District, Division 2, California.

Aug. 10, 1953.

Proceeding to forfeit the interest in an automobile of the registered owner thereof because of its use to transport marijuana while in her son's possession. From a judgment of the Superior Court of Los Angeles County, Robert H. Scott, J., forfeiting such interest, the owner appealed. The District Court of Appeal, Fox, J., held that the evidence supported inferences that appellant gave her son permission to use the automobile and that he had either express or implied permission to use it on the particular occasion involved, though appellant testified that she did not give him permission to use the automobile on such occasion.

Judgment affirmed.

Forfeitures 🔑5

Testimony of registered owner of automobile in her son's possession when seized because of its use in transporting marijuana that she did not drive automobile and had stated to inspector that son had driven automobile with her permission and, in her application for insurance thereon, that it would be driven by son, was sufficient to support inferences that she gave son permission to use automobile and that he had express or implied permission to use it on particular occasion involved, so as to justify forfeiture of such owner's interest therein, notwithstanding her contrary testimony. Code Civ.Proc. § 1847; Health and Safety Code, § 11610.

Mary Peery, appellant, in pro. per.

Edmund G. Brown, Atty. Gen., and Delbert E. Wong, Deputy Atty. Gen., for respondent.

FOX, Justice.

Mary Peery appeals from a judgment forfeiting her interest, as registered owner, in the automobile here in question because it was used to transport marijuana, in violation of section 11610 of the Health and Safety Code. The car was in the possession of her son, Richard T. Haynes, but was being driven by his female companion. Appellant contends that the judgment is against the evidence and the law because the testimony establishes that on this particular occasion her son did not have permission to drive the vehicle. Her contention, however, is not well founded.

It is true Mrs. Peery testified that she had not given her son general permission to use the car and that she had not given him permission to use it on the particular occasion. She admitted, however, after the seizure of the vehicle, that she had stated to Inspector Storer that Richard had driven the car with her permission; also, that in her application for insurance on the car it was stated it would be driven by her son. She further testified that she did not drive and did not have a driver's license; that her son drove for her when she went on errands and drove the car on other occasions when she gave him the keys.

In this proceeding appellant's interest in the car was at stake. If it were established that her son had permission, express or implied, to use the car on this occasion her property in it would be lost. People v. One 1937 Buick Coupe, 89 Cal.App.2d 556, 561, 201 P.2d 402; People v. One 1941 Chrysler Tudor, 71 Cal.App.2d 312, 316, 162 P.2d 653. In view, therefore, of appellant's obvious interest in the case, her admission to the inspector, and her declaration in her application for insurance, the trial court was not required to believe her testimony that her son did not have permission to use her car on this occasion. Code Civ.Proc., § 1847; People v. One 1937 Buick Coupe, supra; Wade v. Markwell & Co., 118 Cal. App.2d 410, 258 P.2d 497. On the other hand, the fact that the appellant did not drive, the relation of the parties, her statement to the inspector and in her insurance application, furnish ample support for an inference that she gave her son permission to use her car, and that he had such permission, either express or implied, to use it on this particular occasion.

The appeal from the order denying the motion for a new trial is dismissed. The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

WEST KEY NUMBER SYSTEM

---

119 Cal.App.2d 276

PEOPLE v. COONTZ.

Cr. 4974.

District Court of Appeal, Second District, Division 2, California.

July 21, 1953.

Defendant was convicted in Superior Court, Los Angeles County, Charles W. Fricke, J., of violation of Penal Code, § 288, and he appealed. The District Court of Appeal, Moore, P. J., held that the evidence was sufficient to sustain the finding of guilty.

Affirmed.

1. Infants 🔑13

Proof of emission is not essential to conviction for violation of statute against lewd or lascivious acts upon child under 14 years of age with lustful intent and only requirement is a touching with lustful intent. Pen.Code, § 288.

2. Criminal Law 🔑260(11)

Law lays upon trial court responsibility of finding facts of controversy, and findings will not be disturbed merely because convicting testimony discloses unusual circumstances.

3. Criminal Law 🔑1159(4)

In prosecution for lewd or lascivious act upon child to justify appellate court in rejecting testimony of witness who was believed by jury and trial judge, the acts of accused must have been either physically impossible or the falsity of the testimony in proof of them must be apparent without resorting to inferences or deductions. Pen.Code, § 288.

4. Infants 🔑20

Evidence sustained conviction for lewd and lascivious act with minor child. Pen. Code, § 288.

5. Criminal Law 🔑260(11)

The determination of the credibility of a witness and of the truth or falsity of the facts in issue are within the exclusive province of the trial court.

6. Criminal Law 🔑260(11)

To warrant reversal of judgment on ground of perjury, testimony attacked must be such as to shock moral sense of court and if it fails to do so, finding of trial court is conclusive, except where it obviously appears that the testimony when considered in conjunction with undisputed facts of case is so inherently improbable as to be impossible of belief, and therefore must be considered to be in effect no evidence at all.

7. Criminal Law 🔑371(9)

In prosecution for lewd and lascivious act upon minor child, testimony of prosecuting witness concerning prior act between accused and prosecuting witness was proper for jury's consideration of intent of accused at time of the crime charged and was not prejudicial. Pen.Code, § 288.

8. Criminal Law 🔑1036(1), 1044

In absence of an objection and motions to strike testimony and to instruct jury to disregard it, all grounds for reversal are waived, as objection for first time on appeal is too late.

9. Criminal Law 🔑1036(1), 1044

Assignment that trial court erred in admitting testimony of prosecuting witness concerning event other than that under investigation would not be considered on appeal, in absence of objection and motion to strike and to instruct jury to disregard such testimony. Pen.Code, § 288.

10. Criminal Law 🔑899

Defendant's causing prosecuting witness to enlarge upon testimony and defendant's arguing such testimony to the jury constituted waiver of grounds for objection. Pen.Code, § 288.

11. Criminal Law 🔑814(17)

Requested instruction that if evidence is susceptible of two constructions, and if one of the possible conclusions should appear to be reasonable and the other unreasonable, the reasonable deduction must be adhered to and the unreasonable rejected and to convict the accused even if the reasonable deduction points to his guilt the entire proof must carry the convincing force required by law, was properly refused where state relied upon no circumstances other than the time and place of commission of crime and witness' testimony was direct and was not inherently improbable.

12. Criminal Law 🔑714

Testimony in record may be read by prosecuting attorney in his argument to jury.

13. Criminal Law 🔑714

That prosecuting attorney in argument played recording of conversation between accused and complaining witness' father which had been introduced in evidence was not objectionable as giving undue influence and weight to evidence, even though conversation was equivocal.

14. Criminal Law 🔑720(6)

It is duty of counsel on trial of any action to present to jury counsel's deductions from the evidence.

15. Criminal Law 🔑728(3)

Mistaken deductions from evidence presented to jury by counsel must be remarked upon by the opponent when made and the correct statement of evidence substituted at that time and failure to assign argument as prejudicial at time it is made constitutes waiver of objection thereto.

◆

Austin Clapp, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Appeal from conviction of a violation of section 288 of the Penal Code. As grounds for reversal appellant asserts the insufficiency of the evidence, errors in the admission of certain testimony, errors in refusing to give a requested instruction, and misconduct of the prosecuting attorney.

Evidence Sufficient

The case was tried October 30, 1952. The evidence furnished abundant proof of appellant's guilt. He was a licensed medical doctor, age 36 at the time of the incident and enjoyed a fair practice in a respectable community in Los Angeles County. The prosecuting witness was a thirteen-year-old boy in the ninth grade. He will be referred to herein as Calvin. He first met appellant in November 1951. On April 19, 1952, he called at the doctor's home to do some housework at the latter's suggestion. It was about 1:00 p. m. on a Saturday. He had begun to remove burrs from a rug, when, because his eyes were watering, appellant directed him to lie down on a rug. As soon as a drug had been administered to the eyes, appellant covered them with tissue. Immediately the doctor pulled down the boy's jeans, fondled the latter's privates, embraced him and laid his hand on the organ of appellant. Some conversation ensued and appellant bit the witness and kissed him and caused him to have a consciousness of sexual feeling. Thereupon the doctor remarked about the work to be done and, as he left the room, Calvin continued to clean the rug. At his first opportunity he escaped through a side door and down the hill to the neighboring filling station where he telephoned his parents. His father called for him and as soon as Calvin was in the parental automobile he related the story given in his testimony, the giving of which the father verified. As further proof of the crime of April 19, Calvin was asked to tell of a previous visit to appellant's office when penicillin shots were injected into his hip. He testified that as that operation was performed the doctor's hand touched the private parts of his patient, "just brushed by them."

When Calvin's father arrived home he reported the experience of his son to the police. Officer Stonehouse testified that he set up a microphone in a radio cabinet in the corner of the father's living room and connected it with a wire leading into a rear bedroom where he had placed a tape recorder. By use of an ear-set monitor the conversation of Dr. Coontz and Calvin's father could be heard. The transcribed record of the conversation was played to the jury. It contained certain hesitancies and pauses following painful accusations, but no attempt to explain or deny Calvin's report.

[1-5] There is nothing inherently improbable in Calvin's testimony. Appellant contends that the boy's testimony to the effect that appellant "was on the side of me or on top of me" was "something out of Barnum and Bailey"; that "there was no testimony that an emission had occurred." Such proof is not essential to a conviction for violating section 288. The only requirement is a touching with lustful intent. The assertion that Calvin's story is of an experience beyond the range of normal human experience is no argument to a reviewing court. The law lays upon the trial court the responsibility to find the facts of a controversy. Such finding will not be disturbed merely because the convicting testimony discloses unusual circumstances. To justify this court in excluding testimony of a witness who has been believed by a jury and the trial judge, the act of the accused must have been either physically impossible or the falsity of the testimony in proof of them "must be apparent without resorting to inferences or deductions." People v. Huston, 21 Cal.2d 690, 693, 134 P.2d 758, 759; Back v. Farnsworth, 25 Cal.App.2d 212, 219, 77 P.2d 295. Neither contradicted testimony nor that whose verity is under justifiable suspicion will justify the reversal of a conviction. The determination of the credibility of a witness and of the truth or falsity of the facts in issue are within the exclusive province of the trial court. (Ibid.)

[6] To warrant the reversal of a judgment on the ground of perjury, the testimony attacked must be such as to shock the moral sense of the court. Hicks v. Ocean Shore Railroad, Inc., 18 Cal.2d 773, 780, 117 P.2d 850. If it fails to do so and its verity is suspected, the finding of the trial court is conclusive, except "in those rare cases where it obviously appears that the testimony upon which the conviction was had is in and of itself, or when considered in conjunction with the undisputed facts of the case, so inherently improbable as to be impossible of belief, and therefore must be considered to be in effect no evidence at all." People v. Van Perhacs, 20 Cal.App. 48, 51, 127 P. 1048, 1049. Such inherent improbability must plainly appear before "the reviewing court should assume the functions of the trial jury." People v. Lewis, 18 Cal.App. 359, 364, 123 P. 232, 234. The revolting character of testimony does not prove that it was inherently improbable that the accused was guilty. People v. Carlson, 73 Cal.App.2d 933, 939, 167 P.2d 812.

No Prejudicial Error In Rulings

[7-10] Calvin was asked: "Shortly after the first of the year, you say the doctor touched your privates?" Answer: "Yes his hand just brushed by them." The incident occurred while the doctor was giving the boy penicillin shots. Both on direct and cross-examination the circumstances were explained. The testimony related to an act between the doctor and the complaining witness and was proper for the jury's consideration as indicating the intent of appellant at the time of the crime charged. People v. Peete, 28 Cal.2d 306, 317, 169 P.2d 924. By virtue of all the answers given with reference thereto, no prejudice could have resulted. Moreover, no reversal can be ordered by reason of a question concerning an event other than

that under investigation in the absence of an objection and motions to strike the testimony and to instruct the jury to disregard it. Appellant's counsel not only caused the witness to enlarge upon his testimony, but argued it to the jury. He is deemed, therefore, to have waived all grounds for objection. An objection for the first time on appeal is too late. People v. McMonigle, 29 Cal.2d 730, 743, 177 P.2d 745; People v. Agajanian, 97 Cal.App.2d 399, 405, 218 P.2d 114.

[11] It was not error to refuse to give appellant's offered instruction, CALJIC* No. 26, to wit:

> "If the evidence in this case is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendant, and the other to his innocence, it is your duty, under the law, to adopt that interpretation which will admit of the defendant's innocence, and reject that which points to his guilt.
>
> "You will notice that this rule applies only when both of the two possible opposing conclusions appear to you to be reasonable. If, on the other hand, one of the possible conclusions should appear to you to be reasonable and the other to be unreasonable, it would be your duty to adhere to the reasonable deduction and to reject the unreasonable, bearing in mind, however, that even if the reasonable deduction points to defendant's guilt, the entire proof must carry the convincing force required by law to support a verdict of guilt."

His reason for offering CALJIC 26 is that the prosecution relied upon both Calvin's testimony and circumstances; "because of the inherent improbability of the boy's story the circumstantial evidence ceased to be merely incidental or corroborative and became vital."

The record contains nothing to indicate the State's reliance upon circumstances other than the time and place of the crime. Calvin's testimony was direct and was evidently the basis for conviction. In such event, proof of the circumstances was only incidental and corroborative of the testimony. Rejection of the offered instruction was therefore proper. People v. Savage, 66 Cal.App.2d 237, 247, 152 P.2d 240.

No Misconduct Of District Attorney

[12, 13] Because the prosecuting attorney in the course of his argument played the recording of the conversation between appellant and Calvin's father, he is now accused of misconduct in that it gave undue influence and weight to the evidence. Nothing recorded of the conversation was denied by appellant. How then could it have caused prejudice by being played again? Also, no objection was interposed by appellant when the prosecutor called for the replaying of the record. In his argument to the jury the prosecuting attorney may read any part of the testimony in the record. Because the conversation in the recording was "equivocal" is not a valid reason for excluding it during the argument. Its equivocality is the result of appellant's reactions when faced with the accusation of his own deed.

[14, 15] Assignment is made of the act of the prosecutor in his argument in drawing inferences from the evidence. Such conduct is not prejudicial. It is the duty of counsel on the trial of any action to present to the jury his own deductions from the evidence. If he misstates any fact it is incumbent upon appellant to remark upon it to the court, and have the correct statement of the evidence made at the time. Failure to assign argument as prejudicial at the time it is made constitutes a waiver of objection thereto. People v. Ash, 88 Cal.App.2d 819, 829, 199 P.2d 711. The same principle applies to other arguments made to which no objection was made in open court.

The orders granting probation and denying the motion for a new trial are affirmed.

McCOMB and FOX, JJ., concur.

---

* California Jury Instructions, Criminal.

119 Cal.App.2d 640

TURNER v. CIVIL SERVICE COMMISSION OF SAN DIEGO COUNTY et al.

Civ. 4575.

District Court of Appeal,
Fourth District, California.
Aug. 10, 1953.

Deputy coroner was removed from his position by coroner, and deputy coroner appealed to the Civil Service Commission. The Commission entered an order sustaining the coroner's order of dismissal, and, in response to a petition filed in the Superior Court of San Diego County, a writ of review was issued. The Superior Court entered a judgment adverse to the Civil Service Commission and the coroner, and they appealed. The District Court of Appeal, Barnard, P. J., held that evidence sustained finding of Commission.

Judgment reversed.

1. Certiorari 🔑29

A writ of review raises a jurisdictional question and cannot be used to review mere error.

2. Administrative Law and Procedure 🔑791
Certiorari 🔑68

Courts, in reviewing decisions of local agencies on writ of review, are not authorized to exercise their independent judgment on the evidence, and their review is limited to a determination of whether or not decision of local agency is supported by substantial evidence.

3. Officers 🔑72(2)

Evidence sustained finding of Civil Service Commission that deputy coroner, who had been removed from his position by coroner, was guilty of insubordination.

4. Officers 🔑72(2)

On appeal by deputy coroner, who had been removed from his position by coroner for insubordination, to Civil Service Commission, Commission did not abuse its discretion in refusing to admit into evidence the efficiency record of the deputy coroner and evidence concerning his reputation.

5. Officers 🔑72(2)

Where charter provided for removal of a person having tenure for certain named causes "or for any other failure of good behavior", conclusion of Civil Service Commission that deputy coroner, who was removed by coroner from his position for insubordination, was not guilty of conduct constituting a failure of good behavior was not inconsistent with conclusions that deputy coroner was guilty of insubordination.

◆

James Don Keller, Dist. Atty., and Robert G. Berrey, Deputy Dist. Atty., San Diego, for appellants.

Martin & Mahedy, Francis J. Maher, San Diego, for respondent.

BARNARD, Presiding Justice.

This is an appeal from a judgment annulling an order of the Civil Service Commission and remanding the matter to that Commission for further proceedings.

The coroner of San Diego County issued an order removing Ernest A. Turner from his position as deputy coroner in the classified civil service. The order stated the grounds therefor, setting forth seven specific charges of insubordination. He was further charged with inefficiency, willful disobedience, and conduct that is incompatible with and inimical to the public service in connection with each of the incidents listed in the insubordination charge. In an eighth charge he was accused of conduct that is incompatible with and inimical to public service in connection with a different incident. In a ninth charge he was accused of conduct constituting a failure of good behavior in a specific instance not covered by the other charges.

Turner appealed to the Civil Service Commission and after an extended hearing the Commission found that one or more of the charges with respect to each of the first seven incidents had been proved, but that the charges based upon the eighth and ninth incidents had not been proved. The Commission then entered an order sustaining the coroner's order of dismissal. In response to a petition filed in the superior court by Turner, a writ of review was issued. A hearing was had in which a transcript of the entire proceedings before the Commission was presented and considered.

The court found that in affirming the order of dismissal the Commission had acted arbitrarily and in excess of its jurisdiction, and had abused its discretion, in each of the following respects: 1. in that it refused to admit into evidence and consider the petitioner's efficiency record; 2. in that it refused to admit and consider evidence of his good reputation for the traits of character involved in the charges; 3. in that there was no substantial evidence to support the Commission's findings against him with respect to three of the first seven charges; 4. in that the Commission's conclusion that the petitioner had not been guilty of conduct constituting a failure of good behavior is inconsistent with its other conclusions to the effect that he was guilty of insubordination, inefficiency, disobedience, and conduct inimical to public service. It was further found that the Commission's findings, with respect to four of the first seven charges, were supported by substantial evidence. As conclusions of law it was found that the Commission's order of affirmance should be annulled and set aside; that the Commission should be directed to hold a further hearing at which it should receive and consider the efficiency records and reputation evidence; and that the Commission should be directed to consider what order should be made in view of such additional evidence and of the court's finding that three of the charges were unsupported. Judgment was entered accordingly, and the Commission and the coroner have appealed. Pending the appeal the petitioner died and the administratrix of his estate has been substituted as respondent.

The appellants contend that the Commission did not act arbitrarily or in excess of its jurisdiction or abuse its discretion by refusing evidence of Turner's good reputation for traits of character involved, or by refusing to consider his efficiency record; that the court erred in finding that three of the first seven charges were not supported by any substantial evidence; that the Commission's conclusion that Turner was not guilty of conduct constituting a failure of good behavior is not inconsistent with its other conclusions; and that under the circumstances the court was not authorized to remand the matter to the Commission.

[1, 2] A writ of review raises a jurisdictional question and cannot be used to review mere error. It is well settled that in reviewing such decisions of local agencies the courts are not authorized to exercise their independent judgment on the evidence, and their review is limited to a determination of whether or not the decision of the local agency is supported by substantial evidence. LaPrade v. Department of Water and Power, 27 Cal.2d 47, 162 P.2d 13; Nider v. City Commission, 36 Cal.App.2d 14, 97 P.2d 293. It was not contended, with respect to any of the charges found by the Commission to be true, that the petitioner had not disobeyed the order in question. In each instance he offered an explanation as to what he had done and why he had not strictly followed the instructions in question. The defense relied on, in effect, was and is that he had substantially complied therewith or, in some instances, done what he considered necessary at the time.

[3] In giving his decision, the court expressed the opinion that the Commission should have received Mr. Turner's efficiency reports and evidence of good reputation for traits of character involved in the charges. He then commented on the evidence with respect to the three charges on which it was held that no substantial evidence was produced. These remarks strongly indicate that the court was weighing the evidence and pointing out contrary inferences which could well be drawn. Whether or not this is true, we cannot agree that there was no substantial evidence before the Commission to substantiate the charges found true or any of them. It would serve no useful purpose to set forth the evidence here. It amply appears that the Commission's findings were made upon conflicting evidence which would have supported a decision either way. If the same findings had been made in the trial court it would have to be held, on appeal, that the evidence, with the reasonable inferences therefrom, was sufficient to sustain them.

[4] Neither abuse of discretion nor prejudice appears in connection with the re-

fusal of the Commission to admit into evidence Mr. Turner's efficiency record, and evidence of his reputation for traits of character involved. With respect to the efficiency records, which were kept pursuant to a charter provision requiring that such a record be considered in considering promotions, it appears that an objection to the introduction of these records into evidence was sustained and that later on it was stipulated that the Commission might examine these records if they deemed them material. It does not appear, as pointed out by the trial court, whether or not the Commission did actually review the efficiency reports. This was a civil proceeding in which the petitioner was charged with specific violations of charter provisions on particular occasions, and evidence of his previous conduct or reputation as to particular traits of character were not material to the issue and could be of little, if any, persuasive effect. The admission of all this evidence was argued at length before the Commission and its decision was made in the light of the fact that its members had in mind what would be shown by any such evidence. Under the circumstances, it cannot be held that the Commission acted arbitrarily or abused its discretion in refusing to prolong the hearing by admitting that evidence.

[5] The conclusion of the Commission that Turner was not guilty of conduct constituting a failure of good behavior is not inconsistent with the other conclusions, when read in the light of the specific charges and the findings thereon. The charter provides for the removal of a person having tenure for certain named causes, and then adds "or for any *other* failure of good behavior". (Italics ours.) This means a failure of good behavior in some manner other than that naturally involved in the other causes of removal. The first eight charges involved the specified causes for removal, and the ninth charge referred to a different act as constituting an "other" failure of good behavior. The Commission found that certain of the charges were proved, and then found that the ninth charge had not been proved. The conclusions of law followed the findings, and the conclusion that Turner had not been guilty of conduct constituting a failure of good behavior was obviously intended as a conclusion in his favor with respect to the ninth charge alone. Since this conclusion referred solely to the specific incident involved in the ninth charge, it is in no way inconsistent with the fact that in a general sense there is necessarily some failure of good behavior involved in being guilty of inefficiency, insubordination or willful disobedience.

The judgment is reversed.

GRIFFIN and MUSSELL, JJ., concur.

119 Cal.App.2d 327

ABRAMS v. ABRAMS.

Civ. 4570.

District Court of Appeal, Fourth District, California.

July 22, 1953.

Wife's action for divorce on grounds of extreme cruelty. The Superior Court, San Diego County, William A. Glen, J., entered a decree granting wife a divorce and husband appealed. The District Court of Appeal, Griffin, J., held that the evidence was sufficient to corroborate wife's testimony and to sustain divorce decree.

Judgment affirmed.

1. Divorce 🔑27(5)

In divorce action, in determining whether a party has inflicted grievous mental suffering upon other party so that such acts constitute extreme cruelty, the trial court must consider all the circumstances including intelligence, apparent refinement and delicacy of sentiment of complaining party. Civ. Code, § 94.

2. Divorce 🔑127(4)

Where a number of charges of cruelty have been made, corroboration of a single act of cruelty may be sufficient to establish grounds for divorce.

3. Divorce 🔑127(4), 130

In action for divorce on grounds of extreme cruelty, evidence was sufficient to corroborate wife's testimony and to sustain divorce decree.

Clarence Harden and Gray, Cary, Ames & Frye, San Diego, for appellant.

Hunter M. Muir, San Diego, and Henry F. Walker, Los Angeles, for respondent.

GRIFFIN, Justice.

This is an action for divorce on the grounds of extreme cruelty. The parties were married May 5, 1939, and have three minor children. Their property rights are not here involved. After trial, the court granted plaintiff a divorce and awarded her custody of the children. No question is raised as to the propriety of the custody order.

It is defendant's principal contention that there was no sufficient case of extreme cruelty resulting in grievous mental suffering established, as found by the court, or if there was, there was no sufficient corroboration thereof. It is his argument that the acts complained of were "sins of omission" rather than of "commission".

Defendant, aged about 48 years, is and has been, during his married life, a successful architect, practicing his profession in La Jolla, California. His net income gradually increased from $1,600 per year in 1939, to $23,000 in 1948. Defendant's worth at the time of trial was in excess of $57,000. He belonged to a beach club, a country club, and two golf clubs. He played golf two or three times a week and engaged in the social activities of each. Periodically, he became drunk and stayed away from home all night. Plaintiff's complaint is that defendant failed, with few exceptions, to take her or the children to these clubs, or to allow her to partake of club activities and of its social life. She testified that on one occasion when he took her he seated her at a table alone, left her, and she was compelled to be entertained by people she did not know; that during her married life she was required to stay at home and care for the children; that when they were first married (plaintiff having been defendant's secretary and about 23 years of age) she was compelled to live in an old made-over and makeshift garage and house without adequate furnishings and heat; that both plaintiff and the children suffered from colds and ill-health because of defendant's unwillingness to better house them when he had the means so to do. She testified that they finally moved from the garage into an unfinished house (two old buildings put together) which was also cold and disagreeable and inadequately furnished; that as a result of this, plaintiff had the "flu" two times and two of the children had pneumonia; that when she remonstrated with defendant about these conditions he became cross and angry; that he compelled her to do the gardening; that the doctor ordered them to live some place else; that defendant finally took plaintiff and the children out in the country to Poway, rented an old house for them far from any neighbors, and that plaintiff became quite frightened to live there; that soon thereafter, instead of commuting daily to his office in La Jolla, defendant obtained a room in a hotel in which to live and did not return to plaintiff's home in the country; that this continued sometimes for a week at a time; that she wanted to move back to the City but he insisted that she remain in the country because of the possibility of a depression, that in that event she could have a livelihood from their rabbitry which defendant started and which plaintiff was compelled to operate; that during the last year defendant did not come to see plaintiff or the children more than twice a month, and then only on week-ends; that defendant would sleep in the bedroom and plaintiff would be compelled to sleep on the couch in the living room; that defendant would take his whiskey to his room and do considerable drinking and then become cross, swear at her, and would pound on the walls and frighten plaintiff and the children; that he would insist that plaintiff act as his nurse and carry food in trays to his bed; that the court later allowed him to use a room in the attic and he locked plaintiff out of the house and said if she entered he would prosecute her; that he put up signs on the door to this effect; that he spent very little time with his children and treated them with indifference; that he never wanted children in the first place and asked plaintiff before they were born to try and get rid of them; that she was a religious woman and her husband tried to keep her from going to church because he did not believe in it and said it was bad for the children to go to Sunday School; that defendant did not want her to have any friends come to the house or to have any other children play with their children; that he would not allow her to become an officer in the P.T.A. or to take any part in the church doings; that he showed no affection to her nor to the children during their married life. This is a brief resume of some of the acts complained of. It is plaintiff's contention that this course of conduct continued through the years of their married life, and the infliction on her of these acts constituted extreme mental cruelty and the trial court so found.

[1] Section 94 of the Civil Code neither sharply defines nor definitely limits the phrase "extreme cruelty", but merely describes it in general terms, leaving a wide range of discretion with the trial court. There is no well-defined rule that may be followed as a test in determining the question as to whether or not certain acts or conduct constitutes extreme cruelty. Each case must be determined according to its own particular circumstances, by the good sense and judgment of the court, keeping always in view the intelligence, apparent refinement and delicacy of sentiment of the complaining party. Fleming v. Fleming, 95 Cal. 430, 30 P. 566; Scheibe v. Scheibe, 57 Cal.App.2d 336, 134 P.2d 835; McFall v. McFall, 58 Cal.App.2d 208, 136 P.2d 580; Shaw v. Shaw, 122 Cal.App. 172, 9 P.2d 876. We conclude that the finding of the trial court is supported by the evidence.

[2] Some question does arise as to corroboration of the many acts about which plaintiff complains. However, the rule is that all of the acts of cruelty charged need not be corroborated. Corroboration of a single act may be sufficient. McGann v. McGann, 82 Cal.App.2d 382, 186 P.2d 424.

As to defendant's ability to provide better living conditions and entertainment for plaintiff and her children, the evidence is not in conflict. Defendant offered in evidence a statement of his net income for the years indicated, and this fact is corroborated. The minister of plaintiff's church testified he called at plaintiff's home to encourage church attendance. He stated that from his observation their home was not furnished comfortably nor properly for the raising of children. This fact was corroborated by a neighbor in Poway, who called on them. She testified she was not allowed to have her child run or play with plaintiff's children because it would disturb defendant; that she was president of the P.T.A. and when she called plaintiff to attend the meetings plaintiff could not come to them. Other neighbors testified they visited her home and plaintiff's children were required to remain quiet all the time because of fear of disturbing defendant; that they noticed that plaintiff was "upset" and nervous a good deal of the time; that defendant spent many nights away from home and plaintiff was worried about him. One witness testified plaintiff's aunt called him about 7:30 a. m. one morning inquiring about defendant not coming home the night before and that she informed him that plaintiff was worried and upset about the matter; that he informed plaintiff's aunt that there had been a stag party at the club and defendant left about 11 p. m. and said he had driven into the country and it turned so foggy he stopped and stayed there all night. The manager of one of the clubs testified he knew both plaintiff and defendant; that defendant did not bring plaintiff with him to the club, but he knew that on occasions defendant would stay in the evenings, have dinner with the men and would be seen in the gaming rooms, doing more talking than playing; and that defendant played golf on an average of twice a week. Defendant, as a witness, gave a somewhat different version of their matrimonial life, and gave his claimed reasons why he remained away from plaintiff's home on so many occasions.

In Wilson v. Wilson, 124 Cal.App. 655, 13 P.2d 376, it was stated that where it is clear that there is no collusion and the defendant's testimony, though conflicting with that of the plaintiff in many of its details, in the more important matters was corroborative of the plaintiff's testimony, which was also corroborated in certain respects by other testimony, the corroboration is sufficient.

[3] We conclude that there was sufficient corroboration of plaintiff's testimony as to certain particulars complained of which would justify the court in granting the decree. Tompkins v. Tompkins, 83 Cal.App.2d 71, 76, 187 P.2d 840; McGann v. McGann, supra; Hellman v. Hellman, 108 Cal.App.2d 588, 590, 239 P.2d 458.

Judgment affirmed

BARNARD, P. J., and MUSSELL, J., concur.

---

119 Cal.App.2d 310

In re HART'S ESTATE.

COUNTY OF LOS ANGELES et al. v. HART.

Civ. 19553.

District Court of Appeal, Second District, Division 3, California.

July 22, 1953.

Rehearing Denied Aug. 7, 1953.

Hearing Denied Sept. 17, 1953.

Proceedings wherein the Superior Court of Los Angeles County entered an order settling and assessing costs of trial and appeal in a will contest, and the contestant appealed from parts of the order. The District Court of Appeal, Vallée, J., held that no abuse of discretion was shown in requiring contestant to pay both his own and executors' costs on trial and appeal.

Affirmed.

Shinn, P. J., dissented.

1. Appeal and Error 🔑123

The right to appeal is determined by legal effect of order rather than by its form.

2. Wills 🔑358

Probate court order disallowing contestant's costs and taxing executors' costs against contestant was appealable. Probate Code, § 1240.

3. Wills 🔑402

Probate code section providing that cost of trial "must" be paid by contestant if probate is not revoked is directory, not mandatory; but only in extreme cases will probate court be justified in ordering that costs of unsuccessful contestant be paid out of estate. Rules on Appeal, rule 26(a); Probate Code, §§ 383, 1232.

4. Wills 🔑403

Question as to whether costs of executors successfully resisting will contest should be assessed against contestant or against estate is one in discretion of trial court; and unless there is an affirmative showing of a manifest abuse of discretion, action of trial court may not be disturbed. Probate Code, §§ 383, 1232, 1240; Rules on Appeal, rule 26.

5. Wills 🔑405, 410

No abuse of discretion was shown in requiring contestant to pay both his own and executors' costs on trial and appeal in proceedings on petition for revocation of probate of will. Probate Code, § 383.

Freston & Files, Eugene D. Williams and Ralph E. Lewis, Los Angeles, for appellant.

Spray, Gould & Bowers, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by William S. Hart, Jr., referred to as Hart, Jr., from parts of an order settling and assessing costs of trial and appeal in a will contest.

William S. Hart, Sr., died testate on June 23, 1946. After probate, Hart, Jr., instituted a contest of the will which was decided adversely to him by a jury, and a judgment was entered denying his petition for revocation of probate of the will. The trial court ordered a provision awarding costs to the proponents of the will stricken from the judgment. On appeal by the executors from that order, it was affirmed. Since Hart, Jr., had appealed from the judgment, the court held that the determination of costs should await a final determination of the litigation on appeal. Estate of Hart, 107 Cal.App.2d 58, 236 P.2d 891. On the appeal from the judgment, it was affirmed. Estate of Hart, 107 Cal.App.2d 60, 236 P.2d 884. Thereafter, the parties filed cost bills: 1) Hart, Jr., for his costs ($4,106.89) on the trial of the contest. 2) The executors for their costs ($15,948.97) on the trial of the contest and on the appeal from the judgment. Hart, Jr., also made a motion for an order that his costs be paid out of the estate; and the executors made a motion for an order settling and taxing their costs. The motions were opposed and affidavits were filed on behalf of Hart, Jr., in support of his motion and in opposition to the motion of the executors. The affidavits sought to have the costs of the executors paid out of the estate.

The court ordered the costs of the executors taxed against Hart, Jr., and the costs of Hart, Jr., disallowed. Hart, Jr., appeals from these parts of the order.

[1, 2] The executors contend the parts of the order appealed from are nonappealable. We held in the Estate of Hart, 92 Cal.App.2d 691, 208 P.2d 59, that the right of appeal in probate matters is purely statutory; that a proceeding to revoke probate of a will is a probate matter; and that the only appealable judgments and orders in probate matters are those listed in Probate Code section 1240 and an order granting a new trial in those proceedings in probate in which the motion is proper. Section 1240 provides that an order refusing to direct an executor is appealable. See Estate of Mitchell, 20 Cal.2d 48, 50, 123 P.2d 503. The parts of the order appealed from should be deemed orders directing the executors. The right to appeal is determined by the legal effect of an order, not by its form. Estate of West, 162 Cal. 352, 356, 122 P. 953. The affirmative opposition of Hart, Jr., to the motion of the executors sought an order that they recover their costs out of the estate. The order awarding the costs of the executors against Hart, Jr., was in effect an order refusing to direct the executors. The record shows that Hart, Jr., by his cost bill and by his motion, was seeking an order directing the executors to pay his costs out of the estate. The effect of the order made was to refuse to so direct the executors. We hold that the parts of the order appealed from are appealable.

[3] Section 383 of the Probate Code reads: "If the probate is not revoked, the costs of trial must be paid by the contestant. If the probate is revoked, the costs must be paid by the party who resisted the revocation or out of the property of the decedent, as the court directs." Section 383 is directory, not mandatory. Estate of Hart, 107 Cal.App.2d 58, 59, 236 P.2d 891. Section 1232 reads: "When not otherwise prescribed by this code or by rules adopted by the Judicial Council, either the superior court or the court on appeal, may, in its discretion, order costs to be paid by any party to the proceedings, or out of the assets of the estate, as justice may require." Rule 26(a) of the Rules on Appeal in pertinent part reads: "In probate cases, in the absence of an express direction for costs by the reviewing court, costs on appeal shall be awarded to the prevailing party, but the superior court shall decide against whom such award shall be made." The remittiturs on the appeals from the order striking the provision awarding costs and from the judgment expressly provided "Respondent to recover costs on appeal." Hart, Jr., was the respondent on the appeal from the order; the executors were the respondents on the appeal from the judgment.

Hart, Jr., contends the trial court abused its discretion in ordering that he pay the costs of the executors and in refusing to order his costs paid out of the estate. He argues that the discretion of the trial court is not unlimited or unrestricted but must be exercised to accomplish justice; and that, under the decisions, the prime factor to be considered in the exercise of such discretion is the good faith of the parties concerned.

Estate of Powers, 97 Cal.App.2d 888, 218 P.2d 1007, was an appeal from an order which denied a motion of an unsuccessful contestant in a will contest for the allowance of his trial and appellate costs. He contended, as does Hart, Jr., that if an unsuccessful contestant acted in good faith, the court must make such an allowance and that its failure to do so is an abuse of discretion as a matter of law. The court said 97 Cal.App.2d at page 890, 218 P.2d at page 1008: "There is no such rule of law", and, after quoting section 383 of the Probate Code, that in a contest after probate in which the probate is not revoked, as was in the proceeding here, trial costs "must be paid by the contestant." As to costs on appeal, the court stated 97 Cal.App.2d at page 892, 218 P.2d at page 1010: "Under the present rules, the probate court, so far as appeal costs are concerned, and even where the appellate opinion is silent as to costs, only has the power to decide who shall be liable for costs, and has no power to award them. The appellate court is now the only court that has power to award appeal costs to either a successful or unsuccessful contestant. Once an appeal has been determined, and where, as here, the appellate court makes no specific mention of costs, the unsuccessful contestant and litigant is not entitled to costs, the probate court has no power to award them, and the litigant's sole remedy, if any, would be in the appellate court on a petition to recall the remittitur."

Hart, Jr., argues that insofar as Estate of Powers said that trial costs "must be paid by the contestant" it is not a correct statement of the law. Estate of Hart, 107 Cal.App.2d 58, 236 P.2d 891, decided on constitutional grounds that section 383 is directory and not mandatory. The court in Estate of Powers did not consider the constitutional question, nor does it appear to have considered whether the word "must" should be construed as merely directory. We are in accord with the views expressed in Estate of Hart, 107 Cal.App.2d 58, 236 P.2d 891, and hold that in a contest after probate if the probate is not revoked, the court has discretion to determine whether a contestant shall pay the costs incurred by him or whether they shall be paid out of the estate.

In Estate of Bump, 152 Cal. 271, 92 P. 642, the order admitting the will to probate after contest provided that the costs of the contest be taxed against the estate. The court stated the rule applicable to trial costs thus 152 Cal. at pages 273–274, 92 P. at page 642: "We can conceive of cases in which the duty of a widow, or other person entitled to administration of an estate in case of intestacy, to contest the probate of an alleged will, might be as plain and urgent, under the circumstances known to such person, as would be the duty of an executor already appointed, or one nominated as executor, in a will offered for probate, or a legatee thereunder, to oppose a contest and endeavor to establish such will. The provision of the Code above quoted [now Probate Code § 1232] is very general in its terms, and applies as well to a party contesting a will as to one proposing it. It puts the entire matter of costs within the sound discretion of the court, and we think it must be held that such discretionary power extends to and includes the case of an unsuccessful contestant. It is proper to say, however, that such cases must be rare and the circumstances must be peculiar indeed to justify such an order in favor of a contestant who has failed, and that, as this court under its rules is sometimes compelled to sustain a discretionary order where it has grave doubts of its propriety, the trial court should use great caution and make such orders only in very extreme cases presenting great hardship, and where it appears that the contestant has acted in the utmost good faith throughout the proceeding. * * * The presumptions are all in favor of the action of the court below."

Estate of Yoell, 160 Cal. 741, at page 743, 117 P. 1047, states: "It is proper to add, in contemplation of the fact that the law (with but few restrictions) permits a person to dispose of his property by will in such manner as he sees fit, that another law which permits one to contest the will, and perhaps lay bare the secrets of a testator's life, and to cloud his reputation after his death, and then permits him to recover all his costs, even when his efforts so to destroy the will have proved futile, is exceptional, in that it takes one man's property and bestows it upon another, when that other has been making an unsustained attack upon the testamentary act of the person whose estate is thus compelled to pay for the attack."

In Estate of Berthol, 163 Cal. 343, 125 P. 750, it was said that the discretionary power under section 1232 (then Code of Civil Procedure, § 1720) should be exercised in favor of an unsuccessful party only "as justice may require" where he has acted in good faith.

In Henry v. Superior Court, 93 Cal. 569, at page 572, 29 P. 230, at page 231, the court stated: "All the provisions of the Code bearing upon the subject of probate contests indicate that good faith and reasonable cause are the things to be inquired into by the court, in the exercise of its discretion."

Some of the statements we have quoted may be *dicta;* we think however, they are correct and sound statements of the law.

Since the remittitur on the appeal from the judgment expressly directed that the executors should recover their costs on appeal, it was within the discretion of the superior court, under rule 26 of the Rules on Appeal, to decide against whom the award should be made—whether against the estate or against the contestant.

In Estate of Williams, 110 Cal.App.2d 50, 242 P.2d 26, a will contest, the trial court awarded the unsuccessful contestant his trial costs out of the estate. The reviewing court held that the trial court had abused its discretion and annulled the order. The trial court also assessed the prevailing parties' costs against the estate. The reviewing court held this was an abuse of discretion and ordered that they be assessed against the unsuccessful contestant, the court saying 110 Cal.App.2d at page 55, 242 P.2d at page 29: "In that litigation, which respondent started, the proponent won and the contestant lost, and there was no reason whatever to assess these costs *against the winning side* instead of the losing side." Estate of Williams did not erroneously hold, as Hart, Jr., argues, that a trial court has no discretion, but is required to assess costs against the contestant. The reviewing court merely held that on the facts the trial court had abused its discretion.

[4] Hart, Jr., argues at length that a prevailing party's costs should not be assessed against the contestant, but against the estate. The matter is one in the discretion of the trial court; and unless there is an affirmative showing on appeal of a manifest abuse of discretion, the action of the trial court may not be disturbed.

We agree with Hart, Jr., that among the matters the trial court should consider in exercising its discretion, are the contestant's relation to the testator, the good faith of the contestant, the naturalness of the will, the size of the estate, its solvency, and the ultimate result of the contest. It should also consider the provisions of the will, the grounds of contest and whether there was any reasonable basis for urging them, the evidence introduced at the trial of the contest, and the entire history of the litigation. In considering these matters and in exercising its discretion, it should apply the rules that the cases "must be rare and the circumstances must be peculiar indeed to justify" an order in favor of an unsuccessful contestant, and that it should use great caution and make such an order "only in extreme cases presenting great hardship and where it appears that the contestant has acted in the utmost good faith throughout the proceeding."

In support of his contention that the court abused its discretion, Hart, Jr., says: the executors did not request or urge that their costs be taxed against him; the will was made at a time when the decedent was over eighty years of age and about two months before his death; at the time the will was made he had been suffering from serious ailments for a considerable period of time; the appraised value of the estate was in excess of $1,179,000 which was more than sufficient to pay all specific legacies to relatives and charity, and to make a gift of real estate for park purposes provided for in the will, and to provide a trust fund for its upkeep and leave a residue for him (Hart, Jr.); experienced counsel, prior to the trial, had analyzed the evidence and had found it adequate; investigation had been made concerning the personal history of the deceased; his (Hart, Jr.'s) personal record was excellent; the contest was decided only after the jury had deliberated for five full days; the lengthy deliberations of the jury indicate that the issues involved were not easily determined.

The contest was brought on the grounds of unsoundness of mind, undue influence, and that the testator suffered from monomania at the time the will was executed. The judge who ruled on the order appealed from, was the trial judge. In exercising his discretion, he took into consideration the evidence introduced at the trial of the contest and the entire history of the litigation, including the fate of the disputed document. There were 7,800 pages of testimony taken at the trial. This testimony is not a part of the record on this appeal. Assuming, but not deciding, we may take judicial notice of it since it was included in the record on appeal from the judgment, we cannot undertake the intolerable burden of searching that record to ascertain whether the court abused its discretion in making the order with respect to costs. Hart, Jr., does not refer us to any parts of that record in support of his contention. As we have said, he filed affidavits in support of his motion. We are unable to say whether the testimony given at the trial accords with the facts set forth in the affidavits. The testator declared in his will that he made no provision for Hart, Jr., because "I have amply provided for him during my lifetime." The executors say, referring to specific parts of the testimony on the trial of the contest, that such financial provision had actually been made, and that there was evidence that the testator had repeatedly stated that any further financial provision for his son would be unwise and detrimental to his character. It appears that the testator established a trust with a bank, of which Hart, Jr., is the beneficiary, which was of a value of $101,959.45 at the time of the trial of the contest. It further appears that on the trial of the contest, Hart, Jr., sought to show that his father, the testator, had been guilty of incest with his sister, Hart, Jr's, aunt, for which there was no basis in fact.

"In a legal sense discretion is abused whenever in the exercise of its discretion the court exceeds the bounds of reason, all of the circumstances before it being considered. [Citation.] An abuse of discretion is never presumed but must be affirmatively established by the party complaining of the provisions of the order. [Citations.] The burden is on the party complaining of the order to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice an appellate court will not substitute its opinion and thereby divest the trial court of its discretionary power." Berry v. Chaplin, 74 Cal.App.2d 669, 672, 169 P.2d 453, 456.

There is nothing in the record before us to indicate that the learned trial judge did not exercise sound judicial discretion in the matter. He stated:

"I felt that it would be the better part of discretion, and also the equitable way to handle a matter of this kind, to have the matter of costs follow the outcome of the case in the same manner as any other case. * * * I can see no reason, Mr. Williams, why costs in this case shouldn't equitably follow the usual rule. [Prob.Code, § 383]"

[5] We hold the court did not abuse its discretion in not assessing Hart, Jr's., trial costs against the estate. We cannot say, as a matter of law, that the court abused its discretion in awarding the trial and appeal costs of the executors against Hart, Jr. Respondents will recover their costs on this appeal from appellant.

Affirmed.

SHINN, Presiding Justice.

I dissent. I think this is just the type of case in which the court should charge the costs of the executors against the estate and that it was an abuse of discretion to charge their costs of some $16,000 against the contestant, but not an abuse of discretion to require him to pay his own costs. When a vain and bitter old man, in his dotage, possessed of an estate of more than a million dollars, is so bereft of the natural instincts of a father as to disinherit his only son and leave vast properties as a public park for his own perpetual glorification, and where the son, through eminent counsel files a contest and it takes a jury some five days to decide the merits of the contest, this, I say, is just the sort of situation the court spoke of as "rare" and "peculiar" in Estate of Bump, 152 Cal. 271, 92 P. 642, in which an order was approved which charged the estate with the costs of an unsuccessful contest by the widow. I would reverse the order, insofar as it charged appellant with the costs of the executors.

119 Cal.App.2d 349

SIDES v. SIDES et al.

Civ. 19525.

District Court of Appeal, Second District, Division 3, California.

July 24, 1953.

Rehearing Denied Aug. 19, 1953.

Hearing Denied Sept. 17, 1953.

Action to establish interest in property alleged to have been concealed by former spouse at time of divorce and execution of property settlement agreement. The Superior Court, Los Angeles County, Roy L. Herndon, J., granted defendants motion for judgment on pleadings and plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that the complaint alleging fraudulent concealment of property at time of divorce and property settlement agreement was insufficient to state cause of action in absence of description of property allegedly concealed and in absence of facts explaining plaintiff's failure to bring action within statutory period.

Affirmed.

1. Fraud 🔑41

Generally, complaint for fraud must allege facts constituting fraud with particularity, general allegations being insufficient.

2. Limitation of Actions 🔑179(2)

In action for fraud brought more than three years after perpetration of acts of alleged fraud, plaintiff is held to stringent rules of pleading and must allege facts which would excuse failure to discover acts constituting fraud within three years after their commission and where it is alleged that discovery was made later circumstances under which it was made must be alleged and facts discovered must also be alleged.

3. Limitation of Actions 🔑179(2)

Complaint alleging fraudulent concealment of community property by husband at time of divorce and property settlement agreement was insufficient to state cause of action without description of property allegedly fraudulently concealed and without allegation of facts justifying failure to bring action within statutory period.

4. Limitation of Actions 🔑95(2)

In determining whether the plaintiff discovered, or should have discovered, the facts giving rise to his cause of action within the statutory period, the same rules govern that are applicable in cases falling within the provision of statute relating to fraud as the gravamen of the original action.

◆

A. V. Falcone, Los Angeles, for appellant.

Roland Maxwell and Paul H. Marston, Pasadena, for respondents.

SHINN, Presiding Justice.

Grace Sides brought this action against her divorced husband, Hollis Sides (herein called defendant), and his second wife Jewell. Plaintiff seeks to establish an interest in property alleged to have been concealed from her at the time of her divorce from Hollis and the execution of a property settlement agreement which was approved by the interlocutory decree. Copies of the decree and the agreement were attached to the complaint.

It was alleged that the parties were married September 3, 1930; two children, still minors, were born; plaintiff sued for divorce July 1, 1945; a property settlement agreement was entered into December 31, 1946; an interlocutory decree was entered in plaintiff's favor February 25, 1947 and the present action was instituted January 2, 1952.

The property settlement agreement listed property of the community and contained a representation by each party that the same described all the property which he or she owned or controlled and it provided "in the event property not described herein is disclosed it is agreed that each party is entitled to an undivided one-half interest therein."

The complaint was in two causes of action. In the first it was alleged on information and belief that at the time of the agreement defendant possessed and had under his control "cash and other properties, according to plaintiff's information and belief, the exact nature, amount and location of which are unknown to plaintiff but known to defendant Sides (except that plaintiff is informed and believes and therefore alleges the same exceeded $25,000 in value), all of which were their community property and in addition to the community property listed in Exhibit 'B' ", and it was alleged that the ownership of such other property was intentionally and fraudulently concealed from plaintiff, who was deceived thereby. It was also alleged that defendant was a physician; he represented that he was in ill health, he would have to limit his work, he had no source of income except about $14,000 a year from his practice, he had no other assets, was in straightened financial circumstances, substantially indebted, would leave the state and not support plaintiff and the children unless a property settlement was agreed upon, and would have to encumber his properties to meet his obligations under the agreement. It was also alleged that upon various occasions after the agreement was made, the dates of which plaintiff could not recall, defendant represented that he was in straightened circumstances, substantially indebted and that all his properties were encumbered.

In the property settlement plaintiff received property of the stated value of some $69,000. The value of defendant's property was not alleged. Under the agreement defendant was to pay plaintiff $400 per month for 18 months after the date of the interlocutory decree for the support of plaintiff and the children and, after that time, $100 per month for each child during minority and, in addition, the children's medical and dental bills.

In the second cause of action plaintiff incorporated all the material allegations of the first cause of action and also alleged the provision of the agreement quoted above under which she would have a half interest in future disclosed property. The prayer of the complaint was for an accounting by defendant as to any properties, ownership of which had been concealed, and the rents, issues and profits thereof; for an award to plaintiff of the whole thereof, or an interest therein, and appointment of a receiver was requested. Defendant answered, denying all charges of concealment and fraud. After repeated motions to strike portions of the complaint had been granted, and the complaint amended, the court eventually granted defendants' motion for judgment on the pleadings. Plaintiff appeals.

Plaintiff designates her complaint as one "in equity for fraud". In her briefs she treats the first cause of action as one for fraud. This cause of action contains many allegations of fraud in the procurement of the agreement but it seeks neither rescission nor damages. Most of these allegations were stricken, but plaintiff restored them in her latest complaint. We shall pass the question whether, in view of the quoted provision of the agreement, plaintiff's rights were limited to an action on the contract and discuss the first cause of action as an attempt to plead damages for fraud.

[1] The general rule is that a complaint for fraud must allege the facts constituting the fraud with particularity, general allegations being insufficient. 12 Cal.Jur. p. 800. Although it was alleged on information and belief that defendant had concealed a large amount of property even plaintiff's alleged information left her in the dark as to whether it consisted of cash or other property, and as to its nature, amount

and location. It was thus shown affirmatively that plaintiff had no information as to particular acts of fraudulent concealment nor as to facts as distinguished from mere suspicions. If she had no information as to what was concealed, or how much was concealed, her ignorance could not excuse her failure to allege facts sufficient to state a cause of action for fraud. It is apparent that her action is a mere fishing expedition. If, upon trial, she should prove the facts alleged in her complaint she would not have made out a case for relief. She would merely have shown that she suspected defendant had not disclosed all of his properties, and she would be in the position of demanding that defendant prove he had not been guilty of fraud.

For an additional reason the first cause of action is defective. While it was alleged on information and belief that defendant fraudulently represented that he had disclosed ownership of all the community and his separate property, no facts were alleged which would justify plaintiff's failure for some five years to make an investigation as to the truth of the alleged representations.

[2] In order to avoid the bar of the statute of limitations upon a claim based upon acts committed more than three years before the commencement of the action it is incumbent upon a plaintiff to allege facts which would excuse the failure to discover the acts constituting the fraud within three years after their commission; and where it is alleged that discovery was made later the circumstances under which it was made must be alleged and, of course, the facts discovered must be alleged. The purpose of this requirement is to enable the court to determine whether, with due diligence, the fraud should have been discovered sooner. And in an action for fraud brought more than three years after the perpetration of the acts of alleged fraud the plaintiff is held to stringent rules of pleading. Davis v. Rite-Lite Sales Co., 8 Cal.2d 675, 67 P.2d 1039.

In order to escape the bar of the statute of limitations the complaint attempts to plead discovery of fraud as follows: "That on or about September 17, 1951, plaintiff conferred with her present attorney of record in this action for the first time regarding proceedings to obtain an increase in the amount of support and maintenance for the said children; that pursuant to her said attorney's suggestions and requests, among other things, plaintiff learned for the first time, on or about November 15, 1951, that none of defendant Sides' said properties were encumbered." It was not alleged that plaintiff had theretofore made any effort to discover the truth or falsity of defendant's alleged representations at the time of the agreement nor that she had discovered any fact except the single one that defendants' properties were not encumbered on November 15, 1951.

[3] It was alleged that defendant at various times made valuable improvements upon his properties, that he claimed they had been encumbered in order to make the improvements and that plaintiff believed and was deceived by these statements. On information and belief it was alleged that defendant had used concealed assets to make the improvements, but it was also alleged that plaintiff was not certain "of the nature, location and value of the concealed community property and the rents, issues and profits therefrom held by the respective defendants." It was not alleged that the statements were made in order to dissuade plaintiff from making an investigation as to the truth of the original representations nor that plaintiff desisted from making an investigation because of the later statements. It is not necessary to dwell upon the insufficiency of the first cause of action to allege discovery within three years prior to the bringing of the action, since plaintiff did not allege discovery of any of the alleged facts which she claims had been concealed from her.

In her second cause of action plaintiff pleaded all but one of the paragraphs of the first cause of action, which confused two theories of recovery, and was, to say the least, poor pleading. She then added the paragraph of the agreement which would give her a one-half interest in any future disclosed property.

[4] Plaintiff assumes that in an action on the contract the statute of limitations would not commence to run until the discovery of property, ownership of which had been concealed. She recognizes, however, that she could not sit idly by and avoid the bar of the statute by sleeping on her rights. Therefore, as an excuse for her failure to make an earlier investigation and discovery, plaintiff made an attempt to allege that defendant fraudulently concealed ownership of property which he had failed to disclose at the time of the agreement. The rule as to the application of the statute of limitations in nonfraud cases was stated in Sears v. Rule, 27 Cal.2d 131, 147, 163 P.2d 443, 452, as follows: "When the right of action is not based upon fraud, the exception provided in subdivision 4 of section 338 is not available to the plaintiff. Nevertheless, if the defendant, after committing the wrongful act, has fraudulently concealed the facts from the plaintiff, who by reason of such concealment did not discover that he had a right of action until too late to sue, the defendant will be estopped from taking advantage of his own wrong by asserting the statute of limitations. Pashley v. Pacific Elec[tric] R. Co., 25 Cal.2d 226, 231, 153 P.2d 325. In such a case, in determining when the plaintiff discovered, or should have discovered, the facts giving rise to his cause of action, the same rules govern that are applicable in cases falling within subdivision 4 of section 338 of the Code of Civil Procedure. Kimball v. Pacific Gas & Elec[tric] Co., 220 Cal. 203, 215, 30 P.2d 39."

The properties defendant improved were those he took under the agreement. Plaintiff at all times had the means of knowledge whether they were encumbered. The fact that they were not encumbered when she made inquiry, some five years after the agreement was made, has only aroused a suspicion in her mind that defendant may have concealed some of his assets. As previously stated it was not alleged that after the agreement was made defendant concealed any facts as to his ownership of property or that plaintiff was dissuaded from making an investigation by any statements of defendant. The action is merely one by which plaintiff seeks to discover whether she has been defrauded. Her complaint failed to state a cause of action and judgment on the pleadings was properly granted.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

119 Cal.App.2d 148

SUNLITE BAKERY v. HOMEKRAFT BAKING CO., Ltd

No. 15476.

District Court of Appeal, First District,
Division 1, California.
July 13, 1953.

Action to enjoin defendant from using bread wrappers allegedly similar to those used by plaintiff. The Superior Court, Santa Clara County, M. G. Del Mutolo, J., entered judgment for defendant and plaintiff appealed. The District Court of Appeal, Wood, J., held that the differences in the wrappers of plaintiff's and defendant's bread were so many and so prominent as to negative any probability that ordinary intelligent buyers, exercising ordinary care, would ever be so far deceived by any resemblance of their wrappers as to buy one brand of bread when intending to buy the other.

Affirmed.

1. Trade-Marks and Trade-Names and Unfair Competition 🔑70(4)

Defendant's bread wrapper which had solid white end with inset blue and red design and red band near end, and bore individual name was not so similar to bread wrapper of plaintiff, which had solid red end and side band with inset white circles and bore its individual name, that ordinary intelligent buyers exercising reasonable care would ever be deceived and use of wrapper was not unfair competition.

2. Trade-Marks and Trade-Names and Unfair Competition ⚷70(4)

Test of unfair competition by use of bread wrappers similar to that of competitors is whether a person exercising that care and caution and power of perception which the public may be expected to exercise in matter which it has in mind, would mistake one of the wrappers for the other.

3. Trade-Marks and Trade-Names and Unfair Competition ⚷70(2)

In cases of unfair competition by use of emblems similar to that of competitor, the law protects not only the intelligent, experienced and astute, but also the ignorant, inexperienced and gullible.

4. Trade-Marks and Trade-Names and Unfair Competition ⚷70(2)

A few isolated instances of confusion resulting from similar emblems used by competitors are not sufficient to support action for unfair competition.

5. Trade-Marks and Trade-Names and Unfair Competition ⚷93(3)

Evidence supported finding that defendant's bread wrapper was not used with intent to deceive public into buying defendant's bread in lieu of bread produced by plaintiff.

6. Trade-Marks and Trade-Names and Unfair Competition ⚷70(2)

An unequivocal showing of intent to deceive by use of similar emblem on competing product is not sufficient to support an action for unfair competition in absence of actual similarity of emblems.

◆

Rea, Jacka & Frasse and Irvin A. Frasse, San Jose, for appellant.

A. W. Carlson and M. F. Hallmark, Oakland, for respondent.

FRED B. WOOD, Justice.

This is an action by Sunlite Bakery, a corporation, to enjoin Homekraft Baking Co., Ltd., a corporation, from using wrappers on its bread similar to those used by Sunlite on its bread, in the territory served by the latter for some fourteen years, alleging that Homekraft wrappers are so similar to Sunlite's as to mislead the public, that Homekraft recently commenced the use of these similar wrappers with intent to deceive the public into buying Homekraft bread under the impression and belief it is Sunlite bread, and that the public is buying Homekraft bread so wrapped under the mistaken belief it is Sunlite bread, to the great and irreparable damage of Sunlite.

The trial court found against Sunlite on these issues and gave judgment for Homekraft. Sunlite has appealed.

[1] Sunlite does not rely upon any trade mark or copyright law. It bases its claims upon the law of unfair competition.[1] Our examination of the record convinces us that Homekraft's wrapper is not so similar to Sunlite's as to constitute unfair competition.

The distinguishing feature of Sunlite's wrapper is its red end,—solid red across one end and on all sides for about three inches from that end. Between this and the other end, on the top and on each side, the word "Sunlite" in black letters 1¼″ high is displayed on a white background. The Homekraft wrapper has a white end bearing a rooster design, a red rooster in a red circle one inch in diameter. Attached is a 2¾″ x 2¾″ blue and white sticker displaying the words "Fresh," "Homekraft" and "Bread." Near this end, extending across the top, bottom and both sides, there is a red band 3⅝″ wide, upon which the red rooster design appears in white circles 2¾″ in diameter; within each circle the words "morning" and "fresh" also are displayed in blue. In grocery stores and markets Sunlite loaves are customarily displayed in racks with the red ends pointing toward the aisles. When Homekraft started distributing in this area, its bread was similarly displayed in racks. The ultimate decision as to stacking bread in a store is that of the manager of the store, but he rarely disturbs the display as set up by the distributor's driver-salesman.

---

[1] As to the distinction between trade-mark protection and unfair competition, see 40 Cal.Law Rev. 571.

Plaintiff produced four witnesses who had made one purchase, each, of Homekraft bread under the mistaken impression it was Sunlite. Each picked up a loaf of Homekraft along with other groceries. Three discovered the error by the time he or she reached the cashier's counter; one, as soon as he reached his auto outside. Three were in a hurry at the time. The fourth thought the loaf he had mistaken for Sunlite had a brown end instead of Homekraft's white end. At the trial none of the four had any difficulty in distinguishing between the Sunlite and Homekraft wrapped loaves, each viewing them from a distance of about nine feet.

We agree with the trial court that Homekraft's wrapper was not sufficiently similar to Sunlite's to meet the test of a " 'similarity which would be likely to deceive or mislead an ordinary unsuspecting customer' ". Academy of Motion Picture Arts and Sciences v. Benson, 15 Cal.2d 685, 692, 104 P.2d 650, 653; quoted in American Distilling Co. v. Bellows & Co., 102 Cal.App.2d 8, 21, 226 P.2d 751. Indeed, with examples of the two wrappers attached to and made a part of the complaint, as they were, we might almost say as a matter of law that the buying public could not be misled. See Scudder Food Products v. Ginsberg, 21 Cal.2d 596, 134 P.2d 255.

[2] We adopt as our own, the opinion rendered by Judge Del Mutolo who presided at the trial: "There are two rules of law which stand out above all others to guide me in the decision of this case. The first is found in the case of American Automobile Ass'n v. American Automobile Owners Ass'n, 216 Cal. 125 [13 P.2d 707, 710, 82 A.L.R. 699], which reads as follows: 'Would a person exercising that care, caution and power of perception which the public may be expected to exercise in the matter which it has in mind, mistake one of said emblems for the other?'

[3] "The other rule is found in the case of American Distilling Co. v. Bellows & Co., 102 Cal.App.2d 8 [226 P.2d 751, 760], and it reads as follows: 'The law, however, protects not only the intelligent, the experienced, and the astute. It safeguards from deception also the ignorant, the inexperienced, and the gullible. * * * "The law is not made for the protection of experts, but for the public—that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze, but are governed by appearance and general impressions".'

"Disregarding the first rule of law, as set forth in the Automobile Ass'n case, and giving plaintiff all benefit of any doubt both in law and fact, there is nothing, in my opinion, about defendant's wrapper, with the exception of the color and size of the loaf, which in any way resembles plaintiff's wrapper. If a person picked up defendant's bread intending to purchase plaintiff's, he could just as well have picked up defendant's Exhibits C, D, or E.[2] All of the aforementioned exhibits have some red on the end of the wrapper. The wrapper most similar to plaintiff's, in my opinion, is defendant's Exhibit E. However, Exhibit E is not in dispute here.

[4] "A person would have to be very careless, indeed, to pick up defendant's bread when he intended to buy plaintiff's. A few isolated instances of confusion would not be sufficient to rule out defendant's product from plaintiff's territory considering that plaintiff does a large volume of business. I venture to say that there have been isolated instances of confusion between Langendorf's bread and Kilpatrick's. One wrapper contains long white and blue stripes and the other is a sort of basket weave with two different shades of blue as the predominant color on both wrappers.

"I do not believe that the principle of law contained in the American Distilling Co. case goes so far as to include the ultra careless and the indifferent purchaser. If it did, then the first comer in the manufacture of a product would have an exclusive monopoly and keep everyone else out of the field by showing that one or a few customers were deceived in buying one product when they intended to buy another.

---

[2] Exhibits C, D, and E were bread wrappers used by other bakeries than Sunlite or Homekraft, in this area.

"The differences in the wrappers of plaintiff's and defendant's are so many and so prominent as to negative any probability that an ordinary intelligent buyer, exercising ordinary care, will ever be so far deceived by any resemblance of defendant's to plaintiff's wrapper as to buy one of these brands of bread when intending to buy the other."

[5, 6] Plaintiff advances the further argument that even if the evidence of "similarity" is weak, plaintiff should prevail because of the proof of defendant's asserted intent to deceive the public into buying Homekraft in lieu of Sunlite bread. The evidence concerning such an intent is not all one way. We can look only at that which supports the finding. Even if an intent so to deceive were unequivocally demonstrated by unconflicting evidence, that would not be a sufficient reason for reversal of the judgment. A bad motive would not convert a lawful act into an unlawful one so as to make the doer of it civilly liable. Scudder Food Products v. Ginsberg, supra, 21 Cal.2d 596, 601, 134 P.2d 255.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

119 Cal.App.2d 355

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. PAULEY et al.

Civ. 4616.

District Court of Appeal, Fourth District, California.

July 24, 1953.

Hearing Denied Sept. 17, 1953.

Action by bank against guarantors upon written guaranty. The Superior Court of Fresno County, Arthur C. Shephard, J., instructed jury to enter verdict for guarantors, and bank appealed. The District Court of Appeal, Mussell, J., held that, where guarantors waived right to require bank to first exhaust security given by borrower before proceeding against guarantors or to participate in any such security, but guaranty provided that guarantors would be liable for borrower's debt only to extent their respectively stated interests bore to total debt, and borrower and some guarantors were discharged in bankruptcy, remaining guarantors were entitled to reduction of original debt by amount realized on security before determination of their respective liabilities.

Judgment affirmed.

1. Guaranty 🔑60

Where guarantors waived right to require bank to first exhaust security given by borrower before proceeding against guarantors or to participate in any such security, but guaranty provided that guarantors would be liable for borrower's debt only to extent their respectively stated interests bore to total debt, and borrower and some guarantors were discharged in bankruptcy, remaining guarantors were entitled to reduction of original debt by amount realized on security before determination of their respective liabilities.

2. Guaranty 🔑77(3)

Where bank was not required to exhaust security it held or apply proceeds to reduction of borrower's indebtedness before proceeding against guarantors, obligations of borrower and of guarantors were entirely independent.

3. Guaranty 🔑92(1)

In action by bank against guarantors upon written guaranty, where testimony adduced before jury did little more than emphasize interpretation sought to be placed upon contract by each party, but material facts were not in dispute, guarantors, who had tendered, within $105.56 in one case and a few cents in another, correct amount due from them were entitled to directed verdict.

◆

Stammer & McKnight, Fresno, for appellant.

Dearing, Jertberg & Avery, Fresno, Lillick, Geary & McHose and Raymond Tremaine, Los Angeles, for respondents.

MUSSELL, Justice.

This is an action to recover amounts due from defendants to plaintiff under the terms and conditions of a written guaranty executed by the defendants. The action was tried before a jury which, after having been instructed by the court so to do, found for the defendants and against the plaintiff. This appeal is taken by plaintiff from the judgment for defendants which was thereupon entered. The material facts are not in dispute and are substantially as set forth in a stipulation contained in the clerk's transcript.

Prior to May 20, 1946, plaintiff had loaned various sums of money to Fresno Iron Works, a co-partnership, on an unsecured basis. On said date Fresno Iron Works, a corporation, was formed. The corporation took over all of the assets of the partnership and the partners became stockholders in the corporation. Application was then made by the corporation to plaintiff bank for additional loans. Before making these loans, the bank insisted and it was agreed that these new loans and those previously made would be consolidated into long term loans, and that the indebtedness of the corporation should be guaranteed by the stockholders and secured by the property of the corporation.

The bank then, in the early part of September, 1946, prepared and delivered to Alfred R. Gaggs a printed form denominated "Continuing Guaranty" with the request that he have it executed by the stockholders. Mr. Gaggs was the president, and a director and stockholder of Fresno Iron Works, a corporation, and had been a partner in the partnership which preceded the corporation. He received the printed form from Mr. Nielsen, vice-president and manager of the Bank of America at Fresno, who told him that in case of loans to a new, closely held corporation it was the policy of the bank to require the guaranty, and that in this case, since the bank was making loans to an untried management on the security of a one purpose building and specialized equipment, the guaranty would be required. Mr. Gaggs took the printed form to Los Angeles where it was read and discussed at an informal meeting of the stockholders and directors of the corporation and with the attorney for the corporation. At that meeting the stockholders objected to the provisions in the printed form which placed 100% liability on each guarantor. After further discussion with Mr. Nielsen, another meeting of the stockholders and directors was held at which all of the proposed guarantors were present except Mr. North. The proposed guaranty was then fully discussed between the guarantors and the attorney for the corporation, who then drafted an amendment and filled in the blanks on the original printed form. After the guarantors had read the amendment and discussed it with their attorney, they signed both documents and delivered them to the bank, where they were accepted by Mr. Nielsen.

The guaranty and the amendment thereto were dated September 30, 1946, and the material portions thereof are as follows:

> "To Bank Of America National Trust and Savings Association.
>
> "(1) For valuable consideration, the undersigned guarantors jointly and severally unconditionally guarantee and promise to pay to the Bank of America, on demand, * * * any and all indebtedness of Fresno Iron Works, a corporation (hereinafter called Borrowers) to Bank. * * *
>
> "(2) The liability of guarantors shall not exceed at any one time the sum of $150,000.00 * * * Notwithstanding the foregoing, Bank may permit the indebtedness of Borrowers to exceed Guarantors' liability. This is a continuing guaranty relating to any indebtedness, including that arising under successive transactions which shall either continue the indebtedness or from time to time renew it after it has been satisfied. Any payment by Guarantors shall not reduce their maximum obligation hereunder, unless written notice to that effect be actually received by Bank at or prior to the time of such payment.
>
> "(3) The obligations hereunder are joint and several, and independent of the obligations of Borrowers. * * *

"(4) Guarantors authorize Bank, without notice or demand and without affecting their liability hereunder * * * to take and hold security for the payment of this guaranty or the indebtedness guaranteed, and exchange, enforce, waive and release any such security; and to apply such security and direct the order or manner of sale thereof as Bank in its discretion may determine. * * *

"(5) Guarantors waive any right to require Bank to (a) proceed against Borrowers; (b) proceed against or exhaust any security held from Borrowers; or (c) pursue any other remedy in Bank's power whatsoever. Guarantors waive any defense arising by * * * reason of any disability or other defense of Borrowers or by reason of the cessation from any cause whatsoever of Borrowers. Until all indebtedness of Borrowers to Bank shall have been paid in full, * * * Guarantors shall have no right of subrogation, and waive any right to enforce any remedy which Bank now has or may hereafter have against Borrowers, and waive any benefit of, and any right to participate in any security now or hereafter held by Bank. * *

"(9) Guarantors agree to pay a reasonable attorneys' fee and all other costs and expenses which may be incurred by Bank in the enforcement of this Guaranty.

"Amendment To Continuing Guaranty
Fresno Iron Works

"Any provision to the contrary notwithstanding, the liability of the undersigned as guarantors, as set forth in that certain continuing guaranty agreement attached hereto and of which agreement this instrument is an amendment, is limited to the extent related below.

"Each of the undersigned guarantors shall be liable for the debts of said Fresno Iron Works only to the extent their respective interests bear to the total indebtedness of said corporation guaranteed hereunder as follows:

Name	Limit of Guarantee
Alfred R. Gaggs	28.75%
Mary Gaggs	28.75
Harold R. Pauley	25.00
William J. North	5.
Claude L. Cameron	2.5
W. Jos. McFarland	5.
Hollis T. Riley	5."

After having received this guaranty and the amendment thereto, the bank, between September 30, 1946 and December 7, 1948, loaned Fresno Iron Works, a corporation, a total sum of $343,397.66, of which $213,318.34 was repaid, leaving a principal balance unpaid of $130,079.32 which, in addition to the guaranty, was secured by a trust deed and a chattel mortgage. Between September, 1946 and December 7, 1948, Fresno Iron Works suffered financial reverses and its plant was demolished by fire. On December 7, 1948, the corporation was indebted and in default to the bank in the sum of $130,079.32, principal, and $3,290.20, interest, and on that date the Bank, by registered mail, made written demand upon each of the guarantors for the payment of his proportionate share of that amount.

On December 16, 1948, a meeting of the interested parties was held at the office of Mr. Stammer, attorney for the bank, at Fresno. J. F. Meilike, in charge of the loan adjustment department of the bank, Mr. Nielsen and guarantors Pauley, Riley, North, Cameron and McFarland were present and the situation was discussed. At this meeting Mr. Stammer told the guarantors that the bank was going to rely upon the guaranty of the whole debt no matter what happened to the security and the guarantors stated that they planned to file a petition in bankruptcy for the Fresno Iron Works. Such a petition was filed December 16, 1948, and the corporation was thereafter adjudicated a bankrupt.

Between April 1, 1949 and May 31, 1950, the bank exhausted all of the security held by it under the deed of trust and chattel mortgages and received therefrom the net sum of $71,155.50, which was applied by the bank to the principal amount of the indebtedness of Fresno Iron Works, a corporation.

On December 31, 1949, defendant McFarland paid on account of the principal indebtedness of the iron works corporation and of his guaranty the sum of $1,750.00 and this amount was applied by the bank to the indebtedness of the corporation and to the amount of McFarland's guaranty.

In March, 1950, Alfred Gaggs and Mary Gaggs filed voluntary petitions in bankruptcy and their obligations to the bank on the guaranty were discharged in bankruptcy on June 15, 1950, and December 1, 1950. On January 29, 1951, the guaranty obligation of Hollis T. Riley was likewise discharged in bankruptcy.

On October 19, 1949, another registered letter of demand was mailed by the bank to each of the guarantors, reiterating the demand contained in the bank's letters to said guarantors of December 7, 1948, and demanding immediate payment of the same amounts as set forth therein.

On April 17, 1950, defendant Pauley deposited $17,716.55 in the name of the plaintiff with the Security First National Bank of Los Angeles and tendered said amount in full satisfaction of his obligation under the guaranty. A like tender was made on the same date by defendant Cameron of $1,771.66 and by defendant McFarland in the sum of $1,793.31. These tenders were refused by the plaintiff bank.

It was stipulated that on April 17, 1950, as a result of the application upon said indebtedness of Fresno Iron Works, a corporation, of the net proceeds to that date received from the properties held under said trust deed and chattel mortgages and said payment of $1,750.00 made on December 31, 1949, by defendant McFarland there remained unpaid from Fresno Iron Works, a corporation, to the Bank of America National Trust and Savings Association a balance of $55,845.88, principal, and $9,780.10, interest.

On June 23, 1950, the bank filed this action to recover from the guarantors the amounts stated in the demands made upon them by the bank in the letters of December 7, 1948.

It is the position of the appellant bank that the written contract of guaranty speaks for itself and that both the written contract and the parol evidence received by the court in aid of its construction demonstrate as a matter of law that the parties intended exactly what was expressed in the written contract, to wit, that each of the defendants guaranteed a certain percentage of the total indebtedness of Fresno Iron Works guaranteed thereunder on the date liability under the guaranty accrued, which was on December 7, 1948, when the plaintiff made demand upon the guarantors for the payment of their guaranties; and that until all of the indebtedness of Fresno Iron Works to the bank is paid in full, and so long as the bank does not attempt to collect from all sources more than the total amount of the indebtedness of Fresno Iron Works to the bank, the amount of each defendant's obligation under the guaranty is not affected in any way by the enforcement of any other security and the guarantors have no right to benefit from the sale of such other security.

It is the position of respondents that in executing the continuing guaranty, they insisted upon limiting their respective liability so that some of them with substantial assets would not be called upon to pay the proportions of others who might not be able to pay; that an amendment was prepared to recite this limitation; that it was the intent of the parties that each of the guarantors guaranteed only his percentage of whatever deficiency remained after the sale of other security and the application thereof to the total indebtedness of Fresno Iron Works. That is to say, appellant claims that each guarantor must pay his percentage of the principal amount of $130,079.32, which was the total indebtedness of Fresno Iron Works before exhausting the other security and respondents claim that they are required to pay only their percentage of the deficiency after exhausting the other security.

At the conclusion of the trial appellant moved for a directed verdict in favor of the plaintiff upon the ground that the written contract was controlling and upon the further ground that all of the evidence presented before the jury demonstrated beyond the point where reasonable minds could differ upon the subject and as a matter of law, that plaintiff was entitled to a judgment in its favor. Respondents then made a similar motion for a directed verdict in their favor. This motion was granted and the verdict of the jury against the plaintiff was returned in accordance therewith.

The uncontradicted evidence is that on December 7, 1948, the Fresno Iron Works, a corporation, was indebted to the bank in the sum of $130,079.32, principal, and $3,290.20 interest; that on said date the bank demanded of each defendant immediate payment of his proportion of said indebtedness as provided in the guaranty. On refusal of the guarantors to comply with such demand, the bank was then in a position to file suit and secure a judgment for the amounts demanded. The guarantors promised to pay on demand any and all indebtedness of the Fresno Iron Works, a corporation. The guaranty authorized the bank, without affecting the liability of the guarantors, to take and hold security for the payment of the indebtedness guaranteed and to apply such security as in its discretion it might determine. Guarantors also waived any right to require the bank to exhaust any security held from borrowers until all indebtedness of borrowers to the bank was paid in full and waived any benefit of, and any right to participate in any security then or thereafter held by the bank.

However, the amendment to the guaranty provides that *any* provision to the contrary notwithstanding the liability of the guarantors is for the debts of the Fresno Iron Works only to the extent that their respective interests bear to the total indebtedness of the corporation. On December 7, 1948, the total indebtedness of the iron works corporation was $133,369.52 and each of the guarantors owed a stated percentage of that amount. Pauley, for example, owed 25% of that amount, for $33,342.38. While the bank was not required to sell the securities held by it, nevertheless this was done and $71,155.50 was applied by the bank to the indebtedness of the corporation, thereby reducing such indebtedness to the total sum of $62,214.02 as of June 23, 1950, when the complaint herein was filed. Since the bank applied $71,155.50 to the indebtedness of the iron works corporation, Pauley, for example, as owner of 25% of the stock of the corporation, was entitled to a credit of 25% of $71,155.50, or $17,788.88 on his total liability of $33,342.38, leaving a balance due from him to the corporation in the sum of $15,553.50, plus interest. Interest at 5% per annum on $33,342.38 from December 7, 1948, to April 17, 1950 (the date Pauley tendered payment in the sum of $17,716.55 in payment of his obligation) amounts to $2,268.61, which, when added to $15,553.50, amounts to the sum of $17,822.11, exceeding the amount of the tender in the sum of $105.56. This difference may be accounted for in the amount of interest due by reason of the application of the security to the reduction of the indebtedness. In making his tender on April 17, 1950, Pauley apparently calculated the amount due the bank on a basis of 25% of the remaining indebtedness of the iron works, plus interest from March 10, 1950, to April 17, 1950. However, the amount of his liability is practically the same, thus calculated, as that based upon the calculation here set forth, and the difference in McFarland's case is only a few cents.

[1] The contention of the bank is that the guarantors are liable for their proportionate share of the indebtedness of the iron works as of December 7, 1948, and that the guarantors were not entitled to a credit for the amount paid on the indebtedness of the corporation unless it was paid in full. We do not agree with this contention. The guarantors were responsible only for their proportionate share of the indebtedness of the corporation and since it was reduced by the application of sums received from the sale of securities, the guarantors were entitled to the benefit of such reduction.

In Thorpe v. Story, 10 Cal.2d 104, 73 P.2d 1194, action was brought by a bondholders' committee against several guarantors to recover upon a written guaranty of a bond issue which limited the liability of each guarantor to a certain percentage of the amount of the bonds. The whole bond issue had been sold but part of the bonds had been paid and retired and the bondholders' committee was the assignee of a portion of the unretired bonds. Plaintiffs claimed that they were entitled to recover from each guarantor his percentage of the entire bond issue but the trial court gave judgment against each guarantor for only the proportionate share of each of the bonds which had been assigned to the bondholders' committee. In commenting upon the action of the trial court, the Supreme Court said, 10 Cal.2d at page 130, 73 P.2d at page 1208:

> "We are in accord with the construction placed upon the guaranty by the trial court. By the plain import of its terms it gives to each bondholder a right of action against each guarantor for a fractional proportion of the indebtedness represented by each bond, so that the payment of a bond proportionately reducing the main indebtedness satisfies each guarantor's proportionate liability for payment of the bond retired. In this way, plaintiffs, holding $216,000 of the bonds, would be entitled to recover, for example, from defendant Robbins, 5/60 of that sum with interest, and in like manner from each other guarantor. It is not necessary to discuss with greater particularity plaintiffs' analysis of the language of the guaranty, as it appears on the face of the instrument that the above construction is the proper one."

And 10 Cal.2d on page 131, 73 P.2d on page 1209:

> "The guaranty, in our view, imposes only a several liability, regardless of which method is used to compute it, and in reality the judgment for which plaintiffs are asking is simply a several judgment against each defendant guarantor for his fraction of the entire indebtedness without deduction for retired bonds. But we find no warrant under the terms of the guaranty for holding any guarantor liable for more than his proportion of the unpaid indebtedness. Plaintiffs' argument seems strained, and it does not support any reasonable interpretation of the guaranty. The actual wording of the instrument, and its only clear and reasonable purport, imposes a several liability against the guarantors limited to fractional proportions of the outstanding unpaid indebtedness."

While it is true that this case did not involve the sale or exhaustion of securities, the indebtedness of the guarantors was reduced by payment of some of the outstanding bonds and in the instant case it was reduced by application of the proceeds from the securities held by the bank.

[2] It is true, as contended by appellant, that the bank was not required to exhaust the security which it held or apply the proceeds to the reduction of the indebtedness of Fresno Iron Works before proceeding against the guarantors on the contract as the obligation of the corporation and that of the guarantors are entirely independent obligations. Loeb v. Christie, 6 Cal.2d 416, 420, 57 P.2d 1303; Everts v. Matteson, 21 Cal.2d 437, 444, 132 P.2d 476; Security-First Nat. Bank of Los Angeles v. Chapman, 41 Cal.App.2d 219, 221, 106 P.2d 431. However, the bank did sell the security herein and did apply the sums received to the debt of the iron works corporation and these cited cases are not decisive of the question here involved.

[3] The respondents herein demanded a trial by jury apparently on the theory that if the guaranty and amendment were interpreted so differently by the parties, the instrument may have been ambiguous, in which event the intent of the parties would have to be determined by evidence offered to demonstrate the true intent, meaning and legal effect. Appellant argued that the contract was unambiguous and its meaning clear and that the intent of the parties could and must be determined from the language of the agreement. The testimony adduced before the jury did little more than emphasize the interpretation sought to be placed upon the contract by each of the parties. The trial court concluded that since there was no dispute in the testimony as to material facts, it was proper to in-

struct the jury to return a verdict for defendants. Such an instruction was proper under the circumstances shown by the record.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

Hearing denied; EDMONDS, TRAYNOR and SPENCE, JJ., dissenting.

---

119 Cal.App.2d 341

WILSON v. NOBELL et al.

Civ. 19381.

District Court of Appeal, Second District,
Division 2, California.
July 24, 1953.

Action was brought for declaratory judgment and accounting. The Superior Court of Los Angeles County entered judgment adverse to certain of the defendants, and they appealed. The District Court of Appeal, Fox, J., held that evidence sustained declaration that under contract between parties plaintiff, as consideration for disposition of his interest in partnership venture, was entitled to royalty of one cent per pound on all resin products having as their principal ingredients a combination of phenol and formaldehyde.

Judgment affirmed in part and reversed in part with directions.

1. Declaratory Judgment 🔑347

In action for declaratory judgment and accounting, evidence sustained declaration that, under contract between parties, plaintiff, as consideration for disposition of his interest in partnership venture, was entitled to royalty of one cent per pound on all resin products having as their principal ingredients a combination of phenol and formaldehyde.

2. Contracts 🔑170(1)

Where conduct of parties after consummation of contract indicated that parties were of opinion that plaintiff was entitled to royalty of one cent per pound on all resin products having as their principal ingredients a combination of phenol and formaldehyde, such conduct supported finding that plaintiff was entitled to such royalty. Code Civ.Proc. § 1860.

3. Evidence 🔑589

Trial court was not required to accept explanation of defendant as to conduct of parties, in view of defendant's obvious interest in outcome of action.

4. Corporations 🔑1

Where individual completely dominated and controlled corporation, and individual and his wife, and on occasions an employee, composed trustees of corporation, and corporation had become owner of individual's property without payment of any consideration, and individual failed to pay money owing by him, on ground that he had no money, there were present all elements necessary to justify piercing the corporate veil of the corporation and establishing the alter ego relationship.

5. Corporations 🔑1

Where both individual and corporation were made parties defendant to action and were represented by same counsel, and it developed that individual had transferred property to corporation without receiving any consideration, and that he completely dominated and controlled the corporation, and that individual could not pay amount owing to plaintiff, it was not error to admit evidence showing that corporation was the alter ego of individual, though no direct issue to that effect had been raised by the pleadings.

◆

Houston A. Snidow, Azusa, for appellants.

Betts, Ely & Loomis, Los Angeles, for respondent.

FOX, Justice.

This is an action for declaratory relief and an accounting. The court declared the rights of the parties and entered judgment in favor of plaintiff for $30,625. Defendants Albert Nobell and Nobell Research Foundation appeal.

In 1938 defendant Nobell was interested in developing resinous products in which phenol and formaldehyde are the principal ingredients. Plaintiff became associated in the business and sales side of the venture. He contributed considerable time and some money. A Mr. York, however, provided the principal financing. The three parties became copartners in the venture. The business was operated under the name of "Synthetic Resins Company." Through a contact made by plaintiff the concern entered into a contract with the Baker Oil Tool Company for a substantial cash payment and a royalty of one cent per pound to each of the partners on all resinous products used by the Oil Tool Company—the latter company actually producing the resins it required for its own purposes. This contract was later cancelled by the Baker Company. In the meantime, however, the York interest in this enterprise was purchased by George Pepperdine, who subsequently transferred it to the George Pepperdine Foundation. (The judgment herein is also against the Pepperdine Foundation but it has not appealed.) Sometime after the beginning of World War II this venture became inactive and had no income other than that received from the Baker Oil Tool Company. Prior to this time, however, plaintiff had gone to Central America with the United States Engineering Department. While there Nobell wrote him that the resin business was again to be an active enterprise and expressed his interest in plaintiff's taking over the business department upon his return so that he could devote his time to production and the improvement of the product, in which fields he had deepest interest and greatest ability. Plaintiff returned to this country in July, 1943, and, at the solicitation of Nobell, resumed his activity in the resin business. There was no suggestion that there should be any change in plaintiff's interest in the venture. This relation continued until early January, 1944. In the meantime Nobell had caused the Nobell Research Foundation, a nonprofit corporation, to be formed with three trustees, consisting of himself, his wife, and an employee. Nobell transferred to the Foundation his interest in the formulas and process for the manufacture of the resin products. On January 10th a lease and license agreement was entered into between the two Foundations as lessors and Nobell as lessee for the manufacture and sale by the latter of "Phenocast," the trade name under which the resin products were then being marketed. It was recited in the agreement that each of the lessors owned an undivided one-half interest in the trade name "Phenocast" and in the process, including certain improvements, by which it was produced. Nobell, who was then operating under the fictitious name of Nobell Resins Company, acquired the right to use the formula, improvements and name in the manufacturing and sale of the product. Plaintiff was not a party to this agreement. It recited, however, that the rights of the lessors "are subject to a prior right of Paul R. Wilson * * to receive a royalty payment of one cent (1¢) per pound on all Phenocast manufactured and sold." The agreement was presented to plaintiff by Nobell for his approval. He made two suggested changes. The first of these was to add after his name in the quoted portion, above, the following, "& his heirs, executors and assigns." The second was to insert after the name "Phenocast" the words "or similar liquid resins." Both Nobell and Pepperdine agreed to these additions. Plaintiff assented to the agreement as thus revised though he did not sign the document in the space provided for such approval, giving as his reason that he did not deem it necessary. Plaintiff continued with the organization until the spring of 1945. In the meantime his work had been reduced to the point where a clerk could handle it. He thereupon advised Nobell that he would secure other employment. For some months after leaving the organization plaintiff received statements of the amount of business that was done. In September, 1946, he was advised that he would no longer receive "copies of all invoices" but only "a statement covering all *cast* resins sold during the preceding month." (Italics added.) Plaintiff, however, demanded an accounting and a royalty on all resin products.

Defendants make three basic contentions: (1) Plaintiff has no contractual rights which he can enforce; (2) the court erred in declaring that plaintiff was entitled to a royalty of one cent per pound on all resin products manufactured and sold by defendants and which have for their principal base the combination of phenol and formaldehyde; and (3) there is no sufficient foundation for the court's determination that the Nobell Research Foundation is the *alter ego* of defendant Albert Nobell. None of these contentions is well founded.

It is unmistakably clear that plaintiff had an interest in this venture when the contract with Baker Oil Tool Company was made. When he returned from Central America, and at the suggestion of Nobell resumed his work in the business on a salary basis rather than return to his position with a former employer, there was no suggestion that he no longer had an interest in it. He had not disposed of his interest, and logically concluded that he still owned it. Nobell and Pepperdine and their respective Foundations considered that plaintiff had an interest in the enterprise. The recital in their agreement of January 10, 1944, and their additions thereto by interlineation, justify such an inference. The net result then of the transaction between all these parties was that plaintiff disposed of his interest in this venture to the defendants for a royalty on its products. This conclusion finds evidentiary support in the agreement of January 10th and in the fact and manner of its amplification. Thus all the elements of a valid contract are present, and the agreement of January 10th furnishes a clear and definite acknowledgment of plaintiff's right to royalty payments. The prior right of plaintiff to one cent a pound royalty payment was acknowledged by Nobell on the witness stand; also, that royalty payments were due plaintiff under the agreement.

Defendants seem to think that plaintiff is asserting his rights as a third party beneficiary under the contract of January 10th. They then argue that he does not come within that principle. Defendants are in error in their initial premise. Plaintiff does not seek to recover upon that theory. The principal value of that agreement is evidentiary. This is made clear by the court's finding that plaintiff, in acting upon the proposal of the agreement of January 10th, accepted the offer by defendants to pay him one cent per pound on all resins in exchange for his interest in the venture.

[1] There is ample evidentiary support for the trial court's declaration that plaintiff is entitled to a royalty of one cent per pound on all resin products manufactured by defendants which have as their principal ingredients a combination of phenol and formaldehyde. Since Phenocast was simply a trade name under which the resin products were sold, it was recognized that it might be changed. Improvements in the process for manufacturing Phenocast were recited in the agreement of January 10, 1944. Laboratory experiments were being made looking to further improvement of the process. It appears to have been the purpose of the parties to protect plaintiff's interest not alone in the trade name Phenocast but to recognize his interest in the product whether sold under that or some other name, and whether produced by that precise formula or process or as a result of some variation or improvement thereof, so long as it had the same base and was similar to Phenocast. Hence the insertion in the contract of January 10th of the words "or similar liquid resins" after the name Phenocast. The court's interpretation of this language finds support in even Mr. Nobell's testimony. He stated: "Our principal product today is a solution consisting of principally phenol alcohols and Phenocast *or similar liquid resins to Phenocast*." (Italics added.) Plaintiff's discussion with Nobell was that he could not go on there unless his royalty "covered every product that was made of phenolic formaldehyde nature." Plaintiff understood his "one cent a pound would come from all of the phenol-formaldehyde products manufactured and sold by the Nobell Resins Company, Albert Nobell, or the Nobell Research Foundation." It is clear that phenol and formaldehyde are the principal ingredients in the resins defendants produce, and that in the process of their manufacture the mixture is a liquid. However, through further

refinements, a semi-solid substance is produced which can be used as glue, or as a coating material for wood or plaster of Paris, or for casting and other like purposes in the plastics field.

[2, 3] Further support is found for the court's declaration that plaintiff is entitled to a royalty on all resins defendants produce in the conduct of the parties after the transaction was consummated. Vogel v. Bankers Bldg. Corp., 112 Cal. App.2d 160, 166, 245 P.2d 1069. Plaintiff did not sever his connections with the resin enterprise until more than a year after the agreement of January 10, 1944. For some months thereafter plaintiff received copies of invoices of all resins sold from which he could readily compute his royalty. It was not until September, 1946, that he was advised that such invoices would no longer be sent to him but only a "statement covering all *cast* resins sold during the preceding month" since he only had an interest in this specific item. (Italics added.) The explanation was offered that the invoices had been sent through error. The court, however, was not required to accept this explanation in view of Nobell's obvious interest in reducing plaintiff's royalty. Bloyd v. Senn, 100 Cal.App.2d 597, 600–601, 224 P.2d 117.

There is no basis for Nobell's claim that plaintiff's royalty was limited to casting resins. If there had been such a purpose it would have been natural so to state in the agreement of January 10th. But no such restriction is there found. This is indeed significant. On the contrary, plaintiff's right to a royalty on Phenocast is expanded by interlineation to include other "similar liquid resins." It is also clear from the agreement and from Nobell's testimony that plaintiff's royalty covered improvements in the formula and manufacturing process. The fact that Nobell did not even mention such a limitation on plaintiff's royalty until long after the contract was executed, and sent plaintiff invoices of all sales for some time after he ceased working for the enterprise, serve to negative the good faith of Nobell's claim. Obviously, for justifiable reasons, the trial court was not impressed.

In this connection Nobell makes the point that parol evidence of the intention of the parties to the agreement should have been admitted. He points out in particular that "one of the issues to be determined by the trial court was the meaning of the term 'similar liquid resins.'" The simple answer to this proposition is that Nobell was given an opportunity to explain what he meant by that phrase. While he was on the stand the following transpired:

Q. (By Mr. Schwartz, Counsel for Defendants.) "* * * When you used the phrase 'Phenocast or similar liquid resins' what did you mean by that phrase as a whole? 'Phenocast or similar liquid resins.'"

Mr. Betts: "I submit that invades the province of this court."

The Court: "I am going to let him answer the question. Answer it, please."

Nobell's answer followed. It may be added that an abundance of extrinsic evidence was also offered by both sides. It covered the negotiations, circumstances surrounding this transaction, the situation and relation of the parties, and the purpose and object of the contract. The court was thus placed, as nearly as possible, in the position of the parties. See Code of Civ. Proc. § 1860.

While it was proper for the court to order an accounting in order to determine the amount of royalty due plaintiff, there is no basis for including therein the period from July 1, 1943, to January 10, 1944. Plaintiff's royalty did not come into existence until about the time of the execution of the agreement on the latter date by the defendants. There is no support for the claim that plaintiff disposed of his interest in this venture as of the date of his return to its employ on July 1, 1943, or that his right to royalty payments began as of that time.

[4] There is ample support and justification for the finding that Nobell Research Foundation is the *alter ego* of defendant Nobell. He and his wife, and upon occasions an employee, composed the trustees. He completely dominated and controlled the Foundation. Without, so far

as the records reveal, paying any consideration therefor, it became the owner of Nobell's interest in the laboratory equipment and the formula and process for the manufacture of resins and was designated as a "lessor" along with the Pepperdine Foundation in the contract of January 10th. Nobell thus used his Foundation as a business agency or instrumentality in his operations. Nobell admitted he owed plaintiff royalty payments on coating resins but had made no payment thereon. His explanation was: "I am just broke, that is all. I have no money." Yet from time to time he turned over funds to the Foundation and caused concerns with which he dealt to make payments to the Foundation rather than to himself. But he still had the control and disposition of these funds. It is thus apparent that the Research Foundation was being used by Nobell to conceal his assets, and that if the Foundation's separate corporate existence was to continue to be recognized a fraud or injustice would be perpetrated on plaintiff. There was therefore present all the elements necessary to justify piercing the corporate veil of the Foundation and establishing the *alter ego* relationship. Thomson v. L. C. Roney & Co., 112 Cal.App.2d 420, 430, 246 P.2d 1017; Gordon v. Aztec Brewing Co., 33 Cal.2d 514, 522–523, 203 P.2d 522; Mirabito v. San Francisco Dairy Co., 1 Cal.2d 400, 406, 35 P.2d 513 and 8 Cal.App.2d 54, 59, 47 P.2d 530.

[5] Although there was no direct issue raised by the pleadings that the Nobell Research Foundation was the *alter ego* of Albert Nobell it was not prejudicial under the circumstances to admit evidence on that question. Both Nobell and the Foundation were parties to the action and represented by the same counsel. Nobell was a principal witness and in possession of all the facts relative to the creation of the Foundation and its relation to him. When it developed that Nobell was indebted to plaintiff; that he was "broke" and that he had turned funds and contracts over to the Foundation it became important and proper to inquire into the relationship between Nobell and the Foundation so that the corporation might not be used by him to commit either a fraud or an injustice. Gordon v. Aztec Brewing Co. supra, 33 Cal.2d at page 520, 203 P.2d 522; Associated Oil Co. v. Seiberling Rubber Co., 172 Wash. 204, 19 P.2d 940; Thomson v. L. C. Roney & Co., supra; Mirabito v. San Francisco Dairy Co., supra.

There is not sufficient substance to other questions raised by defendants to justify their discussion.

The judgment is affirmed insofar as it declares the rights of the parties; the money portion, however, of the judgment is reversed with directions to ascertain the amount of royalty included therein from July 1, 1943, to January 10, 1944, and to deduct such amount therefrom, and to enter a new judgment for the difference.

Each party will bear his own costs on appeal.

MOORE, P. J., and McCOMB, J., concur.

119 Cal.App.2d 632

PEOPLE v. TURLEY.

Cr. 2349.

District Court of Appeal,
Third District, California.
Aug. 10, 1953.

Rehearing Denied Aug. 20, 1953.

Hearing Denied Sept. 4, 1953.

Accused was convicted of filing false claim of fire loss. The Superior Court, Sacramento County, Grover W. Bedeau, J., suspended pronouncement of judgment and sentence and defendant appealed. The District Court of Appeal, Peek, J., held that the evidence was sufficient to show that the accused filed the false claim of loss with guilty intent.

Affirmed.

1. Insurance ⚷31

In prosecution for crime of filing false claim of fire loss, evidence was sufficient to sustain finding that furniture listed on the itemized statement of loss filed by defendant with insurer was not present on the premises at the time of the fire. Insurance Code, § 556.

2. Criminal Law ⚿37

"Entrapment" is the conception and planning of an offense by an officer and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer.

See publication Words and Phrases, for other judicial constructions and definitions of "Entrapment".

3. Criminal Law ⚿37

Accused who filed false claim of loss of certain articles of furniture as result of fire was not entrapped by encouragement and extension of time granted him for filing proof of loss by soliciting agent and insurance adjusters. Insurance Code, § 556.

4. Criminal Law ⚿338(2)

Intent to commit a crime may be proved by proof of surrounding circumstances.

5. Insurance ⚿31

Evidence on issue of whether defendant, when submitting inventory of fire loss to insurer, knew that items appearing on inventory were not on premises at time that fire occurred and had guilty intent was sufficient to sustain conviction for filing false claim of loss. Insurance Code, § 556.

6. Insurance ⚿31

In prosecution based on statute making it unlawful to present false claim for payment of loss under insurance contract, the basis of the offense alleged is accused's intent to defraud which intent does not depend solely upon the legal obligation arising out of the insurance contract. Pen.Code, § 950; Insurance Code, § 556.

7. Indictment and Information ⚿71

An information alleging filing of false claim of loss for certain articles of furniture as result of fire, setting forth the date of the offense and describing and identifying with reasonable particularity the writing which had been subscribed and submitted, sufficiently advised the accused of the precise charge he had to meet. Pen.Code, § 950; Insurance Code, § 556.

C. Huntington Jacobs, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen. and Gail A. Strader, Deputy Atty. Gen., for respondent.

PEEK, Justice.

Following a jury trial defendant was found guilty of the crime of filing a false claim of loss of certain articles of furniture as the result of a fire at the premises rented by him. Throughout the three trials which were had the defendant acted as his own counsel. The first two trials resulted in hung juries, the third resulted in a verdict of guilty. Thereafter defendant obtained the services of counsel who moved for a new trial and arrest of judgment, which motions were denied. The matter was then referred to the probation officer, and upon the return of his report the court suspended the pronouncement of judgment and sentence and granted defendant probation.

[1] His first contention on appeal is that the evidence fails to prove the commission of the offense because the acts forming the basis of the charge were done, he says, at the instigation and consent of the insurer in that he was encouraged to present a proof of loss under his insurance contract. In support of such contention he alludes to the extension of time granted to him for filing proof of loss and the encouragement from the soliciting agent and from the adjusters.

It appears wholly unnecessary to summarize the voluminous transcript or the numerous references to portions of the transcript set forth in defendant's 200 page opening brief. Suffice it to say that we have read the entire record but we find no evidence to support such contention. The fraud in this instance consists of the preparation and presentation of an itemized statement of furniture, People v. Engelhart, 78 Cal.App.2d 6, 7, 176 P.2d 789, which competent evidence showed was not present on the premises at the time of the fire. Also there was absolutely no evidence to indicate that the insurer or any of its agents suggested or encouraged the defendant either to include in his inventory any item which was not on the premises or to place excessive valuation on the individual items shown in that inventory.

[2, 3] His second contention is predicated upon the same evidence from which he next concludes that he was unlawfully entrapped. As stated in People v. Lindsey, 91 Cal.App.2d 914, 915, 205 P.2d 1114, 1115, "Entrapment is the conception and planning of an offense by an officer and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer." Defendant has failed to point to one bit of evidence showing that the idea of including non-existent items in his proof of loss originated with an officer or with any one other than himself. Obviously in the absence of such a showing his contention in this regard is wholly devoid of merit.

[4, 5] His third contention is likewise predicated upon the same evidence, it being his argument in this regard that such evidence was insufficient to show that the proof of loss was fraudulently or deceitfully presented by him since it does not show directly that he in fact knew that the items of furniture in question were not present on the premises at the time of the fire. It is well established that intent may be proven by proof of the surrounding circumstances. People v. Ross, 105 Cal.App.2d 235, 233 P.2d 68. Therefore since the element of intent may be so proved this phase of the case is controlled by the rule enunciated in People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 779, wherein the court stated:

> "'* * * it is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground' of insufficiency of the evidence, 'it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. * * *' If the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury." See also People v. Engelhart, 78 Cal.2d 6, 9, 176 P.2d 789.

Here there is positive evidence that no remains of certain items listed by defendant were found. In fact nearly all of the items so appearing on his inventory were not on the premises when the fire occurred.

[6] His fourth contention is that the evidence was insufficient for the reason that it did not show the existence of a valid contract of insurance under which the claim of insurance was filed. Under the uncontradicted facts as shown by the record it is difficult to see how defendant can seriously make such contention. He does not deny that on October 10, 1950 he paid the premium on a policy of fire insurance, that he received the policy from the Providence Washington Insurance Company and that the proof of loss which he filed was addressed to that insurance company and specifically referred to the number of his policy. Furthermore it was not incumbent upon the prosecution to prove with exact legal nicety the obligation upon the part of the insurer. The basis of the offense alleged is the defendant's intent to defraud which intent obviously does not depend solely upon the legal obligation, if any, arising out of the insurance contract. People v. Grossman, 28 Cal.App.2d 193, 82 P.2d 76.

[7] Lastly the defendant contends that the information failed to charge a crime in the manner required by the constitutional guarantees of due process. He contends that the information fails to allege the existence of the insurer as a corporate entity having the capacity to contract and that the information also failed to allege that a contract of insurance existed at the time he submitted the proof of loss. However, he does not indicate how he was misled by the language of the information nor does he contend that he was unable to determine therefrom the nature of the offense with which he was charged.

The information specified the charge against him in substantially the wording of section 556 of the Insurance Code, alleged a violation of that section, set forth the date of the offense, and described and identified with reasonable particularity the writing which he had subscribed and submitted, so that he was fully advised of the precise charge he had to meet. It is therefore apparent that the information met all of the requirements of Penal Code section 950.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

---

119 Cal.App.2d 152

LEHMANN v. DALIS.

No. 15485.

District Court of Appeal, First District, Division 1, California.

July 13, 1953.

Proceeding by duly licensed civil engineer for work, labor, and services performed, at defendant's request and as civil engineer, in forming and drawing plans and sketches for erection of bowling alley. The Superior Court in and for the County of San Mateo, A. R. Cotton, J., entered judgment for engineer, and defendant appealed. The District Court of Appeal, Wood, J., held that registered civil engineer was entitled to render and be paid for his services in forming and drawing, at defendant's request, plans and sketches for erection of bowling alley building.

Judgment affirmed.

1. Licenses 🔑39.40

Registered civil engineer was entitled to render and be paid for his services in forming and drawing, at defendant's request, plans and sketches for erection of bowling alley building. Business and Professions Code, §§ 5500–5604, 6731.

2. Licenses 🔑39.40

To extent that architectural services and civil engineering services overlap, they may be rendered either by licensed architect or by registered civil engineer. Business and Professions Code, §§ 5500–5604, 6731, 6733.

3. Licenses 🔑39.40

Fact that architectural practice act expressly mentions and recognizes classification of structural engineer does not mean that registered civil engineer, who is not authorized to use such title, cannot lawfully perform any service that an architect is licensed to perform. Business and Professions Code, §§ 5501, 5537, 6736; Education Code, § 18199.

◆

Wm. L. Mattenberger, Los Gatos, Donald B. Richardson, San Jose, for appellant.

Currie, Lebsack & Hannig, Redwood City, for respondent.

FRED B. WOOD, Justice.

Defendant Dalis appeals from a judgment for $1200 based upon findings that plaintiff is a duly licensed civil engineer and that defendant became indebted in the sum of $1200 for work, labor and services as civil engineer in forming and drawing plans and sketches for the erection of a bowling alley building, performed and furnished by plaintiff at defendant's request.

The sole defense, upon this appeal, is that these were architectural services and plaintiff, not a licensed architect or structural engineer, did not inform defendant in writing, prior to accepting this employment, that plaintiff was not a licensed architect. Section 5537 of B. & P. Code permits an unlicensed person to furnish to another "plans, drawings, specifications, instruments of service, or other data for buildings, if, prior to accepting employment or commencing work," he "fully informs such other person * * *, in writing, that he * * * is not an architect."

[1] Plaintiff does not claim that he gave any such notice. He predicates his right to render this type of service, and be paid for it, upon his status as a registered civil engineer. This claim of his is well founded: "Civil engineering embraces the following *studies or activities in connection with* fixed

works for irrigation, * * *, foundations, *framed and homogeneous structures, buildings* or bridges:

"(a) The economics of, *the use and design of, materials of construction* and the determination of their physical qualities. * * * (e) *The preparation and/or submission of designs, plans and specifications and engineering reports.*" (B. & P. C., § 6731, definitive of what a civil engineer is licensed to do; emphasis added.) This definition is not narrowed or cut down by the sentence which immediately follows the portion we have quoted.

Defendant contends that because the Civil Engineers' Act expressly exempts architects (§ 6733 of the code) and the Architectural Practice Act (B. & P. C., §§ 5500–5604) does not expressly exempt civil engineers, the Legislature intended not to permit a civil engineer to perform any architectural service without an architect's license unless he gives written notice that he is not an architect.

[2] We derive no such legislative intent from those statutes. It is a simple case of requiring an architect's license or the indicated written notice when architectural services are rendered and of requiring a civil engineer's certificate if civil engineering services are rendered. To the extent that architectural services and civil engineering services overlap, they may be rendered either by a licensed architect or by a registered civil engineer. The fact that the Civil Engineers' Act expressly exempts the licensed architect "insofar as he practices architecture" and the Architectural Practice Act does not expressly exempt the registered civil engineer insofar as he practices civil engineering, is of no significance in ascertaining the nature and scope of the work which the former authorizes a registered civil engineer to perform and the latter authorizes a licensed architect to do.

[3] Of similar import is defendant's argument predicated upon the express mention and recognition of "structural engineer" in the Architectural Practice Act. §§ 5501 and 5537 of the B. & P. Code. This means, says defendant, that a registered civil engineer who is not authorized to use the title of "structural engineer" can not lawfully perform any service that an architect is licensed to perform. Here again defendant ignores the authority which the Civil Engineering Act confers upon a registered civil engineer, including as it does some services of an architectural nature. We are not here concerned with the mere right of a registered civil engineer to use the title "structural engineer." (See § 6736, formerly § 6735, B. & P. Code.) Nor are we concerned with school buildings, plans and specifications for some types of which may be performed only by a structural engineer or a licensed architect. Education Code, § 18199.

Indeed, it would appear from the evidence herein that the plans here involved were in the nature of preliminary sketches, the preparation of which need not necessarily partake of the nature of architectural services. See Joseph v. Drew, 36 Cal.2d 575, 225 P.2d 504; Ballard Corp. v. Dougherty, 106 Cal.App.2d 35, 42, 234 P.2d 745.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

---

119 Cal.App.2d 523

HARDY v. SAN FERNANDO VALLEY CHAMBER OF COMMERCE et al.

Civ. 19372.

District Court of Appeal, Second District,
Division 3, California.
Aug. 5, 1953.

Action by attorney to recover fee due him under an alleged oral agreement with defendants. The Superior Court, Los Angeles County, Otto J. Emme, J., entered judgment for plaintiff and denied defendants' motion for new trial and defendants appealed. The District Court of Appeal, Parker Wood, J., held that evidence warranted finding that there was an oral agreement for payment of fee directly to plaintiff, and not to him through attorney who had originally been retained by defendants, and who had relinquished handling of case to plaintiff.

Judgment affirmed; appeal from order dismissed.

1. Attorney and Client ⚷166(5)

In action by attorney to recover fee due him under an alleged oral agreement, wherein it appeared that defendants had originally retained another attorney and that plaintiff's attorney had assumed the handling of the case after discussions with attorney and allegedly with defendants evidence sustained finding that a contract had existed between plaintiff and defendants by which defendants were to pay plaintiff's fee directly to him, and not to the other attorney for ultimate payment by him to plaintiff.

2. Estoppel ⚷92(1)

Where defendants from whom plaintiff sought to recover an attorney's fee due him under an alleged oral agreement, had originally retained another attorney, and plaintiff has assumed handling of case after discussion with attorney and defendants, and had obtained judgment in favor of defendant, and plaintiff introduced evidence tending to show that a substitution of attornies was made but not filed, defendants who had accepted the benefits of judgment obtained by plaintiff, were not in the position to rely on failure of other attorney to file the substitution.

3. Estoppel ⚷118

In action by attorney to recover fee due him under alleged oral agreement, wherein it appeared that defendants had originally retained another attorney and that plaintiff had assumed handling of case after discussions with the attorney and allegedly with defendants, record, on defense of estoppel, did not warrant conclusion that plaintiff attorney had relied upon other attorney for payment.

◆

George M. Pierson, Los Angeles, for appellants.

Lester E. Hardy, pro. per. and Jennings & Belcher, Los Angeles, for respondent.

PARKER WOOD, Justice.

Action to recover attorney's fees allegedly due under an oral agreement between plaintiff and defendants. Judgment was for plaintiff in the sum of $2,533.25. Defendants appeal from the order denying their motion for a new trial, and from the judgment.

Appellants contend that plaintiff failed to establish the existence of an express contract between plaintiff and defendants providing for the payment to plaintiff of any sum whatever.

It appears that the San Fernando Valley Chamber of Commerce, a corporation and a defendant herein, was not a chamber of commerce in the ordinary acceptation of those words but it was operated as a private enterprise or business and it owned several parcels of real property. Dr. Canfield was president, and Mr. Courtney was secretary, of the purported chamber of commerce. On January 2, 1947, Mr. and Mrs. Courtney owned certain real property. On said date the chamber of commerce agreed in writing to sell said real property (then owned by the Courtneys) to Dr. and Mrs. Canfield for $6,000; and the Canfields agreed in writing to buy the property for said sum. The sale was subject to restrictions, including one that the property was to be used exclusively for a community health service. The agreement was signed on behalf of the chamber of commerce by Dr. Canfield, as president, and by Mr. Courtney, as secretary. On March 24, 1947, the Courtneys conveyed the property to the chamber of commerce. On August 1, 1947, the Canfields filed an action for specific performance of the agreement of January 2d, and named as defendants the San Fernando Valley Chamber of Commerce, Mr. and Mrs. Courtney, Fred C. Stillwell and Kenneth Gage. The Courtneys employed Fred C. Stillwell, who was then an attorney-at-law, to represent them in that action. He was employed on a contingent fee basis—that if the defendants prevailed in the action, they would thereafter sell the property, and Stillwell would receive 50 per cent of the profit realized from such resale. He filed an answer on behalf of all defendants. Thereafter, in September or

October, 1947, he asked Mr. Hardy, an attorney-at-law and plaintiff herein, if he would represent the defendants in said action, and Mr. Hardy stated that he would do so for a fee of 25 per cent of the profit realized from a resale of the property. After October, 1947, plaintiff conducted the defense in said action. (Stillwell's license to practice law was suspended from September 15, 1948 to December 15, 1948.) The action was tried on October 4, 1948, and judgment was in favor of defendants—that is, specific performance was denied. Thereafter, the property was resold for $15,000.

Plaintiff testified that in his first talk with Stillwell regarding the case Stillwell said that he could not handle the case himself, and if plaintiff would take the case he would pay plaintiff one-half the amount Stillwell would receive under his contingent fee agreement; plaintiff stated that he would handle the case but he wanted it understood that the property would be placed on the market at the earliest opportunity and sold, and that his fee would be paid out of escrow and would be 25 per cent of the profit on the resale of the property over the amount due from Dr. Canfield on the purchase price; the amount due at that time was $4,867; plaintiff told Stillwell to talk the matter over with Mr. Courtney and, if he agreed, plaintiff would represent the defendants; plaintiff asked Stillwell if he had anything in writing about the fee, and Stillwell replied that he had or that it would be forthcoming. Plaintiff testified further that during their next discussion, in October, 1947, Stillwell told him that he had discussed the matter with Courtney and he had "agreed to it"; plaintiff asked Stillwell to bring the Courtneys to plaintiff's home; his reason for making the request was that he wanted personal assurance from the Courtneys that he would be paid by them out of escrow, because he did not want to take Stillwell's word for it; thereafter, in October, 1947, Stillwell and the Courtneys came to his home; plaintiff discussed the details of the case with Mr. Courtney, and then told him that he could not accept the case on the basis of being paid by Stillwell because Stillwell had too many creditors; plaintiff said, "Now, if I go into this thing, I will take it over, but my fee must be paid out of the profits out of escrow, and the property must be put in escrow as soon as it can be done after the trial, if we win it"; he told Courtney that they would have to remove the restrictions and then sell the property; Mr. Courtney said that if they won the suit this would be done, and that plaintiff's fee of 25 per cent would be paid out of the profit resulting from the sale of the property; on October 16, 1947, a substitution of attorneys, substituting plaintiff and Stillwell as counsel for the chamber of commerce and the Courtneys, was signed by Courtney; a copy was sent to the Canfields' attorneys, and plaintiff gave the original document to Stillwell to file, but it was not filed; thereafter, plaintiff commenced preparations for the trial of the Canfield action, and he did not see the Courtneys again until a year later in September, 1948; on September 15, 1948, Stillwell showed plaintiff a document,[1] dated September 15, 1948 (which was signed by the Courtneys, purportedly on behalf of the chamber of commerce, and which recited that it was to confirm the verbal understanding "as to consideration" for Stillwell's services as attorney); after reading said document, plaintiff suggested that Stillwell draw an agreement with the chamber of commerce whereby the board of directors would also authorize Stillwell to appear as counsel. He testified further that he (plaintiff) had an agreement with Stillwell and the Courtneys, but the agreement "was solely Mr. Stillwell's word"; that in order to make sure that the Courtneys understood what was being done, plaintiff insisted that they come to his home—that he wanted them to come "so that there would be an agreement about my fee."

---

[1] "Sept. 15, 1948.

"Mr. Fred C. Stillwell,
2600 Ramona Blvd.,
Los Angeles.

"Dear Sir:

"This is to confirm our verbal understanding as to consideration for your services as attorney in obtaining repossession of the property sold under contract to Dr. Canfield at Reseda.

"It is understood that you will pay all expenses of the suit and may obtain associate counsel at your own expense.

"In return for said services and expense we agree that in the event you are successful in obtaining return of the said property that we will place the property up for sale and will give you one half of all monies received from the sale above the amount we would have received from Dr. Canfield if he had consummated the contract of sale he had with us.

"We further agree that the property may not be sold for less than Twelve Thousand Dollars unless all parties agree that that amount cannot be obtained.

"San Fernando Valley Chamber of Commerce
By: Bill Courtney, Secretary
By: Olive Courtney.

"Accepted
Fred C. Stillwell."

On September 28, 1948, the Courtneys and Stillwell came to plaintiff's home. Stillwell arrived first and typed two documents. One of those documents was a resolution by the board of directors of the chamber of commerce authorizing Stillwell to handle its interest in the action, and to obtain such legal assistance as may be required; further providing that his compensation shall be one-half the sale price of the property less the amount payable by Dr. Canfield; and further providing that "upon termination of the action" said board of directors would convey the property to the Courtneys. That resolution was signed at plaintiff's home by Stillwell, as president, and Mr. Courtney, as secretary. The other document was an agreement between Stillwell and the Courtneys, which provided that, in consideration of the agreement of Stillwell to handle all legal matters in connection with the action, the Courtneys agreed, upon receiving title to the property involved, to sign the papers necessary to remove the restrictions of record, to sell the property, upon Stillwell's request, for not less than $12,000, and that Stillwell be paid his fee out of escrow. The Courtneys signed that document at plaintiff's home at the request of Stillwell.

Plaintiff testified further that, after said documents were signed, he said that they were not satisfactory—that it was all right for Stillwell, but they did not mention plaintiff, and he wanted it definitely understood that if he won the case the property was to be sold, that he was to get 25 per cent out of escrow, and that he was not relying on Stillwell to pay him because Stillwell had too many creditors; plaintiff then said that he would not try the case until something definite was determined about his fee,—but if it was agreeable with defendants to try the case on those terms, he would try it; Courtney said, "All right"; Stillwell said that he would abandon one-half of his fee, and he told plaintiff he had agreed to that before. Plaintiff testified further that after plaintiff was in the case there was a new agreement between Stillwell and the Courtneys—that Stillwell waived one-half of his fee, which amount was to be paid to plaintiff, and Courtney and Stillwell agreed that said money was to be paid to plaintiff out of escrow.

Mrs. Courtney testified that the first time they went to plaintiff's home, he briefed them on the Canfield case, and nothing was said about fees of plaintiff or Stillwell; the second time they went there, they signed two documents (dated September 28th), because Stillwell advised them to do so, but nothing was said on that occasion regarding attorney's fees; she never had any conversation at any time with plaintiff concerning payment of fees to him; that no amount was paid to Stillwell after they turned the case over to him in August, 1947; after they won the Canfield case, plaintiff called a number of times on the telephone wanting to know whether the property had been put up for sale, and she advised him that everything was being done that could be done.

Mr. Courtney testified that he never had any agreement with plaintiff as to payment of attorney's fees directly to him; except for the written documents, he never authorized Stillwell to employ plaintiff; after his agreement with Stillwell in the Canfield action, he did not pay him any money for attorney's fees; plaintiff kept saying that he wanted the property sold; he told plaintiff the property was on the market and there was no objection to selling the property. He testified further that the fee was to go to Stillwell, and that was the intention of all concerned, until it was discovered that Stillwell was not a licensed attorney; right after Stillwell employed plaintiff, he advised them that half of his fee was to go to plaintiff and half to him; they replied that was up to him, according to the agreement.

During the taking of Stillwell's deposition, plaintiff and the attorney for defendants stipulated that a substitution of attorneys was signed on August 15, 1948. Stillwell testified in his deposition that before plaintiff went into the case, plaintiff said that he would not depend on getting his fee through Stillwell because there were too many judgments against him (Stillwell); at a later date, plaintiff told him that he would not have anything to do with the case unless he got his money direct from the Courtneys; he (Stillwell) repeated that to the Courtneys and they said it was all right with them; at plaintiff's home on September 28th, it was said that plaintiff would have to have "one-quarter on it [compensation] direct from them," and that he had nothing to do with the paper—and the Courtneys would put the property up for sale and the money would be paid from the sale of the property.

The court found, in part, that plaintiff "accepted such employment as attorney upon an agreement entered into by the Plaintiff and Defendants, and each of them, providing that if the Defendants prevailed in said action Defendants would immediately remove certain restrictions of record upon the property involved in said action and would place the property on sale with real estate agents immediately after the trial and would pay to Plaintiff on account of plaintiff's fee therein from escrow upon such sale 25% of the amount realized from the sale thereof over and above the amount due the Courtneys from the Canfields in the event the Canfields had prevailed in said action, which amount was $4867.00."

[1] Appellants contend in effect, as above indicated, that the evidence was insufficient to prove a contract between plaintiff and defendants. They argue that the agreement to pay attorney's fees was with Stillwell, that there was no agreement to pay a fee directly to plaintiff, and that the matter of a separate agreement with plaintiff to pay a fee to him did not arise until plaintiff discovered (after the present action was commenced) that Stillwell's license as an attorney had been suspended. They argue further in effect that it is not reasonable to believe that plaintiff would be insisting that Stillwell have a written contract with the Courtneys as to Stillwell's fee, and at the same time the plaintiff would make an oral contract with them as to his fee. Whether there was an oral agreement between plaintiff and defendants was a question of fact for the determination of the trial court. The finding, above quoted, that there was such an agreement is supported by the evidence.

[2] Appellants contend further that there was no legal substitution of attorneys, and that Stillwell was the only attorney of record. It was alleged in the complaint herein that on October 16, 1947, the Courtneys signed a substitution of attorneys, substituting Stillwell and plaintiff as attorneys of record. The answer expressly admitted said allegation. There was evidence on behalf of plaintiff that the substitution was made but not filed. There was no evidence on behalf of defendants that it was not made. The counsel for defendants had stipulated, however, during the taking of Stillwell's deposition that there was a substitution of attorneys signed on August 15, 1948. At the trial, counsel for defendants referred to the file in the action and stated that there was no record of any substitution of attorneys. Upon his request, he was then permitted to amend his answer to deny the allegation that the Courtneys had signed a substitution of attorneys. Plaintiff appeared at the trial as attorney for defendants, and conducted the trial on their behalf and in their presence. He obtained a judgment in their favor and they accepted the benefits thereof. Under the circumstances, it is to be assumed that he was acting as their counsel with their consent, and therefore they are not in a position to rely on Stillwell's failure to file the substitution.

[3] Appellants also contend that plaintiff is estopped to set up the oral agreement as a basis for this action. Their argument

in support of this contention is to the effect that plaintiff relied upon Stillwell's written contract until he discovered, after this action was filed, that a recovery could not be had thereunder because Stillwell was not a licensed attorney. This contention is not sustainable. The court did not find that plaintiff relied upon Stillwell's oral agreement but did find that there was an oral agreement between plaintiff and defendants.

The judgment is affirmed, and the appeal from the order denying the motion for a new trial is dismissed.

SHINN, P. J., and VALLÉE, J., concur.

HALL v. HALL.*

Civ. 19288.

District Court of Appeal, Second District
Division 3, California.
Aug. 3, 1953.

Rehearing Denied Sept. 1, 1953.
Hearing Granted Oct. 1, 1953.

Wife's action for divorce wherein the Superior Court of Los Angeles County, J. T. B. Warne, Judge Assigned, made determinations deemed adverse by the husband, and he appealed. The District Court of Appeal, Shinn, P. J., held that the alimony award was excessive.

Modified and affirmed.

1. Divorce ⚷286

On husband's appeal from alimony provisions of divorce decree, appellate court would have to take that view of evidence which tended most strongly to support implied finding that $350 per month was reasonably required for support of wife and that husband was able to pay such sum without undue hardship.

2. Divorce ⚷240(2)

Divorced wife whose youngest child was aged 16 and who was only 42 years old and in good health and capable of following some gainful employment was nevertheless not obliged to take employment, but her capacity to support herself, at least in part, would be an important fact to be considered in determining propriety of alimony award in her favor.

3. Divorce ⚷240(2)

Convenience and comfort of parties are to be considered, in proper case, in fixing alimony, but controlling considerations are reasonable necessities of wife and reasonable ability of husband to provide for those necessities. Civ.Code, § 139.

4. Divorce ⚷240(2)

Husband should not be required to suffer all hardship merely because he is one responsible for disruption of marriage. Civ.Code, § 139.

5. Divorce ⚷240(5)

Award of $350 as alimony was excessive under evidence in wife's action for divorce on ground of desertion, and would accordingly be reduced to $200 per month.

6. Divorce ⚷227(2)

Where wife's attorney had devoted 80 hours to case at trial and record showed that wife's interests had been well protected, award of $750 for trial services and $200 as a fee for services rendered to wife on husband's appeal from portions of judgment was not excessive.

◆

Sheppard, Mullin, Richter & Balthis, Los Angeles, for appellant.

Moore, Trinkaus & Binns, Los Angeles, for respondent.

SHINN, Presiding Justice.

Judgment was entered in this action awarding plaintiff a divorce on the ground of desertion, making a division of community property, awarding plaintiff for her support until the further order of the court the sum of $350 per month, requiring defendant to maintain in force certain insurance policies and directing him to pay to plaintiff's attorney $750 as attorney's fees and $25 costs, to be paid in installments of $50 per month. Defendant made a motion for a new trial which was denied. He also made a motion to vacate the judgment and to enter another and different judgment modifying the allowance for support of plaintiff. This motion was denied. Defendant has appealed from those parts of the judgment awarding plaintiff $350 per month for her support and requiring defendant to pay plaintiff's attorney's fees. He has appealed also from an order that he pay the cost of printing plaintiff's brief on the appeal, and to her attorney $200 fees on the appeal, at the rate of $50 per month. Although defendant had a cross-complaint on file seeking a divorce this was dismissed, and the evidence which he introduced related solely to the property and finances of the parties.

---

* Subsequent opinion 267 P.2d 249.

The parties were married March 1, 1930 and separated June 8, 1950; they have two unmarried daughters, Mary Ellen and Suzanne, the former then 21 years of age, the latter aged 16. Pursuant to stipulation the court made a division of all the community property. Plaintiff was awarded the family home appraised at $28,000, subject to an indebtedness of $5,000; household furniture and furnishings valued at some $3,000; one 1946 Dodge automobile; certain government oil and gas permits or leases of uncertain value; property in New Mexico of indeterminate value; 180 shares of stock of Bohemian Distributing Company worth $3,600, and a few dollars in her possession. Defendant was awarded a 1949 Studebaker car, a law and reference library (value not stated), and 180 shares of stock of Bohemian Distributing Company, pledged for an indebtedness of $3,000. United States Savings Bonds of $125 were ordered sold, the proceeds to be paid to plaintiff's attorney on account of the fees allowed. The defendant was ordered to maintain in force life insurance policies of $5,000 for the benefit of each of the daughters and to maintain for a period of three years a $5,000 policy in favor of the plaintiff. The court made no findings with respect to the income of either of the parties, as to their ownership of separate property, nor as to the amounts required to meet the necessities of the respective parties although it was found that $350 per month was a reasonable amount to be allowed plaintiff personally for her support. There was no finding as to whether plaintiff is in good health and qualified and able to obtain remunerative employment. It was found, however, that she has not maintained any vocational skill or trade and that she was at the time of trial without a vocation. It is conceded that neither of the parties owns separate estate nor has income other than the salary received by defendant as a Judge of the United States District Court. While it appeared that in the past ten years there had been income from the oil and gas holdings of $5,000 or $6,000 it was agreed that they had no present market value. Although the daughter Mary is of age, it was stipulated that defendant would pay each of the daughters $100 per month until she marries or completes her education and it is not questioned that he has been paying those amounts. In the year preceding the trial Mary earned approximately $500 and Suzanne approximately $265. The daughters live with their mother in the home, taxes upon which amount to about $600 per year. Plaintiff has received substantial sums from her mother as advances upon her inheritance but declined to state the amounts of such advances.

[1] We must take that view of the evidence which tends most strongly to support the implied findings that $350 per month is reasonably required for the support of plaintiff and that defendant is able to pay said sum without undue hardship. The briefs contain computations and arguments upon these issues which are widely at variance. Plaintiff estimated the necessary living expenses of herself and the daughters while living in the home at $736 per month. From defendant's annual salary of $15,000 he has been receiving, after deductions, $1,044.40 per month. He testified, without contradiction, that his living expenses were $410 per month, that he had been assessed additional income tax for 1951 of $471.40, the cost of which was $40 per month, and that he was under medical treatment, and would be, indefinitely, at a cost of $50 per month. He has had surgery at a cost of $100 above his Blue Cross receipts and may need further surgery. Until the income tax liability is discharged

defendant's minimum needs will amount to $500 per month; after that time they will amount to $460 per month as long as he is under medical treatment. He is required by the judgment and order to pay $100 per month for four months and thereafter $50 per month for 8½ months for attorney's fees, the amount of $750 presumably having been reduced by $125 or thereabouts through sale of the bonds. Defendant will also have an obligation to pay fees to his own attorneys and his own costs of the litigation. It should be assumed that these sums would not be less than the amounts awarded for the fees of plaintiff's attorney and for costs. In addition he has unsecured debts of $650. Defendant's income is insufficient to meet his own necessary expenses, the amount of which is not disputed, and the amounts he must pay plaintiff and the daughters, including the insurance premiums, which total $610 per month. In a year's time there would be a deficit of about $800, with nothing paid upon account of his present debts, the attorney's fees and costs of litigation. He would be in debt to the extent of some $3,000, exclusive of the secured debt, and without any assets with which to reduce the debts except the Bohemian stock which is unlisted and not readily saleable. These estimates do not take into consideration any emergency expenses. It was in evidence that defendant is occasionally required to hold court away from Los Angeles. During these times he must maintain his living quarters in Los Angeles and receives an expense allowance of $10 per day. His necessary expenses during these absences exceed his allowance at the rate of $100 per month. It is a mathematical certainty that defendant has insufficient income to meet his own living requirements and to comply with the judgment. He can only choose which of his obligations he will meet and seek deferment of the remainder. It is argued by plaintiff that defendant's income tax liability will be reduced by reason of his support of plaintiff; defendant testified to the contrary, and contends that it will be increased under the new conditions. We need not pursue the matter. It is a minor factor.

As stated by the trial court "* * * Judge Hall occupies a very important position, a position in which he has to keep up a certain standard of living. * * * There is a certain dignity that he has to maintain there, and he has to have something to live on to maintain that standard." We thoroughly agree, but would add that one cannot maintain the dignity due to such an office and at the same time plead poverty to his creditors. The court should seek a reasonable solution of the problem which would enable defendant to free himself from the embarrassment of his pressing debts.

So far we have been discussing only defendant's ability to pay. As the learned trial judge explained to Mrs. Hall it was necessary to determine first "what amounts can be taken from him (defendant) and still give him sufficient to live upon. Secondly, what your needs are. And thirdly, your age enters into it, your ability to get out and support yourself." These matters were given the consideration of the court with much patience and understanding. As previously stated Mrs. Hall's demand for $736 per month was readily perceived by the court to be excessive.

[2] As we read the record it becomes clear that the award of $350 per month was intended by the court to provide for a temporary situation. The court stated to Mrs. Hall that her use of the house would be taken into consideration whether it was found to be her separate property, as she claimed, or community property, as the court found. In either case occupancy of the house would relieve her of the necessity to pay rent. And at the same time the court stated: "I have had in mind the fact that the plaintiff is a comparatively young woman, her age, according to the testimony, being now 42 years. She appears to be in good health, and I see no reason, notwithstanding the fact that she has been a housewife for some twenty-two years, why she cannot adjust herself so as to earn a portion of her own living." The record is barren of even the slightest suggestion upon the part of plaintiff that she has any such intention or recognizes that she has any such duty.

She is not obliged to take employment, but her capacity to support herself, at least in part, as the court told her, is an important fact to be considered. Plaintiff is not one who is necessarily dependent upon others for her support. The record shows in striking manner that she is a woman of unusual intelligence and force. In discussions which took place in the court's chambers, respecting agreements as to the issues and the disposition of the community property, plaintiff practically took charge of her own case, in the presence of her own able counsel. She attempted to make bargains with the court and argued her contentions with an admirable degree of understanding. During the trial she was not content to rely upon her attorney to conduct her case but frequently interrupted the proceedings. It is clear, as the court stated, that there is no need for Mrs. Hall to remain unemployed, nor is there any necessity for her to occupy her present home if she remains unemployed. According to an affidavit of defendant, which was uncontradicted, the residence has a rental value of $300 per month and the taxes are $600 per year.

In a dispassionate view of the situation of the parties defendant will be seen living in an $85 per month apartment and plaintiff in a $28,000 home which is now her separate property and has a rental value of $300 per month. Defendant will be performing his duties as a Judge of the United States District Court, and while he will be providing the means of livelihood for all concerned until the daughters have finished their education or married, he will be unable to free himself from debt. Plaintiff, a woman 42 years of age, will be unemployed but in good health and capable of following some gainful employment. However desirable it may be from her viewpoint to be maintained in comfort, occupying a home at a cost of $300 per month, it is our opinion that a judgment which favors a divorced wife to such an extent is not a reasonable solution of the problem. No claim is made, nor do we believe that one could reasonably be made, that defendant should live more modestly. It appears to us that his stated requirements are close to the minimum. The same cannot be said of the provision which the judgment makes for the support of plaintiff.

[3, 4] The considerations which are controlling in such cases are the reasonable necessities of the wife and the reasonable ability of the husband to provide for those necessities. Section 139 of the Civil Code both grants and limits the court's power to award support to the innocent wife. The convenience and comfort of the parties are to be considered in proper cases but the husband should not be required to suffer all the hardship merely because he is the one responsible for disruption of the marriage. Support of the innocent wife in the event of divorce is an incident of the husband's marital obligation. It is awarded because the duty of support does not end with a decree of divorce for fault of the husband. It is measured by well settled rules and is not imposed as an unregulated penalty.

[5] Defendant's salary is insufficient to enable the parties to maintain separate establishments in the manner to which they have been accustomed, although the necessities of life are well within their reach. Opinions will differ with respect to the proper division of inadequate income in such cases. The facts of the present case are unique. Its counterpart will not be found among the cases cited in the briefs. They are of no assistance to us in finding a solution for the problem which is presented by the record. We are satisfied that there are compelling reasons for a modification of the judgment that will enable defendant to rid himself of his present unsecured debts and to live within his income. We believe that the order for support should be modified by reducing the amount thereof from $350 per month to $200 per month until the further order of the court.

One fact to be considered upon a further hearing will be whether defendant is still obligated to pay, or is paying, a monthly sum to Mary Hall. We are also of the opinion that defendant should not be required to pay an amount for plaintiff's support which will enable her to occupy the home under the existing conditions and be relieved of all duty to obtain employment. It may well turn out to be to her advantage to qualify herself for employment commensurate with her undoubted ability.

[6] We find no merit in the appeals from the allowances of attorney's fees for the trial or on the appeal. It was stated, and not questioned, that Mrs. Hall's attorney at the trial had devoted 80 hours to the case and the record shows that her interests were well protected. We are of the opinion that the allowance of $750 was reasonable and that $200 as a fee on the appeal from portions of the judgment was not excessive.

The judgment is modified by striking the amount of $350 therefrom and substituting therefor "$200 per month until the further order of the court" and as modified is affirmed. The order awarding attorney's fees and costs is affirmed; respondent to recover costs of appeal.

WOOD, J., concurs.

VALLÉE, J., deeming himself disqualified, did not participate.

---

119 Cal.App.2d 426

PEOPLE v. BAKER.

Cr. 4978.

District Court of Appeal, Second District, Division 3, California.

July 29, 1953.

Defendant was convicted of unlawfully keeping and occupying a room with papers and paraphernalia for the purpose of recording bets on a horse race. The Superior Court, Los Angeles County, Edwin L. Jefferson, J., rendered judgment, and defendant appealed. The District Court of Appeal, Wood, J., held that the evidence sustained the conviction.

Affirmed.

1. Gaming 🔑98(5)

Conviction for unlawfully keeping and occupying a room with papers and paraphernalia for purpose of recording bets on a horse race was sustained by evidence. Pen.Code, § 337a, subd. 2.

2. Criminal Law 🔑418(1)

Declarations or statements made in party's presence are admissible, not as evidence in themselves but to understand what reply party to be affected by statement should make, and to raise presumption of acquiescence if such party is silent when he ought to have spoken.

3. Criminal Law 🔑418(2)

In prosecution for keeping a room with paraphernalia for purpose of recording bets on a horse race, officer's testimony as to statements made to defendant by man who came into defendant's shop, to effect that man wanted money that was coming to him on a bet he had made on a horse, was admissible not for purpose of proving that defendant had owed man money or that man had placed bet on horse with defendant but as bearing on issue as to purpose for which defendant used room. Pen.Code, § 337a, subd. 2.

◆

John J. Bradley, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Norman H. Sokolow, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant was convicted in a nonjury trial of violating section 337a, subdivision 2, of the Penal Code in that she unlawfully kept and occupied a room with papers and paraphernalia for the purpose of recording bets on a horse race. (She was also charged with violating subdivision 1 [bookmaking] and subdivision 4 [recording a bet], but she was acquitted of those charges.) She appeals from the judgment of conviction, and the order denying her motion for a new trial. Her contention is that the evidence was insufficient to support the judgment or the order.

Officer Bradley, an expert in bookmaking activities, testified that on August 11, 1952, about 3:20 p. m., he was observing a music or record shop at 4419 Avalon Boulevard in Los Angeles; at that time he was in a grocery store directly across Avalon Boulevard from the shop; he saw the defendant standing behind the counter in the shop; then he saw a woman enter the shop and go to the counter in front of defendant; the defendant and the woman stood there a few seconds, and then defendant went to an adding machine which was about three feet to her left on the counter; she manipulated the machine several times; a few minutes later a man entered the place, leaned over the counter and stood there a very short time facing defendant; then defendant went to the adding machine and manipulated the machine several times; a few minutes later, another man went in and had a similar transaction, following which defendant manipulated the adding machine; none of those three persons, who entered the shop, took anything into or out of the shop in his or her hands; about 3:35 p. m., while defendant was seated by a window in front of the counter, a woman came out of 4421 Avalon Boulevard (next door) and entered the shop; defendant then went behind the counter to a place near the adding machine; after the woman had stood at the counter in front of defendant a few seconds, the defendant manipulated the adding machine; thereafter the woman went away; about five minutes later, a Mrs. Rogers entered the shop and she and defendant stood next to the counter a few minutes; then defendant operated the adding machine, reeled off some of the adding machine tape, tore the tape off, folded and handed it to Mrs. Rogers, who put it in her dress pocket; then the officer entered the shop and, while defendant was about three feet from him, asked Mrs. Rogers to remove the articles from her pocket; she removed two articles and said that was all she had; he asked her to see if there were other papers in her pocket; then she removed the adding machine tape and handed it to him.

The tape, referred to by the officer, was received in evidence as Exhibit A. It was stipulated that it was a betting marker.

Officer Bradley testified further that, after receiving the tape, he arrested the defendant and began searching below the counter; at that time defendant was standing next to the officer (witness), and Officer Harris was standing next to defendant, and Mrs. Rogers and Officer Scott were sitting in chairs; then a Mr. Griffith entered the shop, walked toward defendant and said, "Where is my money I got coming on that horse. Give half of it to this little lady here [Mrs. Rogers]. I told her I was going to give her part of it if the horse won"; Officer Scott asked Griffith if he bet a parlay; he replied that he bet "Quaiate," and he then pointed to a newspaper, which he had brought with him, and said, "Here it is in the second race"; the officer (witness) found that a horse by that name was listed in the second race at Del Mar on that day; after a few minutes, Griffith said, "Mrs. Baker [defendant], may I have my money now?"; she replied, "What money?"; Griffith said, "The money I have coming on that horse I bet. I know he won and he must have paid good"; a few minutes later, he said, "Mrs. Baker, can I get my money that I have coming?"; she said, "What money? I don't owe you any money." Defendant objected to, and moved to strike out, the testimony as to what Griffith said, but the objection was overruled and the motion was denied. The officer testified further that he found three other slips of adding machine tape (Exhibits B, C and D) in the shop, one of which slips was in the wastebasket; he also found a newspaper (Exhibit E) on the counter next to the adding machine, and the last page of the paper—upon which there were racing entries—was the top side of the paper as it lay on the counter; Exhibit A, the tape, which "contains a series of figures separated by spaces" is a betting marker; the first series starts with the number 621, which is the identifying number of the bettor—it might be the address of the bettor; the next number 400 indicates the track—Del Mar; the next number 200 indicates the post position of the horse—the zeros have no significance; the next number 600 indicates the race; the next number 1 is a $1.00 show wager; the tape contains 16 groups of figures and all of those, except one which is crossed out and one which is the total of all the groups, are records of wagers on horses running on that date; the last series on the tape starts with 4421, which is the identifying number of the bettor, and is the same number as the address of the place next door to defendant's shop (which place next door is the address of one of the women who had entered defendant's shop); Exhibit C is an owe sheet; he arrested Mrs. Rogers about a week later and found slips of adding machine tape similar to Exhibit A, in a room where she was arrested.

Miss Thomas, called as a witness by defendant, testified that at the time involved here she was employed in an adjustment bureau at 4421 Avalon Boulevard; on the afternoon in question she took some cancelled checks from that place and went into defendant's shop and added the checks on the adding machine; one of the officers examined the checks; she did not see defendant operate the adding machine on that day.

Defendant testified that she has a record shop at 4419 Avalon Boulevard; the adding machine was there for sale—it was from a grocery store; Miss Thomas was in her shop that afternoon; one of the officers asked her (Miss Thomas) what she had in her hand and she showed him some cancelled checks; Mrs. Rogers (also known as Mrs. Lorick) was in her shop that afternoon when the officers came in; Officer Bradley told her to take things out of her pocket; she took a piece of paper, Exhibit A, from her pocket; that paper does not look like anything that she (defendant) has written; while the officers were there, a man by the name of Griffith came into the shop; she knew Griffith—he had an office a few doors from her shop; when he came in he said, "Miss Baker, give me my money"; she did not answer him at first because she did not know what he was talking about; he was under the influence of liquor; he also said, "Miss Baker, give me my money. I bet a horse and I won and I want my money"; she replied that she did not owe him any money and "You haven't bet no horse with me"; when the officers were taking her out of the shop, after the arrest, she said to Griffith that he knew that he had told lies about giving her a bet; he then said that he was only kidding; she did not accept any wager from Griffith on that day or any other day.

Officer Bradley testified, in rebuttal, that when the officers and defendant were going out the door of the shop the defendant said, "Mr. Griffith, I don't know why you would do that to me. You know I haven't taken any bet from you"; Griffith replied, "I'm sorry"; she said, "Don't tell me you are sorry. What I should do to you is pop you right in the mouth."

[1] The defendant was in the record shop which was owned and operated by her. She operated the adding machine, tore some tape therefrom, and handed it to Mrs. Rogers. That tape was a betting marker. Another tape found in the shop was an owe sheet. A newspaper was on the counter next to the adding machine, and the last page of that paper, which contained racing entries, was visible to a person standing by the machine. The evidence was sufficient to support a finding that the defendant kept and occupied a room with papers and paraphernalia for the purpose of recording bets on a horse race. The evidence supports the judgment and the order denying the motion for a new trial.

[2, 3] Appellant asserts that the court erred prejudicially in receiving the testimony of the officer as to statements made to defendant by Griffith (who came into the shop) to the effect that he wanted the money that was coming to him on a bet he had made on a horse. She argues that the evidence was hearsay. The statements were accusatory. When he first made the statement, defendant did not say anything in reply thereto. After a few minutes, when he made the statement a second time, she said she did not owe him any money. She did not deny that she took a bet from him until she was leaving the shop with the officers and then she said that Griffith had lied about giving her a bet. The evidence was admissible. As stated in People v. Cacioppo, 34 Cal.App.2d 108, at page 111, 93 P.2d 194, 196: "It is the rule that declarations or statements made in the

presence of a party are received in evidence, not as evidence in themselves, but to understand what reply the party to be affected by the statement should make to the same. If he is silent when he ought to have spoken, the presumption of acquiescence arises. In this sense admissions may be implied from conduct." The statements of Griffith to defendant were not admissible for the purpose of proving that defendant did owe Griffith money or that Griffith had placed a bet on a horse with defendant but the statements coming in the midst of an investigation and search of the room by the officers, and being made in the presence of defendant, constituted a circumstance to be considered. Such a statement, if made by telephone during an investigation similar to the investigation here, would have been admissible for the purpose of proving the purpose for which the room was used. People v. Reifenstuhl, 37 Cal.App.2d 402, 405, 99 P.2d 564. Under the circumstances in the present case, where the defendant was present and heard the statements of Griffith, the statements were material on the issue as to the purpose for which defendant used the room.

The judgment and the order are affirmed.

SHINN, P. J., concurs.

VALLEE, J., concurs in the judgment.

119 Cal.App.2d 456

PALMER v. METRO-GOLDWYN-MAYER PICTURES et al.

Civ. 19316.

District Court of Appeal, Second District,
Division 1, California.
July 31, 1953.

Action was brought to recover damages for alleged infringement of plaintiff's play by defendants' moving picture. The Superior Court of Los Angeles County, Ellsworth Meyer, J., entered a judgment sustaining a demurrer to the complaint, and the plaintiff appealed. The District Court of Appeal, Doran, J., held that the moving picture did not infringe the play.

Judgment affirmed.

1. Pleading 🔑216(2)

On demurrer to complaint charging infringement of literary composition by moving picture, court, which has both productions before it in accordance with statute providing for attachment of compositions to the complaint, or viewing of production if attachment is not feasible, may determine whether there is substantial similarity between the compositions, and, if, as a matter of law, there is no such similarity, no question of fact is in issue and demurrers to complaint are properly sustained. Code Civ.Proc. § 426, subd. 3.

2. Jury 🔑34(1)

Determination of issue of similarity of literary composition and moving picture that allegedly infringes the literary composition, on demurrer, does not violate section of the Bill of Rights providing that right of trial by jury shall be secured to all and shall remain inviolate. Code Civ. Proc. § 426, subd. 3; Const. art. 1, § 7.

3. Pleading 🔑312

In action to recover damages on ground that plaintiff's play was infringed by defendants' moving picture, the works themselves superceded and controlled any allegations of conclusions of fact about them or descriptions of them in the complaint. Code Civ.Proc. § 426, subd. 3.

4. Literary Property 🔑8

Where the only similarity between play and moving picture that allegedly infringed the play was that both involved baseball teams and both were concerned with amorous difficulties of a baseball player and the girl he loved, there was no infringement. Code Civ.Proc. § 426, subd. 3.

◆

Thomas P. Burke, Los Angeles, for appellant.

Loeb & Loeb, Los Angeles, Herman F. Selvin, Los Angeles, Harry L. Gershon, Los Angeles, of counsel for respondents.

DORAN, Justice.

The action herein is predicated upon a complaint alleging that, prior to March 29, 1948, the plaintiff-appellant had invented, originated and composed a certain literary composition and play entitled, "Base Hits and Bloomers"; that during the year 1948 appellant submitted copies thereof to the respondents who deliberately and unlawfully copied and appropriated the composition, producing and selling the same by way of a motion picture entitled, "Take Me Out to the Ball Game", to appellant's damage in the sum of $100,000.

Respondents demurred to the complaint on the ground that it failed to state facts sufficient to constitute a cause of action. A copy of appellant's composition was attached to the complaint as an exhibit but a copy of the motion picture produced by respondents was not attached thereto because of its nature, bulk and unavailability. In connection with the demurrer, and pursuant to stipulation, the trial court made an "order for a view of the production", as provided by Section 426, subd. 3, of the Code of Civil Procedure. After an examination and comparison of the motion picture and appellant's composition, the demurrer was sustained without leave to amend, upon the stated ground "that there is insufficient similarity between the two works". Plaintiff has appealed from the judgment entered thereon.

The trial court, in a memorandum opinion, states that "similarity between two artistic or literary productions is to be resolved by a comparison of the two productions, not by the testimony of witnesses about them", and that "If the evidence of similarity is such that there would appear to be no grounds for a difference of opinion among impartial readers and viewers, the matter may be treated on demurrer as the evidence may be treated upon a motion for nonsuit or a directed verdict. This would seem to be the legislative intent in the amendment of the section (Code of Civil Procedure, section 426(3)."

Section 426, subd. 3, referring to the requisites of a complaint, as amended in 1947, provides that

"If the demand be for relief on account of the alleged infringement of the plaintiff's rights in and to a literary, artistic or intellectual production, there must be attached to the complaint a copy of the production as to which the infringement is claimed and a copy of the alleged infringing production. If, by reason of bulk or the nature of the production, it is not practicable to attach a copy to the complaint, that fact and the reasons why it is impracticable to attach a copy of the production to the complaint shall be alleged; and the court, in connection with any demurrer, motion or other proceeding in the cause in which a knowledge of the contents of such production may be necessary or desirable, shall make such order for a view of the production not attached as will suit the convenience of the court, to the end that the contents of such production may be deemed to be a part of the complaint to the same extent and with the same force as though such production had been capable of being and had been attached to the complaint".

"The basic idea of plaintiff's story", as stated in the trial court's memorandum opinion, "is the chronicle of a good baseball player who is not achieving his best until he falls in love and marries. He becomes the manager of his team and while on tour, his wife, who has been converted to the suffragette movement, is maneuvered into the management of a rival team.

"The defendants' picture is the story of two entertainers who perform now on the stage, now on the baseball diamond and in between at picnics or any occasion, when for reason or no reason, they can sing or dance. No actual timing of the scenes was made but much of the picture was devoted to the singing, dancing and antics of Gene Kelly and Frank Sinatra and frequently this duo was increased to a trio.

"Plaintiff's story is not concerned with dancers, singers or comedians of the stylized variety. It is concerned with fictionized events in the realm of baseball which originate with the movement for women's rights.

"It must be declared that viewing the picture and reading the story the two impressions gained are quite different * *.

"It is not sufficient to say that both plots include baseball or that 'boy meets girl' in each or that in each 'the path of true love is not smooth'. The last two are at least common to most novels and motion pictures".

It is appellant's contention that the trial court was in error in sustaining respondents' demurrer for the reason that "The function of a demurrer is to raise a question of law", and that "The issue of similarity is an issue of fact, which cannot be resolved as a matter of law on demurrer". Appellant further argues that "Granting, without conceding, that Section 426(3) confers the power exercised by the court below, it was error to sustain the general demurrer in the case at bar".

Respondents answer the above arguments by averring that "Section 426(3) expressly requires that the court compare the accused and accusing works deemed a part of the complaint to determine whether a cause of action for plagiarism is stated thereby"; that in the present case, "the court below correctly determined that there was insufficient similarity of protectible material between them to sustain a cause of action for plagiarism. As such comparison demonstrates, the only similarities, and therefore the only parts of appellant's story which might have been copied, related only to the unprotectible theme and basic idea, rather than to treatment, expression and development".

[1] That, under the provisions of Section 426, subd. 3, of the Code of Civil Procedure hereinbefore quoted, the trial court possessed authority to consider and determine the matter of protectible similarity between the two productions, cannot be doubted. The rule is set forth in the recent case of Weitzenkorn v. Lesser, 40 Cal. 2d 778, 256 P.2d 947, 957, as follows: "Having both productions before it in accordance with section 426(3), the court may determine whether there is substantial similarity between them. If, as a matter of law, there is no such similarity, no question of fact is in issue and the demurrers to each count of the complaint were properly sustained".

The Weitzenkorn opinion just cited calls attention to the fact that "The 1947 amendment to section 980 has eliminated the protection formerly given to 'any product of the mind'. The statute as it now exists, and as it read at the time this cause of action arose, provides protection only 'in the representation or expression' of a composition. The Legislature has abrogated the rule of protectibility of an idea and California now accepts the traditional theory of protectible property under common law copyright".

This case also notes that Stanley v. Columbia Broadcasting Co., 35 Cal.2d 653, 660, 221 P.2d 73, 23 A.L.R.2d 216, and Golding v. R.K.O. Pictures Inc., 35 Cal.2d 690, 698, 221 P.2d 95, relied upon by appellant, were decided under the former wording of the statute which extended protection "to an 'idea' rather than to the form and manner of its expression", and to the "'basic dramatic core'" of plaintiff's production, matters which are not subject to protection under the amended phraseology.

[2] Appellant further contends that the action of the trial judge, in determining the issue of similarity upon demurrer, is, in effect a violation of Section 7, Article I, of the Bill of Rights, which provides that "The right of trial by jury shall be secured to all, and remain inviolate", since the office of a demurrer is to raise an issue of law as to the sufficiency of the pleading. This contention, as noted in respondents' brief, "arises from a misconception of the issues here presented. As we have observed, the only issue raised by the demurrer is the legal sufficiency of the plaintiff's complaint to satisfy the requirements of a cause of action for plagiarism. That is a ques-

tion of law for the court, not of fact for the jury".

[3] In the present case, access to plaintiff's production being admitted by demurrer, the sole issue then remaining was that of similarity, a matter to be determined by direct comparison of the two productions. As said in Shipman v. R.K.O. Radio Pictures, D.C., 20 F.Supp. 249, "the works themselves supercede and control any allegations of conclusions of fact about them or descriptions of them which may be contained in the complaint".

As hereinbefore noted, and under the provisions of Section 426, subd. 3, of the Code of Civil Procedure, the two productions in question were made part of the complaint. Unless some similarity of protectible material was discernible therein, no cause of action was stated; nor would it be possible to state one by way of amendment. After viewing the respondents' motion picture and reading the plaintiff's story, such actionable similarity was not apparent, and the trial court declared that "the two impressions gained are quite different". This reviewing court has likewise witnessed a presentation of the picture, C.C.P. § 426, subd. 3, comparing the same with appellant's production, and it cannot be said that the trial court's conclusion in the matter was unwarranted.

[4] "The only similarity between the two works", as stated in respondents' brief, "lies in the fact that both involve baseball teams playing in the 1900's, and both are concerned with amorous difficulties of a baseball player and the girl he loves. But these similarities are similarities only of abstract ideas which no one can monopolize". Since appellant has not alleged and cannot allege a cause of action in the absence of some substantial similarity between the productions, a trial on the merits is uncalled for.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

---

119 Cal.App.2d 284

SILVA et al. v. PACIFIC GREYHOUND LINES et al.

Civ. 19470.

District Court of Appeal, Second District, Division 2, California.

July 22, 1953.

Rehearing Denied Aug. 4, 1953.

Hearing Denied Sept. 17, 1953.

Action by passengers against owner and driver of bus for injuries sustained when bus in which they were riding, which was overtaking vehicle on three-lane highway, collided, near curve, with on-coming automobile, which was overtaking another vehicle, and overturned. The Superior Court, Los Angeles County, Arthur Crum, J., rendered judgment for owner and driver of bus, and from judgment and order denying plaintiffs' motion for new trial, plaintiffs appealed. The District Court of Appeal, Moore, P. J., held that instructions that inference arose that proximate cause of collision was negligence of defendants, and that fact of accident, alone, did not justify inference of negligence on part of defendants were not confusing or prejudicial, when considered with other instructions relating to duty required in emergency and effect of actions of others not parties.

Affirmed.

1. Trial ⊂=296(7)

In action by passengers against owner and driver of bus for injuries sustained when bus in which they were riding collided with on-coming automobile and overturned, instructions that inference arose that proximate cause of collision was negligence of defendants, and that fact of accident, alone, did not justify inference of negligence on part of defendants, were not confusing or prejudicial, when considered with other instructions relating to duty required in emergency and effect of actions of others not parties.

2. Trial ⊂=243

In action by passengers against owner and driver of bus for injuries sustained when bus in which they were riding collided with on-coming automobile and overturned, instructions which referred to duty of owner and driver of bus to exercise utmost care, and to duty of one confronted with sudden peril to exercise ordinary care were not contradictory or prejudicial, where reference to ordinary care related to situation involving drivers of bus and on-coming automobile, and reference to utmost degree of care related to duty of owner and driver of bus, in general.

On Petition for Rehearing.

3. Trial ⚷295(1)

Instructions must be read as a unitary charge.

◆

Margolis, McTernan & Branton, by Mitchell Levy, Los Angeles, for appellants.

Bauder, Gilbert, Thompson & Kelly, Los Angeles, for respondents.

MOORE, Presiding Justice.

Plaintiffs, husband and wife, sued defendant bus company and defendant driver for personal injuries received while passengers on defendant's bus. The jury found for the defendants. From the judgment and an order denying their motion for a new trial, plaintiffs appeal. The order is not appealable. Code Civ.Proc. § 963.

The Facts

Appellants were passengers on a bus of the corporate respondent, enroute from Bakersfield to Los Angeles. The accident which produced appellants' injuries occurred on a three lane portion of U. S. Highway No. 99 between Castaic and Newhall in Weldon Canyon. In an approximately straight portion of the highway with a slight upgrade, the Greyhound driver attempted to pass another smaller bus also proceeding south. At about the time the Greyhound was abreast the smaller bus, a truck and a coupe came around the curve at the south end of the straightaway proceeding north, with the coupe alongside the truck and in the center lane.

The owner of the coupe, seated beside the driver, testified that the two vehicles occupying the center lane collided head on and that the coupe was thrown against the truck by the impact.

The physical facts, such as tiremarks and debris along the highway, and the testimony of several witnesses, including one of the appellants, indicate that the driver of the coupe, on becoming aware of the impending crash, turned or skidded into the side of the truck and then caromed across the highway into the Greyhound, of which the front end at least was within the southbound lane.

After the impact, the right wheels of the bus were on the shoulder of the highway and over the berm.[1] The bus continued along the road as the driver attempted to regain his position by steering the right wheels onto the solid shoulder. But his aim was thwarted by the berm and the momentum of the bus, until finally the shoulder merged with the steeper embankment onto which the conveyance fell. Appellants were injured as a result of either the impact or the rolling of the bus.

While no claim is asserted that the facts do not support the verdict, appellants contend that the court so erred in instructing the jury in two respects that the resulting prejudice requires a new trial to be granted.

Are Two Instructions Contradictory?

[1] The jury were instructed in the words of B.A.J.I.[2] 206-B on the doctrine of *res ipsa loquitur:*

> "From the happening of the accident involved in this case, as established by the evidence, there arises an inference that the proximate cause of the occurrence was some negligent conduct on the part of the defendant. * * *"

Also, they were advised in the language of B.A.J.I. 131 Alternate:

> "The mere fact that an accident happened, considered alone, does not give rise to a legal inference that it was caused by negligence or that any party to this action was negligent."

The giving of these two apparently contradictory instructions is assigned as error.

---

[1] A small dirt curbing (about twelve inches high at this point) placed along the shoulder by the Division of Highways to prevent water from running over the embankment.

[2] California Jury Instructions Civil.

Between the two quoted forms, fourteen other instructions were given covering the issues of negligence and proximate cause, the duty required in an emergency and the reliance on the actions of others. However, immediately preceding the second instruction (B.A.J.I. 131 Alternate) quoted above, the jury were directed as follows:

"You are instructed that if you should find that the operator of another vehicle negligently operated the same, and that such negligence was the sole and proximate cause of the accident in question, then you are instructed that the plaintiffs are not entitled to recover from this defendant, even though such other driver is not a party to this proceeding."

On considering all the issues of the controversy and all the instructions together, the quoted instructions given could not reasonably be regarded as confusing to the jury or in any degree prejudicial to appellants, since B.A.J.I. 131 Alternate is closely tied into the instruction which relates to the negligence of the operator of another vehicle.

Decisions cited by both appellants and respondent contain instructions similar to those first quoted above, but each of them is distinguishable from the factual situation here. In Brown v. George Pepperdine Foundation, 23 Cal.2d 256, 143 P.2d 929, and England v. Hospital of Good Samaritan, 22 Cal.App.2d 226, 70 P.2d 692, relied on by appellants, the court *affirmed* the *granting of a new trial* by the trial judge after judgment for defendant, enumerating four and seven errors, respectively, in instructions given or refused to justify its refusal to reverse the trial judge. Appellants in the case at bar are seeking a new trial after judgment for defendant and a denial of a new trial by the trial judge. Also, in the England case, there was no independent agency, such as the coupe involved herein, to which the instruction on ordinary negligence could pertain.

As to respondent's authorities, in Bazzoli v. Nance's Sanitarium, Inc., 109 Cal.App.2d 232, 240 P.2d 672, and Seedborg v. Lakewood Gardens Civic Ass'n, 105 Cal.App.2d 449, 233 P.2d 943, there was a question of whether or not the doctrine of *res ipsa loquitur* would apply. Both instructions here in question were given and the trial court explained that their application depended on the answer to the prior question, a situation different from that in the case at bar. *Judgment for the plaintiff was affirmed* in both cases. In Radisich v. Franco-Italian Baking Co., 68 Cal.App.2d 825, 158 P.2d 435, the court again *affirmed a judgment for plaintiff*, holding that any confusion or prejudice created by the instructions would have been to the advantage of the defendant. Crooks v. Wright, 107 Cal.App. 304, 290 P. 497, presented a situation wherein the court was concerned with the distinction between a presumption and an inference.

Are the Instructions Confusing?

[2] In view of appellants' contention, we first quote the instructions criticized as prejudicial. One of them proceeded as follows:

"* * * that it is incumbent upon the *defendant* to rebut the inference [of negligence] by showing that it did, in fact, exercise *the utmost care and diligence*, or that the accident occurred without being proximately caused by any failure of duty on its part."

"As applied to a common carrier such as defendant Pacific Greyhound Lines, the word 'negligence' where used in the instructions just given you, means *any breach of duty toward the passenger*, evidence of which has been received in this trial. That duty is defined elsewhere in my instructions to you."

"The speed at which a vehicle travels upon a highway, considered as an isolated fact and simply in terms of so many miles an hour, is not proof either of negligence or of *the exercise of utmost care*. * * *"

"A person who, without negligence on his part, is suddenly and unexpectedly confronted with peril, arising from either the actual presence, or the appearance, of imminent danger to himself or to others, is not expected, nor required to use the same judgment and prudence that is required of him, in *the exercise of ordinary care*, in calmer and more deliberate moments. His duty is to exercise only the *care that an or-*

dinarily prudent person would exercise in the same situation. If at that moment he does what appears to him to be the best thing to do, and if his choice and manner of action are the same as might have been followed by *any ordinarily prudent person* under the same conditions, he does all the law requires of him, although, in the light of after-events, it should appear that a different course would have been better and safer."

"A person who, himself, is *exercising ordinary care* has a right to assume that others, too, will perform their duty under the law, and he has a further right to rely and act on that assumption. Thus it is not negligence for such a person to fail to anticipate injury which can come to him only from a violation of law or duty by another. However, an exception should be noted: the rights just defined do not exist when it is reasonably apparent to one, or in the *exercise of ordinary care* would be apparent to him, that another is not going to perform his duty. One is not justified in ignoring obvious danger although it is created by another's misconduct, nor is he ever excused from *exercising ordinary care*."

"The defendant, Pacific Greyhound Lines, a corporation, however, was not an insurer of the safety of the plaintiffs; that is to say, it did not warrant such safety in the sense of a guarantee. Its responsibility was not to use the most effective methods for safety that the human mind can imagine, nor that the best scientific skill might suggest. The *care required* of it, however, *was the highest that reasonably* could have been exercised consistently with the mode of transportation used, and the practical operation of its business as a carrier. * *" (Emphasis added.)

Appellants contend that the jury was never clearly or definitely instructed as to the duty to use utmost care and diligence which a carrier for hire owes to its passengers. The instructions quoted refute this contention. In the first and last, respondent is specifically referred to when either "utmost care" or "highest care" is mentioned.

Appellants contend that the instructions which refer to "ordinary care" are contradictory and confusing and constituted prejudicial error. Such is not the fact. They refer to the situation when the drivers of the Greyhound and the coupe found themselves occupying the same lane, and do not contradict the specific instructions on the utmost care required of respondent in general. Dodge v. San Diego Electric Ry. Co., 92 Cal.App.2d 759, 765, 208 P.2d 37.

But do the quoted instructions reduce the amount or degree of care to be exercised on the part of the Greyhound driver to that of an ordinarily prudent person in the same situation or to that of a person charged with utmost care under like circumstances? There would certainly be no error if the instructions had used "the care required by law" rather than "ordinary care," thereby covering both the Greyhound driver and the coupe driver. In Dieterle v. Yellow Cab Co., 53 Cal.App.2d 691, 128 P.2d 132, a case very similar to the instant action, the court held that the mixing of "ordinary" and "utmost" care in an instruction was not grounds for a new trial. The instruction there given was:

"In other words, if you find * * * [the driver] in the operation of the taxicab conducted himself as might reasonably be expected of the *ordinary prudent person* charged with the duty of exercising a *high degree of care* for his passengers, then I instruct you that he was not negligent * *." 53 Cal.App.2d at page 699, 128 P.2d at page 136. (Emphasis added.) In Pezzoni v. City & County of San Francisco, 101 Cal.App.2d 123, 225 P.2d 14, the court affirmed the granting of a new trial based on error in mixing "ordinary" and "exceptional" in a negligence instruction. In the action at bar, the "utmost" did not occur in the same instructions as the "ordinary" complained of, as it did in the decisions above cited, and the "ordinary" was used repeatedly, not merely once. The instructions containing "ordinary care" did tend to lower the standard of care required of a carrier for hire in an imminent head-on collision and therefore it was error to give them in the form used.

But, in order to justify a reversal of the judgment herein by reason of the refusal to grant the motion for a new trial, it would be necessary to find that the giving of the last quoted instructions was prejudicial to appellants. Const. Art. VI, § 4½; Code Civ.Proc. § 475. There were two opportunities for negligence on the part of respondent, namely, (1) attempting to pass the other bus when conditions were not safe for doing so, and (2) acting or failing to act on observing the approaching coupe in the center lane. The instructions allegedly given in error do not apply to the first opportunity. As to the second, it must be said there is no evidence in the record that the Greyhound driver exercised other than the utmost care in turning the bus into the southbound lane as quickly as it was humanly possible after he sensed his peril, and in maintaining the equilibrium of the bus as long as possible after the impact.

We have reviewed with care the several instructions given as well as those refused. A close reading of the entire transcript on appeal leaves no doubt that the basic issues were fairly presented to the jury. The motion for a new trial afforded a new opportunity for the court to renew its study and appraisal of the problems that had arisen out of the trial. Search as they would, counsel for appellants came up with no more than the criticisms of the instructions now urged for a reversal. While the passages in the instructions are, in the respects indicated, amenable to criticism, the instructions when considered in their entirety state the law of the case fairly and clearly. Therefore, no error played a part in the jury's deliberation; certainly none that was sufficient to justify the conclusion that a different verdict might have otherwise been rendered.

The appeal from the order is dismissed. The judgment is affirmed.

McCOMB and FOX, JJ., concur.

On Petition for Rehearing

PER CURIAM.

[3] In his petition for rehearing, appellant emphasizes less important passages of certain instructions given and fails to stress the remaining portions which directly tie in with preceding instructions. It is trite to say that the instructions given in a lawsuit must be read as a unitary charge.

Petition denied.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

41 Cal.2d 314

In re SARGAVAK'S ESTATE.

KURKJIAN et al. v. OHANNESON et al.

L. A. 22189.

Supreme Court of California, in Bank.
Aug. 11, 1953.

Probate proceedings involving question of construction of holographic codicil to a will. The Superior Court, Los Angeles County, Joseph W. Vickers, J., made order from which the contestants appealed. The Supreme Court, Carter, J., held that when codicil to will was positive and unequivocal that persons named therein were legatees, and not trustees, contestants were not entitled to adduce extrinsic evidence to show an intent of testatrix to make gift to such named persons as trustees for benefit of contestants.

Order affirmed.

Prior opinion 245 P.2d 690.

1. Wills 🔑672(1)

In order to impose a trust upon property bequeathed, it must appear that testator intended to impose mandatory duties, and where an absolute estate has been devised by will, the estate will not be limited by subsequent words unless they indicate as clear an intention therefor as was shown by the words creating the estate. Probate Code, §§ 104, 105.

2. Wills 🔑487(3)

Generally, although declarations of a testator before and after execution of the will are admissible for purpose of ascertaining the intent with which the instrument was executed, they are not admissible for purpose of proving the meaning the testator attributed to such specific provisions of an admitted will. Probate Code, § 104.

3. Wills 🔑440, 441

Where an uncertainty arises upon face of will as to meaning of any of its provisions, testator's intent is to be ascertained from the words of the will, but circumstances of execution thereof may be taken into consideration, excluding the oral declarations of the testator as to his intentions, but when the intent is plain from the words used, it is court's duty to declare that intent, without regard to the consequences. Probate Code, §§ 104, 105.

4. Wills 🔑488

Holographic codicil declaring that testatrix left everything she had to her boy, followed by name of person who was not in fact her son, and to her lawyer, who was also named, and that she gave them a power of attorney to divide what was left of her belongings "to them", followed by specific declaration that she gave nothing to named person, and that she would rather help her very own nieces and grand nieces than perfect strangers, was a positive and unequivocal designation of the two persons named therein as legatees, and extrinsic evidence was not admissible for purpose of showing an alleged intent of testatrix to create trusts for benefit of her nephews and nieces. Probate Code §§ 104, 105.

5. Wills 🔑467

Where person directed to carry out wishes of testator is both executor and legatee, words addressed to him will ordinarily be considered as having been addressed to him in his capacity as legatee, and not as imposing a mandatory duty on him as executor.

6. Trusts 🔑96

Where will unequivocally named two persons as legatees, thereby excluding extrinsic evidence that testatrix intended in fact to make them trustees for benefit of nieces and nephews, an oral agreement with testatrix by which such persons were to hold the property in trust could be proved by extrinsic evidence and a constructive trust would arise in favor of such beneficiaries, but such trust, if any, could not be established in probate court, but only by an independent proceeding in equity.

7. Trusts 🔑96

Where a testator devises or bequeaths property to a person in reliance on his agreement to hold the property in trust, the devisee or legatee holds the property upon a constructive trust for the persons for whom he agreed to hold it.

◆

Cameron & Perkins, William Kinley, Simpson & Wise and George E. Wise, Long Beach, for appellants.

C. W. Byrer, Charles E. Hobart, Los Angeles, Robert M. Dulin, Beverly Hills, Spurgeon Avakian, Oakland, and Melvin E. Fink, Los Angeles, for respondents.

CARTER, Justice.

This is an appeal from an order in proceedings to determine heirship in the estate of Ruby Sargavak, deceased, initiated by nephews and nieces, the only heirs of Mrs. Sargavak. J. G. Ohanneson and Samuel G. Mahdesian, the legatees in the codicil later mentioned, were declared by the order to be entitled to the entire estate under the codicil.

It appears that in 1945 Mrs. Sargavak made a witnessed will in which she named her heirs as legatees and Mahdesian as executor. That will was admitted to probate and a contest filed on the ground of mental incapacity. Following a verdict for contestants the probate court granted to proponents a judgment notwithstanding the verdict. That judgment was reversed on appeal, Estate of Sargavak, 95 Cal.App.2d 73, 212 P.2d 541, and judgment entered on the verdict. The trial court then granted a motion for a new trial, and apparently that proceeding has not progressed beyond that stage.

Shortly after the 1945 will was offered for probate a holographic instrument, dated September 29, 1946, was offered for probate as a codicil to the 1945 will. It reads:

> "1566 W-29th St.
> Los Angeles 7, Cal.
> Sep 29, 1946
> Sunday Evening
>
> "To Whom It May Concern:
>
> "I the writer—Mrs. Ruby Sargavak wants everyone to know that she is writing these lines of her own free will—no one is putting her ~~of~~ or urging her to do it. She leaves everything she has to her Boy Sam Mahdesian & her *layer,* J. G. Ohanneson—she gives them power of attorney to divide what is left of her belongings to them. She specifically advises to give nothing what so ever to Mrs. Lillian Shooshan—she is no relation nor friend of hers—Mrs. Sargavak has been more than kind to her, just because she begged us to help her for a little time—Mrs. Sargavak would rather help her very own nieces & grand nieces & perfect strangers, who are truly in need of help. God has been good to us, she did not appreciate the goodness of the Lord to her. All honor & glory unto his High and Holy Name! Mrs. Ruby Sargavak. P. S. It is 8 o'clock, I am very tired—
> Ruby Sargavak."

Its probate was contested by Mrs. Sargavak's heirs on the ground that she did not intend it as testamentary disposition of her property. Extrinsic evidence was received on that question and it was ordered admitted to probate. On appeal it was claimed that the evidence without contradiction showed no testamentary intent and also that extrinsic evidence was not admissible. The order was affirmed, this court stating that "we are here concerned not with the meaning of the instrument [codicil], but with the intention with which it was executed. In re Estate of Sargavak, 35 Cal.2d 93, 96, 216 P.2d 850, 851, 21 A.L.R.2d 307. We held that extrinsic evidence was admissible to show whether the testator intended the codicil to be effective.

In the instant heirship proceedings initiated by decedent's heirs the latter asserted that it was her intent by the codicil that the property go to Ohanneson and Mahdesian in trust for persons other than Mrs. Shooshan and that they have power of attorney to divide it between the other persons, but as the beneficiaries of the trust were uncertain (the claimed beneficiaries being decedent's nieces and nephews and strangers) the trust failed and the property would pass by intestate succession to the heirs. The court refused to permit the heirs to introduce any extrinsic evidence to show that the intent was that claimed by them and determined that Ohanneson and Mahdesian took the property absolutely, and that no trust was intended by the codicil.

The heirs, petitioners in the heirship proceedings, assert error claiming that the codicil was ambiguous on its face and extrinsic evidence was admissible to show a trust. In this connection they contend that this court's decision in the former appeal, In re Estate of Sargavak, supra, 35 Cal.2d 93, 216 P.2d 850, 21 A.L.R.2d 307, established that such evidence was admissible. The extrinsic evidence sought to be introduced by petitioners consisted of the circumstances surrounding the making of the will such as the size of the estate, the property involved and the circumstances and relations of the parties involved; and oral declarations of the testatrix such as were mentioned in Estate of Sargavak, supra, 35 Cal.2d 93, 216 P.2d 850, including her statement to Mahdesian in referring to the codicil—that she wanted Ohanneson, her attorney, and him, as her executor, to take care of her estate the way he knew she wanted it.

Referring to the last contention first (the effect of the decision in the former appeal on this case), it is clear that the decision on the former appeal has no bearing upon the present case. As above mentioned it was there expressly stated in the forepart of the opinion that the court was concerned only with the question of whether the codicil was intended as a testamentary document and *not* with the *meaning* of the instrument. Here we are concerned with the meaning—whether there was an intent to create a trust. It is true, as stated by Ohanneson and Mahdesian, that we there said, in discussing the evidence on the question of testamentary intent, that nothing indicated an intent that decedent did not leave the property to those persons, that there was evidence of such intent because of the close association between decedent and them and that the purpose to leave her property to them was expressed by the instrument. But that discussion was aimed solely at the question of whether she intended to make a will and not as to the meaning of the will—as to whether their interest should be absolute. The only thing before the court was whether the codicil was a will and no question of construction was involved. See In re Estate of Salmonski, 38 Cal.2d 199, 238 P.2d 966.

[1–3] The statutes on the subject of the admissibility of extrinsic evidence in the construction of wills provide: "A clear and distinct devise or bequest cannot be affected by any reasons assigned therefor, or by any other words not equally clear and distinct, or by inference or argument from other parts of the will, or by an inaccurate recital of or reference to its contents in another part of the will." Prob.Code, § 104. "When there is an imperfect description, or no person or property exactly answers the description, mistakes and omissions must be corrected, if the error appears from the context of the will or from extrinsic evidence, excluding the oral declarations of the testator as to his intentions; and when an uncertainty arises upon the face of a will, as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, excluding such oral declarations." Prob.Code, § 105. Recently this court has stated the rules of construction and on the admissibility of extrinsic evidence. To impose a trust upon property bequeathed it must appear that the testator intended to impose mandatory duties, and where an absolute estate has been devised by will, that estate will not be limited by subsequent words unless they indicate as clear an intention therefor as was shown by the words creating the estate. In re Estate of Collias, 37 Cal.2d 587, 233 P.2d 554; In re Estate of Kearns, 36 Cal. 2d 531, 225 P.2d 218; Prob.Code, § 104, supra. While declarations of the testator before and after the execution of the will are admissible for the purpose of ascertaining the intent with which the instrument was executed, they are not admissible "for the purpose of proving the meaning the testator attributed to specific provisions of an admitted will. [Citations.] 'Such * * * declarations of intent to make a will are admissible when the attempt is not to explain an ambiguity but to show the testamentary character of a letter.'" Estate of Sargavak, supra, 35 Cal.2d 93, 97, 216 P.2d 850, 852. In re Estate of Kearns, supra, 36 Cal.2d 531, 225 P.2d 218, the court was considering whether a clear dispositive clause of a will was modified by a later clause which seemed to indicate, by allegedly precatory words, the creation of a trust. We concluded that the later clause was not as clear as the dispositive clause and hence under section 104 of the Probate Code, supra, a trust was not created unless the intent of the testator to do so can be shown by extrinsic evidence and "Section 104 must be read with section 105 of the Probate Code which provides that 'when an uncertainty arises upon the face of a will, as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, excluding * * * oral declarations' of the testator as to his intentions." Estate of Kearns, supra, 36 Cal.2d 531, 537, 225 P.2d 218, 222. As there was an "uncertainty" on the face of the will the trier of fact may consider such matters "as the size of the estate, the property involved in the gift, the circumstances of the parties, and their relation to each other and to the testator." In other words, oral declarations of the testator are not admissible but circumstances may be shown where there is an uncertainty. Or as was said in Estate of Salmonski, supra, 38 Cal. 2d 199, 214, 238 P.2d 966, 975; "When an uncertainty arises upon the face of a will as to the meaning of any of its provisions, the testator's intent is to be ascertained from the words of the will, but the circumstances of the execution thereof may be taken into consideration, excluding the oral declarations of the testator as to his intentions. * * * But 'where the intent is plain' from the words used, 'the duty of the court is to declare that intent, without regard to the consequences.'" As in the Kearns case, the question here presented is whether the testatrix *intended to create a trust* rather than an ascertainment of who are the beneficiaries thereof if one was created, hence it is not a case of determining an "imperfect description" or where no person * * * exactly answers the description" as contemplated by the first clause of section 105 of the Probate Code, supra. The problem is whether a trust was intended at all for any beneficiaries, not who those beneficiaries might be after it has been determined that a trust was intended. Thus it is not a question of ascertaining the objects or property of the testator's bounty, and cases on that issue relied upon by petitioners are not applicable.

[4] Decisive on the admissibility of extrinsic evidence is, therefore, the presence or absence of uncertainty in the codicil. That there is no uncertainty is plain considering the codicil and rules of construction applicable. The bequest to Mahdesian and Ohanneson, hereafter referred to as legatees, is positive and unequivocal. The testatrix declares that she "leaves everything she has" to her "boy" Mahdesian (he was not her son) and her lawyer Ohanneson. True, she goes on to state that she "gives them power of attorney to divide what is left of her belongings to them," but the giving of the power of attorney does not indicate a trust as it is only an authorization to the legatees to divide the property between them, merely another way of saying that she leaves it to them with full power to take charge of it and divide it. It is clear that when she said she gave power of attorney to "them" the "them" referred to the legatees, and it clearly follows that the second "them" in the same clause also refers to the legatees. There is no relation between that "them" and the nieces and grand nieces and strangers later mentioned. She states that Mrs. Shooshan is to be given nothing, undoubtedly fearing a possibility that the legatees might give her something, an eventuality which she wants to avoid because of her feeling toward Mrs. Shooshan. The references to nieces and grand nieces and "perfect" strangers is a further expression of her dislike for Mrs. Shooshan, it being stated that she would rather help them than Mrs. Shooshan, indicating that she did not even see fit to help such persons. When she refers to what is "left of her belongings" she plainly means what is left at the time she dies or after the creditors and expenses of administration have been paid.

[5] It is urged that because Mahdesian was named executor in the 1945 will (none

was named in the codicil) and that will stands as far as it appoints an executor, a presumption arises that the bequest to him was intended to be in trust. It is not known now whether the 1945 will will withstand the contest as a new trial has been granted and the outcome is not known as above mentioned. Aside from that, however, the law is not as claimed by petitioners. Even if Mahdesian was named as executor in the codicil it still appears that he is clearly made a legatee, and any power of attorney does not appear to be addressed to him as executor. "Where the person directed to carry out the wishes of the testator is both executor and legatee, the courts in construing the effect of the language have refused to follow the strict rule which imposes a mandatory duty on the executor and have apparently treated the words as being addressed to him in his capacity as legatee." Estate of Kearns, supra, 36 Cal.2d 531, 534, 225 P.2d 218, 221; In re Estate of Collias, supra, 37 Cal.2d 587, 590, 233 P.2d 554.

[6, 7] It may be noted that some of the extrinsic evidence to which reference is made in Estate of Sargavak, supra, 35 Cal. 2d 93, 216 P.2d 850, might indicate that there was an oral agreement between the testatrix and Ohanneson and Mahdesian that they would hold the property received by them under the codicil for petitioners or some of them. Such an oral agreement could be proved by extrinsic evidence and a constructive trust would arise in favor of the beneficiaries, for "Where a testator devises or bequeaths property to a person in reliance upon his agreement to hold the property in trust, the devisee or legatee holds the property upon a constructive trust for the person for whom he agreed to hold it." (Rest., Trusts, § 55; see Sears v. Rule, 27 Cal.2d 131, 163 P.2d 443; Beck v. West Coast Life Ins. Co., 38 Cal.2d 643, 241 P.2d 544, 26 A.L.R.2d 979; Orella v. Johnson, 38 Cal.2d 693, 242 P.2d 5; 25 Cal.Jur. 177. The probate court is not, however, the appropriate forum in which to establish such a trust; it must be litigated in an independent proceeding in equity. Sears v. Rule, supra, 27 Cal.2d 131, 163 P.2d 443; In re Estate of Morelli, 102 Cal.App. 2d 39, 226 P.2d 716. Hence, the question cannot be considered in the instant proceeding.

The order is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

---

41 Cal.2d 300

HERRSCHER v. HERRSCHER et al.

HERRSCHER v. JACKSON.

L. A. 22363.

Supreme Court of California, in Bank.

July 28, 1953.

Action by an unborn infant, by its guardian ad litem, for a determination that defendant was the father of plaintiff, and for other relief, wherein defendant filed an answer and cross-complaint. The Superior Court, Los Angeles County, Julius V. Patrosso, J., entered a minute order granting plaintiff's motion to strike defendant's cross-complaint and defendant appealed. The Supreme Court, Shenk, J., held that there was no final order on file and that minute order granting plaintiff's motion was not appealable.

Appeal dismissed.

Prior opinion see, Cal.App., 251 P.2d 84.

1. Pleading ⚷360(4)

An order granting a motion to strike a cross-complaint from files is equivalent to an order dismissing cross-complaint.

2. Appeal and Error ⚷80(6)

Where parties to cross-complaint are not identical with parties to original action, order dismissing cross-complaint amounts to final adjudication between cross-complainants and cross-defendants and is appealable.

3. Appeal and Error ⚷78(4)

An order of dismissal is to be treated as a judgment for purposes of taking an appeal when order finally disposes of particular action and prevents further proceedings as effectually as would a formal judgment.

4. Appeal and Error ⚷347(1)

Language of rule providing that date of entry of appealable order which is entered in minutes shall be date of its entry in permanent minutes, unless such minute order as entered expressly directs that a written order be prepared, signed and filed, in which case date of entry shall be date of filing of signed order, is clear and leaves no room for interpretation. Rules on Appeal, rule 2(b)(2).

5. Judgment ⚷214

It is matter of trial court procedure whether court chooses to make its final decision by entry in minutes of order without a direction that a written order be prepared, signed and filed, or elects to enter a direction that a formal order be prepared.

6. Judgment ⚷214

In action by unborn infant, by its guardian ad litem, for determination that defendant was father of plaintiff, and for other relief, wherein trial court at same time granted plaintiff's motion to dismiss cross-complaint and granted defendant's motion to dissolve temporary restraining order, it was discretionary with trial court to direct either party to prepare formal order, and fact that direction was to defendant immediately following order granting defendant's motion did not relieve defendant of duty to prepare a formal order disposing of all matters embraced within minute order, including disposition of motion against defendant.

7. Appeal and Error ⚷133

In action by unborn infant, by its guardian ad litem, for determination that defendant was father of plaintiff, and for other relief, wherein trial court granted plaintiff's motion to dismiss cross-complaint and granted defendant's motion to dissolve temporary restraining order, and directed preparation of written order by defendant and directed signing and filing of such order, and no written order was filed, there was no final order on file and minute order granting plaintiff's motion was not appealable. Code Civ.Proc. § 581d; Rules on Appeal, rule 2(b)(2).

◆

Marcel E. Cerf, Robinson & Leland, San Francisco, James B. Fredericks, Beverly Hills, and Henry Robinson, San Francisco, for appellant.

Hahn, Ross & Saunders, Los Angeles, Thomas D. Mercola, Beverly Hills, and Saul Ross, Los Angeles, for respondent.

SHENK, Justice.

This is an appeal from a Minute Order granting plaintiff's motion to strike defendant's cross-complaint.

In July, 1951, an action was commenced by John Doe Herrscher, an unborn infant, by its guardian ad litem Ann Jackson, for a determination that the defendant Herrscher is the father of plaintiff, for $1,000 per month support, for $5,000 costs, for reasonable attorney's fees, and $5,000 immediately for medical care of plaintiff's mother during her pregnancy and pending the birth of the plaintiff. The complaint alleged that the plaintiff was conceived during the month of April, 1951 that at that time Ann Jackson was an unmarried woman; and that she and the defendant had never been legally married. An injunction pendente lite was secured restraining defendant and four named defendants from disposing of any of defendant's property.

The defendant filed an answer and cross-complaint. The answer denied the existence of plaintiff and denied paternity. The cross-complaint named Ann Jackson, as guardian ad litem and individually, and ten fictitious persons as cross-defendants. It alleged that Ann Jackson had introduced herself to defendant by false representations; that she had engaged in a course of conduct of introducing herself to men and engaging in intimate relations with them and that on frequent occasions she had demanded money for purported pregnancies from those men under threats of violence and embarrassment; that upon learning these facts the cross-complainant had informed her that he did not desire to continue keeping company with her, whereupon she extorted money from him under threats of violence; that she had threatened to charge him with assault and burglary; that she had caused to be published in the newspapers false information concerning him; that fictitious cross-defendants, acting jointly with her in the common design to extort money from cross-complainant, had demanded that he pay her the sum of $25,000 under threats of violence, humiliation and embarrassment; and that he had no knowledge of the claimed pregnancy until this suit was brought. The cross-complaint prayed that the complaint be dismissed; that judgment be rendered declaring the non-existence of the relationship of parent and child between cross-complainant and the purported plaintiff; for $100,000 general damages for injury to his credit and reputation; and for other relief. Some time after the filing of the complaint the unborn plaintiff died.

The cross-defendant Ann Jackson appeared and filed a demurrer to the cross-complaint. She also filed a notice of motion to strike the cross-complaint from the files on the ground that it was not filed in good faith and that it was sham, irrelevant, and frivolous. These matters came before the court for hearing on December 21, 1951, together with a motion of the defendant to dissolve the restraining order. Following the hearing an order was entered in the minutes on January 18, 1952, the pertinent parts of which are as follows: "* * * Demurrer is ordered off calendar. Motion of plaintiff and cross-defendant is granted. Motion of defendant is granted. (Defendant to prepare, serve and file formal order). * * *"

The defendant contends that there is no basis in law for striking his cross-complaint from the files; that it sufficiently states a cause of action by way of cross-complaint against Ann Jackson within the terms of Section 442 of the Code of Civil Procedure; that it is shown therein that Ann Jackson is endeavoring to perpetrate a fraud on him by falsely alleging that she is pregnant because of him; that she is using her alleged pregnancy as a means to obtain money from him; that her alleged physical condition and personal conduct are sufficiently connected with the alleged cause of action for her own claim of support as to give it proper standing as a cross-complaint; and that in any event there is no showing whatever to justify striking his cross-complaint from the file on the grounds asserted.

It is the position of the plaintiff that an order dismissing a cross-complaint or striking it from the files is not an appealable order and, furthermore, that the particular order from which this appeal is taken is not a final order and therefore is not appealable.

[1–3] An order granting a motion to strike a cross-complaint from the files is equivalent to an order dismissing the cross-complaint. Howe v. Key System Transit Co., 198 Cal. 525, 246 P. 39. Where the parties to the cross-complaint are not identical with the parties to the original action, the order amounts to a final adjudication between the cross-complainants and cross-defendants and is appealable. Sjoberg v. Hastorf, 33 Cal.2d 116, 199 P.2d 668; Kennedy v. Owen, 85 Cal.App.2d 517, 520, 193 P.2d 141. It has long been the rule in this state that an order of dismissal is to be treated as a judgment for the purposes of taking an appeal when it finally disposes of the particular action and prevents further proceedings as effectually as would any formal judgment. Southern Pac. R. R. Co. v. Willett, 216 Cal. 387, 14 P.2d 526.

[4] The time for filing a notice of appeal is determined by the provisions of Rule 2 of the Rules on Appeal, namely, "within 60 days from the date of entry of the judgment".* This rule followed the provisions of former Section 939 of the Code of Civil Procedure which it superseded. Difficulties in practice were encountered in determining what was meant by the phrase "date of entry." Did it mean the date when the order was set forth in the so-called rough minutes of the court, or did it mean the date

---

* Rule 40(g) of the Rules on Appeal provides: "'Judgment' includes any judgment, order or decree from which an appeal lies."

when it was entered in the permanent minutes? What was the effect of an appealable order evidenced by a minute entry which was followed later by a written order or judgment filed? It had been decided that where findings of fact or a further or formal order is required, an appeal does not lie from a minute order. Trubowitch v. Riverbank Canning Co., 30 Cal.2d 335, 182 P.2d 182; Estate of Dow, 91 Cal.App.2d 420, 205 P.2d 698; Hirschberg v. Oser, 82 Cal.App. 2d 282, 186 P.2d 53. Rule 2(b)(2) was adopted to clarify this situation. As amended, effective January 1, 1951, 36 Cal. 2d 1, this rule provides: "The date of entry of an appealable order which is entered in the minutes shall be the date of its entry in the permanent minutes, unless such minute order as entered expressly directs that a written order be prepared, signed and filed, in which case the date of entry shall be the date of filing of the signed order." The language of this rule is clear and leaves no room for interpretation. Pessarra v. Pessarra, 80 Cal.App.2d 965, 967, 183 P.2d 279.

[5] It is a matter of trial court procedure whether the court chooses to make its final decision by the entry in the minutes of an order without a direction that a written order be prepared, signed and filed, or elects to enter a direction that a formal order be prepared. Gwinn v. Ryan, 33 Cal. 2d 436, 202 P.2d 51.

[6] Here the direction for a formal order was made to the defendant. A motion on behalf of each party was ruled upon at the same time, one by the plaintiff to dismiss the cross-complaint and the other by the defendant to dissolve the restraining order. Both motions were granted. It was discretionary with the court to direct either party to prepare the formal order. The fact that the direction was to the defendant immediately following the order granting his motion would not relieve him of the duty to prepare a formal order disposing of all matters embraced within the minute order, including the disposition of the motion against him. It would be unreasonable to impose upon the court the duty to require both parties to prepare the formal order. When prepared, signed and filed the order would properly include a disposition of all of the matters embraced within the minute order, both for and against the party charged by the court with the duty of preparing it. Here, the direction of the court was not complied with and a final, formal order was never filed.

[7] The defendant calls attention to the fact that when Section 581d was added to the Code of Civil Procedure in 1947 it provided that "All dismissals ordered by the court shall be entered upon the minutes thereof * * * and such orders when so entered shall constitute judgments and be effective for all purposes * * *"; also that when the same section was re-enacted in 1951, effective January 1, 1952, it incorporated the language just quoted. It is urged that since the code section as re-enacted was effective after the adoption of Rule 2(b)(2) the rule has been superseded by the code provision. The conclusion is then drawn that the minute entry is "effective for all purposes". But this does not follow. The code section obviously contemplates that the minute entry there referred to shall be a presently effective order and not an order such as we have here which by its terms and provisions of the rule is not to take effect until the formal order is prepared, signed and filed. In other words the code section deals with orders "Entered upon the minutes" which by their terms are final. It does not assume to declare effective immediately upon its entry in the minutes an order which the trial court has expressly indicated should take effect at a later date. The code section does not declare what shall constitute entry, nor the time when an order shall be deemed entered for the purpose of starting the time within which an appeal may be taken. These are matters within the scope of the Rules on Appeal. They are clearly and definitely provided for in the rules and there is no inconsistency between them and the code provisions. It was within the discretion of the trial court to direct that a written order be prepared, signed and filed. Such a direction was made and was entered in

the minute order. Since no written order was filed there is no final order on file and the minute order is not appealable.

The appeal is dismissed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR and SPENCE, JJ., concur.

41 Cal.2d 306

ALLEN v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

L. A. 22684.

Supreme Court of California, in Bank.

July 28, 1953.

Prohibition proceedings were brought by nonresident against the Superior Court of the State of California, in and for the County of Los Angeles, to restrain the Superior Court from taking any further proceedings in an action filed against the nonresident to recover for damages arising out of an automobile collision. The Supreme Court, Spence, J., held that Superior Court acquired in personam jurisdiction over nonresident by virtue of service of process on him without the state.

Writ discharged and peremptory writ of prohibition denied.

Prior opinion, 251 P.2d 358.

1. Process 🔑96(4)

Where affidavit, on which order for publication of summons was made, was a lengthy recital of extended efforts made to effect service on defendant for over three years and included considerable hearsay, but it further contained statements clearly and directly establishing that defendant was residing in foreign state at time application was made for the order, the affidavit satisfied the requirements of the statute. Code Civ.Proc. § 412.

2. Judgment 🔑16, 17(1)

The rendition of a valid personal judgment against a defendant requires that he be a member of the class subject to its power and that he have proper notification of the action, with opportunity to appear therein.

3. Judgment 🔑17(2)

Statutes providing that a person who resides out of the state, or has departed from the state, or cannot, after due diligence, be found within the state, or conceals himself to avoid service of summons, is subject to service by publication, and that personal service outside the state is the equivalent to publication, are broad enough in their terms to authorize a personal judgment based on extraterritorial service of process, either through publication or personal service on a defendant without the state. Code Civ.Proc. §§ 412, 413.

4. Judgment 🔑17(1, 3)

Statute providing that where jurisdiction is acquired over a person who is outside of the state by publication of summons in accordance with statutes, court shall have power to render a personal judgment against such person only if he was personally served with a copy of the summons and complaint, and was a resident of the State at the time of the commencement of the action or at the time of the service, was designed to restrict the power of the court if a personal judgment is to be entered. Code Civ.Proc. §§ 412, 413, 417.

5. Constitutional Law 🔑315
Judgment 🔑17(1, 3)

Statute providing that where jurisdiction is acquired over a person who is outside of the state by publication of summons in accordance with statutes, court shall have power to render a personal judgment against such person only if he was personally served with a copy of the summons and complaint, and was a resident of the state at the time of the commencement of the action or at the time of the service, satisfies requirement of procedural due process. Code Civ.Proc. §§ 412, 413, 417.

6. Automobiles 🔑235

Where defendant, who was involved in automobile accident within the state, was a resident of the state at the time of the accident and at time action was brought against him to recover for damages arising out of accident, and at time of making of order for publication of summons and at time of personal service on defendant in foreign state, he was a resident of the foreign state, court acquired in personam jurisdiction over defendant by virtue of service of process on him. Code Civ.Proc. §§ 412, 413, 417.

7. Judgment 🔑17(1, 3)

Statute providing that where jurisdiction is acquired over a person who is outside of the state by publication of summons in accordance with statutes, court shall have power to render a personal judgment against such person only if he was personally served with a copy of the summons and complaint, and was a resident of the state at the time of the commencement of the action or at the time of the service, is applicable to pending as well as future litigation. Code Civ.Proc. §§ 412, 413, 417.

◆

Stephen J. Grogan and Henry N. Cowan, Los Angeles, for petitioner.

No appearance for respondent.

Arthur Wasserman and Engelhardt, Campbell & Singer, Los Angeles, for real parties in interest.

SPENCE, Justice.

Petitioner seeks a writ of prohibition to restrain the Superior Court of Los Angeles County from taking any further proceedings in an action filed against him by Irving and Jeanette Bromberg. The determinative question is whether the court acquired *in personam* jurisdiction over petitioner by virtue of service of process on him without the state. Consideration of our statutory provisions and settled legal principles precludes petitioner from obtaining the relief sought.

The main action is one for damages arising out of an automobile collision which occurred in this state on November 1, 1947. The complaint was filed in the respondent court and summons was issued on July 12, 1948. A second alias summons was issued on March 25, 1952. Pursuant to affidavit by plaintiff Irving Bromberg, an order for publication of summons was made on April 29, 1952. The order states that it appeared to the court that "defendant [petitioner herein] resides out of California and cannot after due diligence be found within State of California" and that he resides in Oregon. On May 3, 1952, petitioner was served personally with summons and complaint in Oregon.

On May 29, 1952, petitioner appeared specially in the action by filing a notice of motion (1) to quash the order for publication of summons on the ground that it was in excess of the power of the court and (2) to quash the service of summons and complaint on the ground that the court had not acquired jurisdiction of him because the action was *in personam.* In support of his motion petitioner filed an affidavit stating that he was a resident of California at the time of the accident, November 1, 1947, and until September 1, 1951—living in Los Angeles until June 3, 1949, and then moving to Oakland; that since September 1, 1951, he has resided with his family in Portland, Oregon, where he is a registered voter, conducts his business, and maintains his bank account; and that he has had no intention of returning to California since moving to Oregon. It therefore appeared without conflict that both at the time that the accident occurred and at the time of the commencement of the action, petitioner was a resident of the state of California; and it further appeared that both at the time of the making of the order for publication of summons and at the time that personal service was effected on petitioner in Oregon, he was a resident of the state of Oregon. The trial court denied the motion. Petitioner challenges the propriety of that denial by this prohibition proceeding. Berger v. Superior Court, 79 Cal.App.2d 425, 426, 179 P.2d 600; Briggs v. Superior Court, 81 Cal.App.2d 240, 241, 183 P.2d 758.

[1] As a preliminary point petitioner argues that the order for publication of summons rests on an insufficient affidavit and is therefore void. In re Behymer, 130 Cal.App. 200, 202, 19 P.2d 829. While the affidavit is a lengthy recital of extended efforts made to effect service on petitioner for over three years and includes considerable hearsay, Narum v. Cheatham, 127

Cal.App. 505, 508, 15 P.2d 1106, it further contains statements clearly and directly establishing that petitioner was residing in Portland, Oregon, at the time application was made for the order. Accordingly, the affidavit satisfies the requirements of section 412 of the Code of Civil Procedure. Porter v. Superior Court of Los Angeles, 30 Cal.App. 608, 611, 159 P. 222.

[2] There now remains the principal question of the propriety of the trial court's assumption of *in personam* jurisdiction of petitioner. The rendition of a valid personal judgment against a defendant requires that he be a member of the class subject to its power and that he have proper notification of the action, with an opportunity to appear therein. Goodrich, Conflict of Laws, 2d Ed.1938, sec. 69.

[3] As long provided by California law, a person who "resides out of the State; or has departed from the State; or can not, after due diligence, be found within the State; or conceals himself to avoid the service of summons" is subject to service by publication. Code Civ.Proc. sec. 412. Under such circumstances, personal service outside the state is declared to be "equivalent to publication". Ibid. sec. 413. This statutory language is literally broad enough in its terms to authorize a personal judgment based on the extraterritorial service of process, either through "publication" or "personal service" on a defendant without the state. See 37 Cal.L.Rev. 80, 84.

However, in Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565, it was declared that a court may not acquire jurisdiction *in personam* over a defendant in an action through the service of process outside the state in which the forum exists. This theory of jurisdiction "based upon physical power over the body of the defendant", 8 Univ. of Chicago Law Review 596, 598, was applied in De la Montanya v. De la Montanya, 112 Cal. 101, 44 P. 345, 32 L.R.A. 82, so as to hold that service by publication upon a California resident outside the state was insufficient to support a personal judgment, even though the defendant had left the state to avoid service. This result was thought to be required by the due process clause of the federal Constitution, and the California domiciliary status of the defendant was disregarded as a distinguishing consideration from the nonresident status of the defendant in the Pennoyer case. Neither the De la Montanya case nor any other cited as subscribing to that view, e. g. Frey & Horgan Corp. v. Superior Court, 5 Cal.2d 401, 404, 55 P.2d 203; Merchants' Nat. Union v. Buisseret, 15 Cal.App. 444, 446-447, 115 P. 58; Pinon v. Pollard, 69 Cal.App.2d 129, 132–133, 158 P.2d 254, concerned a situation where a resident or former resident of this state was personally served with process while in another state. In the De la Montanya case no consideration was given to the adequacy of the notice, but rather the decision was based wholly on the proposition that "the state has no jurisdiction over * * * persons * * * not within its territory". 112 Cal. 112, 44 P. at page 347.

The broad language of Pennoyer v. Neff, supra, construed as prohibiting acquisition of personal jurisdiction over any person served with process outside the state has since been re-examined in the light of its particular factual situation. Thus in Milliken v. Meyer, 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278, a personal judgment of a Wyoming court was upheld against a domiciliary who had been personally served outside the state. In so deciding the question presented, the Supreme Court of the United States observed 311 U.S. at pages 462-463, 61 S.Ct. at page 342: "Domicile in the state is alone sufficient to bring an absent defendant within the reach of the state's jurisdiction for purposes of a personal judgment by means of appropriate substituted service. Substituted service in such cases has been quite uniformly upheld where the absent defendant was served at his usual place of abode in the state (citing authorities) as well as where he was personally served without the state. (Citing authority.) That such substituted service may be wholly adequate to meet the requirements of due process was recognized by this Court in McDonald v. Mabee, 243 U.S. 90, 37 S.Ct. 343, 61 L.Ed. 608, despite earlier intimations to the contrary. See Pennoyer v. Neff, 95 U.S. 714, 733, 24 L.Ed. 565;

* * *. Its adequacy so far as due process is concerned is dependent on whether or not the form of substituted service provided for such cases and employed is reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard. If it is, the traditional notions of fair play and substantial justice (McDonald v. Mabee, supra) implicit in due process are satisfied. Here there can be no question on that score. Meyer did not merely receive actual notice of the Wyoming proceedings. While outside the state, he was personally served in accordance with a statutory scheme which Wyoming had provided for such occasions. And in our view the machinery employed met all the requirements of due process. Certainly then Meyer's domicile in Wyoming was a sufficient basis for that extraterritorial service." See International Shoe Co. v. State of Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95; also annos. 126 A.L.R. 1474; 132 A.L.R. 1361; 14 So.Cal.L. Rev. 488.

The decision in the Milliken case is entirely in keeping with present-day needs affecting the power of a state to acquire jurisdiction over persons who have departed from its borders. The increasingly artificial nature of state boundaries, the expanding of metropolitan areas into two or more states, and the multiplying transportation facilities, especially through the widespread use of automobiles and trucks affecting the mobility of population, all bear significantly on the problem of process. The necessities of the situation are recognized in the nonresident motorist statutes, e. g. Vehicle Code, § 404, permitting an injured person to obtain effective redress against transient motorists. Jurisdiction in such cases is predicated upon the theory of consent of the nonresident to substituted or constructive service and the appointment of the secretary of state or like officer as agent for receipt of service of process. Kane v. State of New Jersey, 242 U.S. 160, 37 S.Ct. 30, 61 L.Ed. 222; Hess v. Pawloski, 274 U. S. 352, 47 S.Ct. 632, 71 L.Ed. 1091; see Berger v. Superior Court, supra, 79 Cal. App.2d 425, 427–428, 179 P.2d 600; Briggs v. Superior Court, supra, 81 Cal.App.2d 240, 246, 183 P.2d 758. This consent is largely fictional but it meets the problem of process in regard to highway automobile accidents involving nonresident motorists. See annos. 35 A.L.R. 951; 57 A.L.R. 1239; 99 A.L.R. 130; also 23 Ill.L.Rev. 427, 436. However, these statutes, in order to be valid, must provide some method of service reasonably designed to give notice of the action to the defendant. 16 C.J.S., Constitutional Law, § 619, pp. 1245, 1249; Wuchter v. Pizzutti, 276 U.S. 13, 19, 24, 48 S.Ct. 259, 72 L.Ed. 446; see 37 Cal.L.Rev. 80, 88–89.

[4] With this background of legislative action and judicial decisions, the Legislature enacted in 1951 section 417 of the Code of Civil Procedure. 23 Cal.Jur. sec. 137, p. 763; sec. 159, p. 782. That section provides: "Where jurisdiction is acquired over a person who is outside of this State by publication of summons in accordance with Section 412 and 413, the court shall have the power to render a personal judgment against such person only if he was personally served with a copy of the summons and complaint, and was a resident of this State at the time of the commencement of the action or at the time of service." Stats. 1951, ch. 935, p. 2537; effective September 22, 1951. As so based on the broad authority of sections 412 and 413, section 417 is manifestly designed to restrict the power of the court if a personal judgment is to be entered. Thus its operation is made dependent on defendant's residence within the state either at the time of commencement of the action or time of service, and on his personal service with summons.

[5, 6] One main objection to service by publication on a person residing outside of the state is that due process requires fair notice. This was a consideration in Milliken v. Meyer, supra, 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278, upholding a personal judgment against a domiciliary based on the personal service of process while absent from the state. It was there said, 311 U.S. at page 464, 61 S.Ct. at page 343: "One * * * incident of domicile is amenability to suit within the state even during sojourns without the state, where

the state has provided and employed a reasonable method for apprising such an absent party of the proceedings against him." The same principle on analogous reasoning applies where a domiciliary at the time of the commencement of the action thereafter changes his state of residence and is personally served with process in the latter state. As a citizen of the state wherein the action was commenced, he had certain responsibilities arising out of his relationship to that state by reason of domicile, one of which was amenability to suit therein. Such relationship and responsibility based on citizenship within the state are not terminated by his subsequent removal to another state, and he may be served with process pursuant to a method reasonably designed to give him notice of the proceedings brought against him in the courts of the state of his original domicile prior to his departure therefrom. We therefore conclude that section 417 satisfies the requirements of procedural due process, for no more certain provision for defendant's receipt of actual notice of the institution of litigation against him could be made than through the specified personal service of process. Milliken v. Meyer, supra, 311 U.S. 457, 463, 61 S.Ct. 339; see 40 Cal.L.Rev. 156.

[7] Petitioner questions the applicability of section 417 to the present case and argues that this section can have no retrospective operation so as to affect pending litigation. He takes the position that since section 417 did not take effect until some three years after the commencement of the action and at a time when he admittedly was not a resident of this state, it can have no significance here. But as above discussed, California at all times under sections 412 and 413 of the Code of Civil Procedure had the power to obtain *in personam* jurisdiction over petitioner for the purposes of this action by means of such service of process as would satisfy the requirements of due process. Then section 417, as a clarifying statute, set forth the restrictive conditions under which this state would assert *in personam* jurisdiction, thereby leaving no doubt that this state was conforming in this regard with "traditional notions of fair play and substantial justice * * * implicit in due process * * *." Milliken v. Meyer, supra, 311 U.S. at page 463, 61 S.Ct. at page 343. As so construed, section 417 may reasonably apply to pending as well as future litigation. In this respect it is not to be regarded as a retroactive law, and petitioner's argument correlating the section with objectionable retrospective legislation effecting an impairment of vested rights, 11 Am.Jur. sec. 368, p. 1197 et seq., is without merit.

The alternative writ is discharged and the peremptory writ of prohibition is denied.

GIBSON, C. J., and SHENK, EDMONDS, CARTER and TRAYNOR, JJ., concur.

SCHAUER, Justice.

I concur. I think it should be mentioned, however, that although in seeking prohibition petitioner appears to have mistaken his remedy, the denial of the petition is without prejudice, and is completely unrelated, to a possible remedy by motion in the trial court to dismiss the action on the ground that the facts bring the case within the provisions of section 581a of the Code of Civil Procedure.

Such facts, as related in the main opinion, show that more than three years elapsed between the time the action was filed against petitioner (defendant in such action) and the time summons was served on him, and also that he remained a resident of California for more than three years after the action was filed. Under such circumstances, in the absence of a showing of facts suspending operation of the statute, it would seem to be the duty of the court on motion of the petitioner or of its own motion to dismiss the main action.

119 Cal.App.2d 380

PEOPLE v. RANSON.

Cr. 2882.

District Court of Appeal, First District,
Division 2, California.
July 27, 1953.

Defendant was convicted in the Superior Court, City and County of San Francisco, Melvin I. Cronin, J., of murder in the first degree, murder in the second degree, and assault with intent to commit murder on three counts, and he appealed. The District Court of Appeal, Dooling, J., held, inter alia, that evidence was sufficient, on issue of deliberation and premeditation, to sustain conviction of first degree murder.

Judgments and order denying motion for new trial affirmed.

1. Homicide ⚷253(3)

Evidence was sufficient, on issue of deliberation and premeditation, to sustain conviction of defendant of first degree murder by the shooting and killing of another.

2. Homicide ⚷116(3, 4)

Self-defense is a question of fact and requires in the actor a real fear of serious bodily injury and an appearance of danger of such injury which would arouse such fear in the mind of a reasonable man.

3. Homicide ⚷244(1)

In prosecution for murder, wherein it appeared that defendant had shot and killed two members of a rival gang of youths at time when others present at the shooting were unarmed, but when members of the two gangs were facing each other, apparently preparatory to physical encounter, evidence warranted finding on defendant's defense of self-defense there was neither the appearance of danger of serious injury to defendant from the viewpoint of a reasonable man nor a fear of such danger in mind of defendant at time of the shooting.

4. Criminal Law ⚷829(5)

In prosecution for murder, wherein it appeared that defendant had shot and killed two members of a rival gang of youths at time members of the two gangs were facing each other in an antagonistic mood, and defendant asserted that killing was in self-defense, instruction given by court amply covered doctrine of right of a person to act on appearances as affecting defense of self-defense, and refusal of requested instruction thereon was not error.

5. Criminal Law ⚷822(8)

In prosecution for murder, wherein defense of self-defense was interposed, instructions on self-defense, taken as a whole, were a correct statement of the law and fully and fairly covered all elements of the defense.

6. Homicide ⚷300(7)

In prosecution for murder, wherein it appeared that defendant had shot and killed a member of a rival youthful gang at time when members of the two gangs were facing each other in an antagonistic mood, evidence warranted giving of instructions that one who has induced a quarrel or made a felonious assault on another is not entitled to act in self-defense unless he first in good faith declines further combat. Pen.Code, § 197, subd. 3.

7. Homicide ⚷228(1)

Evidence in prosecution for murder by the shooting and killing of two victims, was sufficient to show the killing and death of the victim as to whom the charge was murder in the second degree.

8. Witnesses ⚷387

In prosecution for murder, wherein it appeared that shooting victims had been members of a rival gang of youths who were allegedly prone to use weapons, and defendant testified that he only carried gun when entering territory frequented by such rival gang, cross-examination of witness for defendant, who had also testified that defendant only carried gun on such occasions, inquiring about an assault by defendant upon two sailors with a gun, and concerning alleged statement with respect thereto made by witness to police officers, was proper.

9. Witnesses ⚷389

In prosecution for murder by shooting by defendant of members of a rival gang of youths, wherein witness for defendant, who had testified that defendant carried his gun only when entering territory frequented by the rival gang, had denied on cross-examination that he had told police officers of an assault by defendant with gun upon two sailors, impeachment of witness by testimony of an officer showing his prior inconsistent statement to the police, was proper, when jury was instructed that the evidence was introduced solely for the purpose of impeachment of the witness.

10. Witnesses ⚷270(1), 387

In determining whether cross-examination relates to irrelevant matters, test to be applied is, does question call for a response which might have been proved as an independent fact, and if subject of inquiry is independently relevant, witness' testimony on cross-examination may be impeached by proof of prior inconsistent statements.

11. Criminal Law ⚷1170½(1)

In prosecution for murder by shooting by defendant of two members of a rival gang of youths, wherein witness for defendant who had testified that defendant carried the gun only when entering territory frequented by rival gang, was impeached, as to his denial of use of gun by defendant on two sailors, by testimony of police officer showing prior inconsistent statement to the police, question of witness whether he remembered defendant and himself "removing some personal property" from the sailors, although improper, did not constitute prejudicial error under the circumstances.

12. Witnesses ⚷387

In prosecution for murder committed by the shooting by defendant of members of a rival gang of youths, wherein defendant sought to show that he carried the gun only when entering territory frequented by the rival gang, and for the purpose of protection, cross-examination of defendant for purpose of showing that he had carried a knife in a sheath on his leg before he had acquired the gun, was proper as tending to contradict his testimony that he first thought of the idea of carrying a weapon after a friend of his had been attacked by the rival gang and had escaped only through appearance of police.

* * *

Robert W. Sinai, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen. of California, Clarence A. Linn, Asst. Atty. Gen., and Arlo E. Smith, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

Shortly after midnight on March 30, 1952 in the San Francisco Civic Center the defendant and appellant successively shot and killed two young men and wounded three others. He was charged by indictment with the murder of the two who died and with assault with intent to commit murder upon the three others. The jury found him guilty of murder in the first degree of Norman Bothelo with recommendation of imprisonment, murder in the second degree of Andrew Ulibarri and assault with intent to commit murder on the other three counts.

The jury was properly instructed, almost in the language of People v. Bender, 27 Cal.2d 164, 183, 163 P.2d 8, as to what constitutes the premeditation and deliberation necessary in the commission of murder in the first degree and no complaint of these instructions as to form or sufficiency is made by appellant. He does however argue earnestly that the evidence is not sufficient to support the jury's finding of deliberation and premeditation in the killing of Bothelo, implicit in its verdict of first degree murder.

The evidence shows that appellant had apparently never met Bothelo prior to March 1, 1952 and never saw him again until the night preceding the early morning of the shooting. On March 1 appellant and several of his friends called at the home of Edith Apodaca. There they met Bothelo and a group of his friends. Bothelo and his friends are described by some of the witnesses as belonging to the "Fillmore gang" and appellant and his friends to the

"Portola gang". The two groups while at Miss Apodaca's home remained aloof from one another. Bothelo and his friends left Miss Apodaca's home first. A few minutes later appellant and his friends also left. Bothelo and some of his friends (the number is in dispute) were still on the sidewalk and unfriendly words were exchanged and some jostling between members of the two groups occurred. Appellant then drew out a .45 automatic revolver and told Bothelo and his friends to "freeze". One of them, Hinmon (afterwards wounded by appellant in the March 30 affray), approached appellant and was struck by him on the head with the automatic. There was a further angry exchange of words and appellant and his friends left in the automobile in which they had come.

On the night preceding the shootings a large dance and entertainment was held in the Civic Auditorium. Both appellant and Bothelo attended. Bothelo was unarmed but appellant carried his .45 automatic in a shoulder holster. During the evening appellant was told by a friend that Bothelo, in appellant's own words, "was looking for me." Shortly before the dance ended appellant walked up to Bothelo and, quoting appellant's testimony: "I walked up to him. He was sitting there on the side. I asked him if he was looking for me. He says: 'Yeah.' And I says, 'O.K. we'll—', I said, 'O.K. we'll have it out.' He said, 'Is it going to be cool?' I says, 'Yes' * *

Q. When he said, 'Is it going to be cool?' and you said, 'Yes', what did that mean * * *? A. Well, it could have been two things; first it was just me and him, him and I was going to fight alone * * * Or it could have meant if I was going to use the gun * * * I think I said, 'I will meet you over in the park, in the Plaza across the street.'

"Q. And what did he say? A. 'O.K.'"

Appellant left the auditorium first with some of his friends and waited in the Civic Center Plaza near one of the fountains. Some time later Bothelo and some of his friends followed. What thereafter ensued is the subject of a great amount of conflicting testimony. Appellant and his witnesses have appellant and only three others arrayed against Bothelo and a group of twenty-five or thirty young men. Other witnesses testified that the groups on each side were about equal in number. Appellant and his witnesses have this larger group gradually forcing appellant and his three friends backward until their backs were almost against the edge of the fountain. Other witnesses have the two groups practically equal in numbers approximately standing their ground on either side. These conflicts were for the jury to resolve and we must assume in favor of the verdicts that they believed the evidence most favorable to the prosecution. We take, as representative of such evidence, the testimony of Hinmon as to what happened.

According to Hinmon Bothelo left the auditorium with two young women, one of them Edith Apodaca. Bothelo met Ulibarri and the two walked into the plaza with Hinmon and one McMenomy following them. The four met Allione, a friend of the appellant and three or four other young men. They approached them and "we started arguing, and we started mixing it up a little bit * * * not exactly blows, shoves or pushes and stuff. Then Ranson came out of the bushes, behind the hedge, one tall shrub there on the left. * * * He drew his gun and held his gun out at his hip * * * he held the gun there and said, 'Which one wants it first?' And Ulibarri said, 'Well you can start with me.' * * * And Norman Bothelo told him to put the gun down, if he wanted to fight him fair, throw the gun away and he would fight him. Then the argument started, and I don't know what was said from then on until the girls rushed him, Edith Apodaca and the other girl." There were no weapons used before appellant appeared, "just hands". When appellant first appeared he said, "freeze", and then "Which one wants it first?" No one moved after that until the girls rushed him, "then somebody from the side line pulled the girls away from him, from Ranson, and—then he started shooting. * * * First he shot Norman Bothelo, and the bullet knocked him backwards and he fell down, and he sort of paused, and then, then he started shooting again." He swung the gun from his right to his left as he continued shooting. "First Ulibarri and Erickson and myself, and * * * Bennett." After Ranson shot Bothelo nobody rushed toward Ranson. "Everybody just stopped still, stood still." He saw nobody in the plaza with any weapon except Ranson, no bottles, sticks, knives, belts, "there were no other weapons at all."

On cross-examination it was developed that Erickson and Bennett arrived after the encounter was under way.

Bennett testified that he followed Hinmon and McMenomy into the plaza and in general corroborated Hinmon's testimony. Erickson testified that when he arrived at the plaza "I remember seeing Ranson pull out a gun and saying, 'who wants it first?' I was feeling pretty good, and I don't remember very much where I went." He did not see Bothelo, he did not hear the shots. The next thing "I remember laying on the ground waiting for the ambulance to come."

A prosecution witness, Hooks, who took no part in the affair, corroborated the evidence that the two groups engaged were about equal in number, that appellant and his group were not forced backward by their opponents before the shooting and that nobody else had any weapons except the appellant. There were six or seven facing Ranson and "three or four other guys with him". Behind Bothelo's group there were fifteen or twenty other people, some of these were older people, most of them were standing there and others just walking through. Hooks from the time he arrived saw no fighting or scuffling. The two groups were just standing there facing one another. He saw appellant draw his gun and tell them "to freeze". Bothelo said: "Put it down and I'll fight you fair." Appellant said: "Who wants it first?" Somebody said: "Shoot the sons of bitches, they won't move" and then appellant started firing. He kept his gun pointed at all times toward Bothelo and Bothelo was the first one that he shot.

[1] There was much testimony produced by appellant, as we have indicated, contradictory of this version of the encounter but accepting this testimony, as we must assume the jury did, there was sufficient from which the jury could reasonably conclude that before going into the plaza, when appellant challenged Bothelo to fight him and assured him that the encounter would be "cool", knowing all the while that he was armed with an automatic, appellant had formed the deliberate and premeditated intent to shoot Bothelo; that he concealed himself behind the shrubbery in furtherance of this predetermined plan and after Bothelo and his friends had arrived in the plaza he stepped out from the shrubbery, drew his gun and shot Bothelo as he had planned.

The inferences were for the jury to draw and we cannot say that the inference suggested is not supported by the evidence above set out.

The jury's verdicts indicate clearly that the jurors were impressed with the distinction between the two degrees of murder. They found appellant guilty of murder in the first degree in the shooting of Bothelo, the one whom appellant had previously challenged, the one whom he first confronted with the gun and the one at whom he fired the first shot. As to Ulibarri, the second one killed, there was no such showing from which deliberation and premeditation might be inferred and as to Ulibarri the jury found the crime to be second degree murder.

Appellant also insists that the evidence "shows beyond all cavil that the appellant had good reason to apprehend great bodily harm and, therefore, the shooting was in lawful self-defense." In support of this defense much evidence was introduced of the brutal fighting methods of the "Fillmore gang", the fact that appellant had been warned after the March 1 incident that the "Fillmore gang" was out to get him, the defense testimony (contradicted by the prosecution witnesses) that Ranson and his group were confronted by overwhelming numbers and were gradually forced backward to the fountain, evidence that some one just before the shooting approached Ranson with a coat which he endeavored to throw over Ranson's head, and the fact that the two young women made their unsuccessful effort to prevent appellant from using his gun.

[2] Self defense is a question of fact and requires in the actor a real fear of serious bodily injury and an appearance of danger of such injury which would arouse such fear in the mind of a reasonable man. "It must appear not only that he believed himself in such peril, but that, as a reasonable person, he had sufficient grounds for his belief." 13 Cal.Jur., Homicide, sec. 42, p. 638.

[3] In determining whether appellant actually believed himself in imminent peril of serious bodily injury the jury had appellant's own testimony concerning Bothelo just before appellant shot him: "I didn't think he was going to do anything at all. * * * I didn't think he would try anything. I didn't think he was going to try anything or would try anything." Coupled with this was the fact that the jury had before it evidence from which it could find that there were no other weapons of any sort exhibited, that the numbers opposed to one another were not disproportionate, that except for the effort of the two young women to prevent the shooting (which was thwarted by one or more of appellant's companions) no one opposed to appellant and his companions advanced after appellant drew the gun and ordered them to "freeze", but all thereafter remained standing where they were, and that there was also testimony that no one approached appellant with a coat in his hands. There was ample testimony, if believed, from which the jury could find that there was neither the appearance of danger of serious injury from the viewpoint of a reasonable man nor the fear of such danger in the mind of appellant. "It is for the jury to determine whether, as a reasonable man, the defendant was justified in believing himself in danger." 13 Cal.Jur., Homicide, sec. 42, p. 640.

Appellant complains of the refusal to give certain proposed instructions on self-defense and of the form of certain instructions given by the court on that subject. Some of these proposed instructions had to do with the right of appellant to act on appearances. Among other instructions given the jury on this particular subject was the following:

"You will note that actual danger is not necessary to justify self defense. If one is confronted by the appearance of peril which arouses in his mind, as a reasonable person, an honest conviction and fear that he is about to suffer death or bodily harm, and if a reasonable man in a like situation, seeing and knowing the same facts, would be justified in believing himself in like danger, and if the person so confronted acts in self defense upon such appearances and from such fear and honest convictions, his right of self defense is the same whether such danger is real or merely apparent. Even if in the light of after-acquired information or from the distance or perspective of the jury box it should appear that there was no actual or only slight danger, that fact would not affect the right of self defense if the appearances establishing that right, as I have stated them, existed."

[4] This instruction amply covered the doctrine of the right to act on appearances. It is a commonplace that a defendant is not entitled to have instructions couched in any particular language so long as the instructions given fully and fairly state the applicable law.

Appellant's other proposed instructions dealt with the general principles of self defense and the fact that where the right to act in self defense exists one is not compelled to flee but may stand his ground. On the right to stand his ground the jury was instructed: "The law of this state does not require that a person retreat before he may act lawfully in self defense. Although one stands his ground or even pursues the adversary until he, the former has secured himself from danger, if his actions are in lawful, justifiable self defense, as allowed by and within the law just stated to you, such actions do not constitute a crime even if they cause death. Under such conditions, this rule applies even if it should appear that the self defending person might more easily have gained safety by withdrawing from the scene or by flight." Appellant could not properly ask for a more favorable instruction on this phase of the law of self defense.

The general doctrine of self defense was stated by the court in this language:

"A homicide is justified and not punishable when committed by a person in the lawful defense of himself, when he has reasonable ground to apprehend that he is in danger of death or great bodily injury, and that there is imminent danger of such a design being accomplished * * *. The law of self defense is founded on the principle of necessity, either actual or apparent, and in order to justify the taking of human life on this ground the slayer, as a reasonable man, must have reason to believe and must believe that he is in danger of receiving great bodily harm; and further, the circumstances must be such that an ordinarily reasonable person, if he were in those circumstances and if he knew and saw what such person in real or apparent danger knows and sees, would believe that it was necessary for him to use, in his defense, and to avoid great bodily injury to himself, such force or means as might cause the death of his adversary.

"A bare fear that a person's life or limb is in danger is not sufficient to justify a homicide. To justify taking the life of another in self defense, the circumstances must be such as to excite the fears of a reasonable man placed in a similar position, and the party killing must act under the influence of such fears alone. The danger must be apparent and must be present and imminent, or must so appear at the time to the slayer as a reasonable man, and the killing must be done under a well founded belief that it is necessary to save oneself from death or great bodily harm.

"If from the evidence in this case, you should have a reasonable doubt whether or not the killing * * * was justifiable under the law as stated to you in my instructions, your verdict must be that the defendant was not guilty."

[5] These instructions are characterized by appellant as "negative and colorless." They correctly state the law and, taken as a whole, the instructions herein quoted and the others given on the subject fully and fairly covered all of the elements of the law of self defense.

[6] Appellant complains of instructions given that one who has induced a quarrel or made a felonious assault on another is not entitled to act in self defense unless he first in good faith declines further combat. Not only did the evidence above recited fully justify the giving of such instructions, but apppellant himself proposed an instruction (the failure to give which he urges elsewhere as error) containing the similar language: "but such person * * * if he was the assailant or engaged in mutual combat, must really and in good faith have endeavored to decline any further struggle before the homicide was committed". Pen.Code sec. 197, subd. 3.

[7] Appellant's suggestion that there is no evidence of the killing of Ulibarri by him, or even that Ulibarri is dead. is without substance. Appellant himself produced two witnesses: Dr. Moon, a pathologist from the coroner's office, who testified on direct examination by appellant's attorney to tests made by him on the body of Ulibarri; and Dr. Hine, a toxicologist, who similarly testified to the result of another test made on Ulibarri's body. That Ulibarri was shot by appellant appears from the testimony of Hinmon and Miss Larsen, and that he died from the gun wound was proved by the testimony of Dr. Warrens. The assertion that Dr. Warrens did not know that the body about which he testified was that of Ulibarri is not borne out by anything which appears in the transcript of his testimony. The appellant testified that he only fired four shots. The witness Larsen testified that she heard five reports; but even if only four shots were fired the evidence establishes without any contradiction that five persons suffered gunshot wounds. If only four shots were in fact fired the only rational conclusion is that one of the bullets wounded two persons.

Finally appellant complains of the introduction of certain evidence and the failure to sustain objections to certain cross-examination. In considering the propriety of these rulings it is necessary to recount at somewhat greater length the nature of a portion of the testimony given by appellant in support of his claim of self defense. He began by testifying that for several years he had been a participant in gang fights and that in these fights weapons such as belts, chains and home-made blackjacks had been used; that the Fillmore gang "use any kind of weapon, lead and iron knuckles, throwing acid in the guy's face." He had heard of two of his friends being badly hurt in fights with the Fillmore gang. The previous Halloween he was present when a friend had been jumped by the Fillmore gang and only escaped when a police officer appeared. As a result of the fear that he felt at that time for his own safety "that is when I first got an idea of carrying the gun." His reason for carrying the gun was: "For protection against—in case I got caught alone." He further testified that he only carried the gun when he was going "out of my district * * * close to Fillmore or to a big dance or party." His purpose in carrying the gun was just in case trouble developed. "Q. * * * Before the ball, did you ever pull the gun on anybody aside from this altercation at Edith Apodaca's house? A. No, sir."

The obvious purpose of this line of testimony developed on the direct examination of the appellant was to persuade the jury that appellant procured and carried the gun motivated by the fear that he might suffer serious injury in a gang fight, that he carried it only for protection against such a contingency, that he carried it only when he was going out of his own district where he might be assaulted by some gang and particularly the Fillmore gang, and that he had never previously used it against anybody except on the one occasion when threatened by members of the Fillmore gang outside of Miss Apodaca's house on the March 1 preceding the shootings in the Civic Center.

In support of this theory the defense witness Allione testified on direct examination: "So far as I know, every time he left the district he took it (the gun) with him. Q. Are those the only times he took the gun as far as you know? A. That's right * * * more or less every time he went downtown towards the Fillmore or to a show."

Against this background Allione was asked about an incident when he was in an automobile with appellant when they picked up two sailors and appellant pointed the gun at the sailors and afterwards struck them over the head with the gun. He denied that such an incident had occurred. Allione was then asked if he had not told certain named police officers at a time and place specified that such an incident occurred. He denied this. One of the police officers was called in rebuttal and testified that Allione had made such a statement.

[8–10] In view of appellant's own testimony that he never used the gun upon anybody, except on the one occasion outside of the Apodaca home, before the morning of the shootings and Allione's corroborative testimony that appellant only carried it when he was going "downtown towards the Fillmore or to a show", with its implication that he only carried it for protection when going outside his own district, and particularly for protection against the Fillmore gang, it was proper on cross-examination to examine Allione about this apparently unprovoked assault upon two sailors. When the witness denied this it was proper to impeach him by showing his prior inconsistent statement to the police. The evidence sought from Allione was independently relevant to contradict one element of the theory developed by appellant in his defense. Being independently relevant, when Allione testified that the incident had not occurred it was proper to impeach this testimony. "In determining whether cross-examination relates to irrelevant matters the test to be applied is, does the question call for a response which might have been proved as an independent fact?" 27 Cal.Jur., Witnesses, sec. 81, p. 107. If the subject of inquiry is independently relevant the witness' testimony on cross-examination may be impeached by the proof of prior inconsistent statements. 27 Cal.Jur., Witnesses, sec. 125, p. 152.

The jury was properly instructed that this evidence was introduced not as evidence of the facts but solely for the purpose of impeaching the witness.

[11] In one question directed to Allione he was asked whether he remembered appellant and himself "removing some personal property" from the sailors. The witness answered this question in the negative and the officer testified to no such incident being related to him by the witness. If error was committed in the asking of this particular single question we do not believe that the appellant was prejudiced by it.

What has been said sufficiently disposes of the cross-examination of appellant about an occasion when he exhibited the gun to a young lady and struck her on the wrist with it and the testimony of the young lady in rebuttal concerning this incident. It directly contradicted the evidence of appellant above quoted that he had never pulled the gun on anybody "aside from this altercation at Edith Apodaca's house."

[12] The development on cross-examination of the appellant that before he acquired the gun he had carried a knife in a sheath about his leg and the introduction in evidence of the knife and sheath and another knife carried by appellant at the same time was proper on a similar theory. It tended to contradict appellant's testimony that he first thought of the idea of carrying a weapon after his friend had been "jumped" by the Fillmore gang and had only escaped through the appearance on the scene of a member of the police force.

A reading of the entire transcript satisfies us that appellant was fairly tried and fairly convicted.

The judgments and order denying appellant's motion for new trial are affirmed.

NOURSE, P. J., and GOODELL, J., concur.

---

119 Cal.App.2d 253

PEOPLE v. BRICKMAN.

Cr. 4952.

District Court of Appeal, Second District, Division 1, California.

July 20, 1953.

Defendant was convicted of unlawfully possessing marihuana. The Superior Court of Los Angeles County, H. J. Borde, J., rendered judgment sentencing defendant to 90 days imprisonment in the county jail, and he appealed. The District Court of Appeal, White, P. J., held that the evidence supported the jury's findings of defendant's possession of marihuana and knowledge of its presence in a house occupied by him.

Judgment affirmed.

1. Criminal Law 🔑543(2)

What constitutes due diligence to secure absent witness' presence, so as to authorize reading to jury of his testimony at preliminary examination, is largely within trial court's discretion to determine from facts of particular case.

2. Criminal Law 🔑1153(6)

The trial judge's decision on questions of diligence to secure absent witness' testimony and propriety of receiving or rejecting testimony given by him at preliminary examination will not be disturbed on appeal from judgment on conviction of crime, in absence of showing of abuse of judge's discretion.

3. Criminal Law 🔑543(2)

Evidence was sufficient to support trial court's conclusion that due diligence was exercised to secure absent witness' presence, so as to authorize reading to jury of his testimony at preliminary examination, so that such conclusion was not abuse of court's discretion.

4. Criminal Law 🔑511(7)

In prosecution for unlawful possession of marihuana, defendant's extrajudicial declarations to police officers that he purchased marihuana, planned to resell it, and placed it in a companion's trousers, wherein it was found, constituted sufficient corroboration of testimony of such companion and others against defendant at preliminary examination to sustain conviction, even if such witnesses were accomplices of defendant, as such declarations tended to connect defendant with commission of crime charged. Health and Safety Code, § 11500.

5. Poisons 🔑4

"Possession" of chattel, such as marihuana, is established by showing that a person has physical control thereof, with intent to exercise it, or having had such control has not abandoned it, and that no other person has such possession. Health and Safety Code, § 11500.

See publication Words and Phrases, for other judicial constructions and definitions of "Possession".

6. Poisons 🔑4

The statute creating offense of possessing marihuana does not require proof of alleged violator's possession of marihuana at very time of his arrest on such charge, and state need not prove that he had marihuana on his person to authorize conviction. Health and Safety Code, § 11500.

7. Criminal Law 🔑1144(13)

On appeal from judgment on conviction of crime, District Court of Appeal must consider evidence in light most favorable to prosecution.

8. Poisons 🔑9

In prosecution for unlawful possession of marihuana, evidence supported jury's findings that defendant had possession of marihuana and had not abandoned such possession. Health and Safety Code, § 11500.

9. Poisons 🔑9

In prosecution for unlawful possession of marihuana, evidence supported jury's findings that defendant knew of presence of marihuana in house occupied by him. Health and Safety Code, § 11500.

10. Poisons 🔑4

Knowledge of existence of object such as marihuana is essential to physical control thereof with intent to exercise such control, as required to establish possession thereof. Health and Safety Code, § 11500.

11. Poisons 🔑9

Conduct of parties charged with unlawful possession of narcotics such as marihuana, and their admissions or contradictory statements and explanations are frequently sufficient to show their knowing possession thereof. Health and Safety Code, § 11500.

12. Criminal Law 🔑822(1)

Instructions to jury must be considered in their entirety in determining whether trial court erred in giving or refusing instructions.

13. Criminal Law 🔑1122(5), 1144(14)

Where record on appeal from judgment on conviction of crime does not contain instructions given jury by trial court, District Court of Appeals cannot consider appellant's challenge of their correctness, which must be presumed.

14. Criminal Law 🔑1186(4)

A trial court's failure to instruct jury that testimony of defendant's accomplices should be viewed with distrust was not prejudicial error requiring reversal of conviction, where claimed accomplices' testimony was corroborated by police officers and defendant's admissions, so that jury could only have returned verdict of conviction had proper cautionary instructions been given. Const. art. 6, § 4½.

A. Brian Weinberg, Santa Monica, for appellant.

Edmund G. Brown, Atty. Gen., and Alan R. Woodard, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was charged with the offense of having in his possession flowering tops and leaves of Indian hemp (Cannabis Sativa), in violation of section 11500 of the Health and Safety Code.

Following the entry of a plea of not guilty the cause proceeded to trial before a jury which returned a verdict finding the defendant guilty of the charge filed against him. His motion for a new trial was denied and he was sentenced to a term of ninety days in the county jail.

From the judgment of conviction and from the order denying his motion for a new trial, defendant prosecutes this appeal.

Epitomizing the factual background of this prosecution, the record reflects that defendant was a young man 19 years of age. While his mother was confined in a hospital he left the family house after a quarrel with his father. He became associated with three older men named Robert Douthit, Mickey Avrutine and Charles Castle.

On April 6, 1952, defendant and the foregoing three men rented from Mrs. Lydia McNulty, and moved into a cottage-type apartment at 1141½ 18th Street in the city of Santa Monica, California. The receipt for the rent deposit paid was made out to defendant. After the first week, the wife of Charles Castle moved into the apartment and a week later another man also moved in.

Approximately one week prior to May 4, Mrs. McNulty, the landlady, saw Mrs. Castle come out into the yard carrying newspapers and a number of dried stalks in a large bag which she placed in the barbecue pit. These stalks were subsequently burned in the incinerator by Mrs. McNulty.

Becoming dissatisfied with her tenants, Mrs. McNulty, on April 30, apprised them of this fact and advised them to vacate when their month was up.

On Friday evening, May 2, Mrs. McNulty saw her tenants moving out. On that occasion she noticed defendant go back into the apartment after helping to carry out some bags. However, defendant departed that same evening about 8:30 o'clock and went to the Wisconsin Hotel where he spent the following two nights with a friend. Between Friday night and Sunday afternoon, Mrs. McNulty did not see any one in or about the apartment.

On Sunday, May 4, Mrs. McNulty went into the apartment to get the linens off the beds for washing. In pulling the sheets off the bed in the rear bedroom she heard a thud on the floor. Upon investigating, she found a pair of blue jeans and a C & H sugar bag containing a white sandwich bag, with leafy contents and four No. 6 brown manila bags, each containing a similar white bag and leafy contents. She returned to her own house, talked to her husband about what she had found, and they decided to call the police.

Shortly after receiving this call, Captain Reinbold and Officer Askew of the Santa Monica Police Department, arrived at the McNulty residence. They spoke to Mr. and Mrs. McNulty in the front house, observed the C & H sugar bag and the contents thereof on the dining room table and then went to the rear house, taking the sugar bag with them. They went into the rear bedroom, where they found the blue jeans. Officer Askew was left at the rear house, vacated by defendant and the other tenants, with one of the brown paper sacks. The front door was locked, and Captain Reinbold and the McNultys left. Reinbold returned directly to police headquarters where he locked the sugar bag in his desk drawer.

At approximately 4:40 p. m. on the same day, Officer Rydgren joined Officers Askew and Gomez inside the rear house. Askew left at this time and approximately half an hour later defendant returned with a young lady, at which time he was placed under arrest. Shortly thereafter, two other officers came and took defendant and the girl to headquarters. Defendant stated that he came back to the house for the purpose of picking up a toy monkey and a book he had forgotten.

At police headquarters defendant was questioned that evening by Officer Askew. They then went to the Wisconsin Hotel in Ocean Park and found two suitcases and some boxes belonging to defendant. During this conversation, defendant denied that the narcotics were his. He admitted that the girl accompanying him was the sister of one Bonner Brown, a "narcotics pusher" in the Ocean Park area. He had known the girl for several years but stated that he had not been with her before. That he had met her at a cafe in Ocean Park during the afternoon and invited her to accompany him.

Castle, Douthit and Avrutine were arrested when they returned to the house at about 2 a. m. on May 5.

On the morning of Monday, May 5, 1952, officers Hillaiel and Askew returned to 1141½ 18th Street and conducted a search of the premises, which disclosed 27 marihuana cigarettes in a clothespin bag hanging in the kitchen. They then returned to headquarters and questioned the persons in custody. At approximately 1:30 they questioned each of the suspects individually. The statements made by defendant at this time were given freely and voluntarily, no force or violence was visited upon his person, nor were any promises of reward or immunity made. Defendant asked, "What will I get?" When he was told that he would have to go to court he denied that the "stuff" was his. Castle was then questioned individually for about 40 minutes and then defendant was brought back into the room, at which time a conversation was had between defendant, Castle and officers Hillaiel and Askew. Castle began the conversation:

> "* * * Norm, why don't you tell these guys the truth about this marijuana business? After all, I wasn't there. I took my wife, as you know, with Avrutine and Douthit—I rented a car, and we took my wife back to—" Officer Hillaiel testified that he thought it was Phoenix, Arizona.
>
> "* * * Now, somebody planted that stuff in my pants, and I don't like the idea. I am P.O.'d. Come out and tell them the truth. It will make it easier on you and everybody else for them to know the truth * * * After all, I don't like the idea of your going ahead and taking the stalks and the weeds and breaking them up and giving them to my wife and having my wife go out to the incinerator to burn that evidence. That takes a pretty low skunk to do a thing like that, I don't like it at all. I am here. Tell these officers the truth."

In response to these statements, defendant said:

> "* * * I am sorry, Castle. It is all my fault. I did it. I am responsible for the whole thing. You have nothing to do with it. Avrutine hasn't anything to do with it, and Douthit hasn't a thing to do with it. It is all my stuff, and I am responsible for it being there."

Castle was then taken out of the room and defendant continued to talk. He said he had made a contact down at the south side of town at a cocktail lounge where a man approached him and asked if he wanted to buy "a little stuff". When defendant indicated that he did, he was given a phone number, which he called. He was told over the phone to enclose $100 in an envelope and put it alongside his house at a certain spot near the alley. Defendant then continued:

> "* * * I got myself $100 and put it in the envelope, I stashed it on the lawn near the shrubbery. After I entered the house, I didn't look out. I just stayed in the house. Within about an hour later or two hours later, I walked right out there, and there they were. There was $200 worth of stuff there."

When asked how it was received, defendant replied:

> "* * * I received it in three manila large bags * * * There was stalks, leaves, and weeds. I took it into the place there. Then I took the leaves off of the weeds. I took myself a bowl and started grinding the stuff.
>
> "I got working on the stuff, and I took my little sandwich wax paper bags, and I filled each and every one of these bags with approximately a can of Prince Albert, the amount that would be in a Prince Albert can. I took some scotch tape and flipped the lids over and put it in the other sacks and then I started rolling my sticks.
>
> "I rolled many of them and then I would take some scotch tape and I would secure 3 sticks in a bundle."

Defendant also admitted that he had rolled the 27 cigarettes.

When asked how much he was selling the "stuff" for, he said, "Well, truthfully, I got caught too quick. I was going to sell three for a deuce, three for two dollars. I was going to sell my package goods in the rough. I was going to sell those from ten to fifteen dollars apiece. I figured out what I had split up with a friend of mine, a couple of boys from the Ocean Park area. I split my stuff with them. I was going to make around $150 out of my share of the stuff."

Defendant then stated that he had planted the "stuff" in Castle's trousers. He indicated that he had tried using it in the past but that this was his first attempt at "pushing" it. Defendant stated that the reason the "stuff" was still in the house was that it wasn't moving very fast. Defendant admitted that he put the C & H sugar bag in Castle's pants because there was no other place to hide it.

At the trial defendant denied that any of the foregoing contraband was his or that he had ever admitted possession or knowledge thereof to the officers.

At the trial, Jesse Klein, an investigator in the Office of the District Attorney, testified that he had received subpoenas on June 23, 1952, and had been directed to serve them on Robert Douthit, Charles L. Castle and Murray Robert Avrutine.

His efforts to serve Douthit consisted of going to the Metropole Hotel on June 23. The register there revealed that Douthit had been registered there for about a week and had been gone two weeks prior to this date. He checked with the Douglas Aircraft Company to see if he had been employed there as a machinist and ascertained that Douthit had worked for Douglas but left February 20, 1952, and had not been employed there since. Klein also checked with the Registrar of Voters in Los Angeles County, and also checked a license number that had been registered in the report of the police officers. He learned that the vehicle in question was registered to one W. J. Gunkle, 2120 Wilshire Boulevard. A check was made of the telephone directories of the Santa Monica, Central and South Districts; furthermore, Klein checked with the Santa Monica Police Department, the Venice Police Department and West Los Angeles Police Department. He also conferred with Mrs. McNulty but received no information which was of any help. A check was also made with the investigating officers. The Machinist's Union was contacted and they had an old address on Douthit, which they refused to disclose as being against their policy. An inquiry was also made at the Post Office where all three names were checked; however, the postal authorities would give out no information as to addresses.

The efforts to locate Charles L. Castle consisted of checking the Pier Avenue Apartments in Ocean Park, which had been given at the preliminary hearing as his address. The register showed that he had never been registered there. The Registrar of Voters and the records of the Motor Vehicle Department were checked. Klein ascertained that Castle had worked for Douglas Aircraft Company but had left there April 22, 1952. Castle had also been registered with the Machinist's Union but they refused to give any addresses. A check was also made of the various telephone directories and with the police departments, as well as the Santa Monica directory. The addresses given by Douthit and Castle were checked several times but neither had been back to either the Metropole Hotel or the Pier Avenue Apartments.

In his attempt to locate Murray Robert Avrutine, Klein checked with the Metropole Hotel and found that Avrutine had registered there along with Douthit under the name of Hirshberg. Inquiry was made at Diamond Distributors, 2110 S. Pico in Santa Monica, where he had worked as a diamond cutter; however, that organization was closed and the telephone was disconnected. A further check was made with the Registrar of Voters, the Motor Vehicle Department, the telephone directories, three police departments in the locality, and the Santa Monica directory.

Neither Douthit nor Avrutine had left any forwarding addresses when they left the Metropole. Klein's investigation did not reveal that Castle had a brother living in the area. He did notice a reference in the files to Phoenix, Arizona, but no inquiry was made at that address since it was out of state. No check was made at the other hotels in the Venice and Ocean Park areas. The Diamond Distributors' office was checked four different times in an effort to find Avrutine but to no avail. No effort was made to check the license for the business or to run it down in the business directory. Officer Gomez had seen Charles Castle in a shooting gallery about three or four weeks prior to the trial, but Klein had been led to believe that Gomez had not seen any of the other men and did not know where they were.

Mervyn A. Aggeler, Deputy District Attorney, testified that he questioned defendant's counsel on July 30, 1952, and was told that the defense had not subpoenaed Castle, Douthit and Avrutine and that defense counsel did not know where they were.

A discussion between counsel for the defendant and the court then took place, at the conclusion of which the court ruled that a sufficient showing had been made to justify reading the testimony of Castle, Douthit and Avrutine given at the preliminary hearing.

Deputy District Attorney Aggeler then took the stand and read such testimony from the reporter's transcript of the preliminary hearing in this matter.

At the preliminary hearing, Robert Douthit testified that he had previously seen marijuana on the stalk. On Thursday, May 1, he saw something that resembled marijuana on the stalk in defendant's possession at the apartment on 18th Street. Defendant was sitting at the kitchen table alone, with some large bags of something resembling marijuana. Douthit told him that he thought it was marijuana and that he should get it out of the house. Defendant said that was all right. He did not say where he had gotten the marijuana or what he had paid for it. At that time there was a bowl on the table resembling a fruit bowl containing material that looked similar to marijuana. Douthit went to bed and the material was not on the table when he got up the next morning. Douthit had been drinking that evening.

Charles Castle testified that he came into the house with Douthit on the night of May 1. He also saw the paper sacks sitting on the table but he didn't pay very close attention to what was in the sacks nor did he hear the conversation between defendant and Douthit. He did not see these sacks upon arising the next morning. He also had been drinking that evening. Castle was present at the questioning of defendant on May 5th when the latter said that he had put the marijuana in Castle's pants. That during the last part of April and the first part of May, Castle had no marijuana in his possession or under his control.

Murray Robert Avrutine testified that he had never possessed or had under his control any marijuana during the time he lived at 1141½ 18th Street.

Clifford C. Cromp, a chemist in the Sheriff's Crime Laboratory, testified that he had received the people's exhibits from Officers Askew and Gomez on the morning of May 5. That he analyzed the contents of the bags comprising those exhibits and found the green leafy material therein to be marijuana. The 27 cigarettes were also examined and found to contain marijuana. He kept all of the evidence submitted to him for examination in his custody until the preliminary hearing, at which time it was surrendered in court.

It is first contended by appellant that the court committed prejudicial error in permitting the prosecution to read into evidence over his objection the testimony of Castle, Douthit and Avrutine given at the preliminary examination. Such procedure is governed by section 686 of the Penal Code which, insofar as here material, provides:

> "In a criminal action the defendant is entitled:
>
> "* * * * * *
>
> "3. To produce witnesses on his behalf and to be confronted with the witnesses against him, in the presence of the court, except that where the charge has been preliminarily examined be-

> fore a committing magistrate and the testimony taken down by question and answer in the presence of the defendant, who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness; * * * the deposition of such witness may be read, upon its being satisfactorily shown to the court that he * * * cannot with due diligence be found within the state; * * *"

[1, 2] It is largely within the discretion of the trial court to determine what constitutes due diligence to secure the presence of a witness which will authorize the reading to the jury of testimony given at the preliminary examination, and such determination depends upon the facts of each particular case. Unless it appears that the decision of the trial judge on the question of diligence and of the propriety of receiving or rejecting the evidence, was an abuse of discretion, it will not be disturbed on appeal. People v. Cavazos, 25 Cal.2d 198, 200, 201, 153 P.2d 177; People v. Centers, 56 Cal.App.2d 631, 633, 634, 133 P.2d 29.

[3] In the instant case we have hereinbefore narrated the efforts made by the district attorney's investigator to locate and serve subpoenas upon the absent witnesses and it is unnecessary to here repeat them.

The trial was set for July 29, 1952. The subpoenas were received by the investigator on June 23, 1952. During that interim several attempts were made as aforesaid to contact the witnesses, the last such attempt being made July 29, the day before Investigator Klein testified.

Suffice it to say that in the case at bar there was evidence of a substantial character to support the conclusion of the trial court, and its conclusion was not therefore an abuse of discretion.

Appellant directs our attention to several cases in which it was held that the showing of due diligence was inadequate to warrant the reception of such evidence. However, not only are such cases distinguishable from a factual standpoint, from the case now engaging our attention, but other cases are not particularly helpful, because as heretofore pointed out, the problem is one primarily for the trial court, and in the final analysis must be solved in accordance with the facts of each individual case.

[4] Appellant next urges that the witnesses Castle, Douthit and Avrutine were accomplices, and that their testimony given at the preliminary examination and read to the jury at the trial, was not corroborated by other evidence tending to connect appellant with the commission of the crime charged. Pen.Code, § 1111.

Conceding, but not deciding, that the aforesaid three witnesses were accomplices, we are persuaded that their testimony was amply corroborated.

The above mentioned extra-judicial declarations of appellant, tending as they did to connect him with the commission of the crime charged, constituted sufficient corroboration to sustain the conviction. People v. Briley, 9 Cal.App.2d 84, 86, 48 P.2d 734; People v. Mastrantuono, 88 Cal. App.2d 178, 183, 198 P.2d 574. In the cases of People v. Reingold, 87 Cal.App.2d 382, 197 P.2d 175, and People v. Petree, 109 Cal. App.2d 184, 240 P.2d 327, cited by appellant, there were no admissions by the accused such as those disclosed by the record in the case at bar.

[5, 6] Appellant insists that the evidence is insufficient to support the judgment of conviction in that there is no showing that he "possessed" the marijuana in question. In the case of People v. Johnston, 73 Cal.App.2d 488, at page 492, 166 P.2d 633, at page 635, cited by appellant, the court quotes with approval the following language found in People v. Basset, 68 Cal. App.2d 241, 247, 156 P.2d 457:

> "* * * 'Possession' of a chattel is established when it is shown that a person has physical control thereof with the intent to exercise such control, or having had such physical control, has not abandoned it and no other person has that possession. Rest., Torts, Sec. 216. *The statute does not require 'proof of possession' at the very time of arrest* (People v. Belli, 127 Cal. App. 269, 271, 15 P.2d 809), *nor is it necessary to prove that the accused had the unlawful article on his person.*

People v. Sinclair, 129 Cal.App. 320, 322, 19 P.2d 23." (Emphasis added.)

[7–11] In the case now before us, the record reflects that appellant admitted to the police officers that he had purchased the marijuana, that he had planned to resell it, and that he had placed it in Castle's trousers because there was no other place to hide it. He also stated that the reason the marijuana was still in the house was that "it wasn't moving very fast".

When these statements are considered with other evidence in the case, and looking at all the evidence in a light most favorable to the prosecution, as we must do on appeal in a criminal case, People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778; People v. Kristy, 111 Cal.App.2d 695, 698, 245 P.2d 547, the conclusion seems inevitable that appellant had possession of the marijuana and that such possession had not been abandoned.

The claim that the evidence was insufficient to show that appellant had knowledge of the presence of the marijuana in the house in question is equally devoid of merit. Undoubtedly, the element of knowledge of the existence of the object is essential to "physical control" thereof with the intent to exercise such control, and as was said in People v. Gory, 28 Cal.2d 450, 455, 170 P.2d 433, 436: "* * * and such knowledge must necessarily precede the intent to exercise, or the exercise of, such control". In the instant case, all the essential requirements were supplied by the "express admissions and statements made by defendant with respect to the possession of narcotics, which supplied the final link in the chain of circumstances connecting defendant with the offense charged against him." People v. Gory, supra, 28 Cal.2d at page 456, 170 P.2d at page 437. And, as was said in People v. Foster, 115 Cal.App.2d 866, 868, 253 P.2d 50, 51; "To show such knowing possession the conduct of the parties, *admissions* or contradictory statements and explanations are frequently sufficient." (Citing cases.) (Emphasis added.) In the case at bar there was abundant evidence, judged by the foregoing rules, to support findings of possession and a knowledge thereof.

[12–14] Finally, appellant contends that the court committed prejudicial error in failing to instruct the jury that the testimony of the accomplices ought to be viewed with distrust and that before they could find the accused guilty, the jury must be convinced beyond a reasonable doubt that he had knowledge of the existence of the marijuana.

The instructions given and refused have not been brought here on this appeal. It is the rule that instructions must be considered in their entirety. Consequently, where the record on appeal does not contain the instructions given, we are unable to consider appellant's challenge to their correctness. The correctness of instructions not incorporated in the record must be presumed and will not be reviewed, People v. Frye, 117 Cal.App.2d 101, 255 P.2d 105. Furthermore, conceding it was the duty of the court of its own motion, without any request by appellant, to instruct the jury with reference to accomplices and their testimony, People v. Crain, 102 Cal.App.2d 566, 582, 228 P.2d 307; People v. Ahern, 113 Cal.App.2d 746, 749, 249 P.2d 63, and that no such instruction was given, we are convinced that the jury could only have returned the verdict they did, had proper cautionary instructions been given. This we say because the testimony of the claimed accomplices was corroborated by the police officers and by admissions of appellant himself. Art. VI, § 4½, Const. of Calif.

For the foregoing reasons, the judgment and the order denying defendant's motion for a new trial are and each is affirmed.

DORAN, J., and SCOTT, Justice pro tem., concur.

119 Cal.App.2d 292

CARLSON et al. v. LINDAUER et al.

Civ. 19504.

District Court of Appeal, Second District,
Division 3, California.
July 22, 1953.

Rehearing Denied Aug. 10, 1953.

Action was brought to quiet title, and defendants filed a cross-complaint. The Superior Court of Los Angeles County entered judgment in favor of plaintiffs, and orders sustaining demurrers and granting motion for judgment on the pleadings, and certain of the defendants appealed. The District Court of Appeal, Vallée, J., held that execution of quit claim deed by owner of mineral rights to owner of surface estate, her heirs, successors, and assigns was sufficient to pass title to minerals, though owner of surface estate was dead at time of execution of quit claim deed.

Judgment affirmed, and appeals from orders dismissed.

1. Appeal and Error ⚿917(1)

On appeal from a judgment entered on an order sustaining a demurrer to a pleading without leave to amend, allegations of the pleading must be regarded as true.

2. Pleading ⚿350(1)

A motion for judgment on the pleadings performs the office of a general, not a special, demurrer.

3. Pleading ⚿345(1.3)

Where answer, fairly construed, states a good defense, plaintiff's motion for judgment on the pleadings should be denied.

4. Pleading ⚿345(1.5)

If cross-complaint stated facts sufficient to constitute a cause of action, plaintiff's motion for judgment on the pleadings should have been denied.

5. Quieting Title ⚿35(2), 37(1)

In a suit to quiet title, general allegations or denials of ownership are, as a rule, sufficient.

6. Quieting Title ⚿43

When party in suit to quiet title undertakes to plead his titles specially, as well as generally, and special allegations reveal the weakness of his title or that he has no title, their effect is to nullify the general allegations and denials.

7. Pleading ⚿8(11)

Where an allegation of ownership is expressly predicated on specific averments in suit to quiet title, allegation of ownership is a mere conclusion of law and may be disregarded.

8. Pleading ⚿345(1.3, 1.5)
Quieting Title ⚿41

If answer and cross-complaint in suit to quiet title alleged facts, specifically and with great particularity, on which defendants' claim of ownership of estate in oil and gas was predicated, and those allegations showed that defendants were not the owners, plaintiffs' demurrers were properly sustained and their motion for judgment on the pleadings was correctly granted.

9. Mines and Minerals ⚿55(1)

An owner of fee title to land may sever all or part of the estate in the oil and gas from the estate in the surface.

10. Mines and Minerals ⚿48

The estate in oil and gas, if of unlimited duration, is a freehold interest, an estate in fee, and real property.

11. Wills ⚿722

Where owner of surface rights, but not of oil rights, devised all of his estate to his wife, title to estate in surface vested in testator's wife on death of testator, subject to administration of testator's estate. Probate Code, §§ 28, 107, 120, 300.

12. Covenants ⚿61

A covenant intended to benefit land is incidental to and runs with it, and whoever becomes the owner of the land is entitled to the benefit of the covenant.

13. Deeds ⚿90

A deed is to be construed in favor of vesting title. Civ.Code, § 1069.

14. Deeds ⚿31

It is not necessary that a grantee in a deed be mentioned by name, and if the designation or description is sufficient to identify the person or persons intended, the deed is effectual.

15. Mines and Minerals 🔑55(7)

Execution of quitclaim deed by owner of mineral rights to owner of surface estate, her heirs, successors, and assigns, was sufficient to pass title to minerals, though owner of surface estate was dead at time of execution of quitclaim deed. Civ.Code, §§ 1053, 1069, 1462.

16. Wills 🔑727

Property to which a devisee acquires title is subject to control of superior court for purposes of administration, sale, or other disposition. Probate Code, § 300.

17. Executors and Administrators 🔑397

A conveyance of realty by an executor or administrator, pursuant to an order confirming sale, conveys all right, title, interest, and estate of decedent in premises at the time of his death, and if, prior to sale, estate has acquired by operation of law or otherwise, any right, title, or interest in the premises, other than or in addition to that of decedent at time of his death, such right, title, or interest also passes by such conveyances. Probate Code, § 786.

18. Wills 🔑722

On death of testate, title to his realty passes to his devisees subject to the limitations of administration.

19. Pleading 🔑87

Laches is an affirmative defense, and one who relies on it must plead facts constituting such laches where there is an opportunity to do so.

20. Equity 🔑72(1)

"Laches" is not mere delay, but delay that works a disadvantage to another.

See publication Words and Phrases, for other judicial constructions and definitions of "Laches".

21. Equity 🔑72(1)

A person is guilty of laches only where he has, by his conduct or negligence and delay, induced or suffered another to do or abstain from something whereby the latter might be injured should former be allowed to enforce his rights.

22. Quieting Title 🔑29

Lapse of time alone is not sufficient to bar a suit to quiet title.

23. Quieting Title 🔑29

Where there was no allegation that plaintiffs had, prior to filing of complaint in action to quiet title, any notice or knowledge that defendants claimed any interest in realty, and there was no averment that defendants had been injured or had suffered prejudice by reason of any delay in the bringing of the action, cause of action was not barred by laches.

◆

Bodkin, Breslin & Luddy, Los Angeles, for appellants.

Wellborn, Barrett & Rodi, and Frank C. Hubbard, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by defendants-cross-complainants, referred to as defendants, from a judgment for plaintiffs entered on an order sustaining demurrers to the answer and to the cross-complaint without leave to amend and on an order granting plaintiffs' motion for judgment on the pleadings in suit to quiet title to realty.

The complaint is in the usual form of one to quiet title. Defendants answered and filed a cross-complaint. Plaintiffs demurred to the answer on the grounds it does not state facts sufficient to constitute a defense, and that the defense is barred by the provisions of section 319 of the Code of Civil Procedure; and to the cross-complaint, on the grounds it does not state facts sufficient to constitute a cause of action, and that any cause of action is barred by the provisions of sections 318 and 319 of the Code of Civil Procedure. Plaintiffs also moved for judgment on the pleadings on the grounds the answer does not raise any material issue and the cross-complaint does not state a cause of action. The demurrers were sustained without leave to amend and the motion was granted. Defendants appeal from the judgment which followed. They also appeal from the orders sustaining the demurrers and granting the motion for judgment on the pleadings. Since these orders are nonappealable the appeals therefrom will be dismissed.

The answer admits plaintiffs are the owners of the surface rights in the realty; denies plaintiffs have any right, title, or interest in the oil rights; alleges the interest of plaintiffs in the surface rights is subject to rights, privileges, and easements in connection with exploring and drilling for oil in accordance with a conveyance from H. T. Rudisill to Union Oil Company, recorded March 29, 1904; alleges defendants claim an estate and interest adverse to plaintiffs; denies defendants' claims are without right.

The answer further alleges:

A. Luther Lindauer, father of two defendants and grandfather of the other two, died August 11, 1936. At that time he was the owner of the surface rights, but not of the oil rights. By his will he devised and bequeathed all his estate to his wife, Lucy, the mother of two defendants and the grandmother of the other two. About August 28, 1936, Lucy was appointed and qualified as executrix of Luther's will.

B. April 1, 1940, while she was executrix of Luther's will, Lucy, individually, entered into a written agreement with Union Oil Company. The agreement was between Union "and the owners of certain interests in the lands" described, including Lucy. One of the parcels of land described in the agreement was that in suit here. The agreement recited that by a recorded deed, dated April 12, 1904, Union acquired from H. T. Rudisill and wife, all oil, gas, and like substances in, upon, and under the described parcels of land. The agreement provided:

"1. This agreement shall apply only to the lands hereinabove described. Whenever hereinafter the term 'lands' shall be used it shall be taken to mean, unless the context shall otherwise so provide, the lands hereinabove described or a portion thereof. Whenever hereinafter the words 'lands subject to this agreement' shall be used, they shall be taken to mean lands forming a part of the lands hereinabove described which belong to an Owner or Owners who have signed this agreement, and which have not been quitclaimed by Union.

"2. Union is about to commence the drilling of a test well on some part of said lands for the purpose of determining the existence therein of oil, gas and other hydrocarbon substances and whether or not the same can be produced therefrom in quantities deemed paying by it. From time to time additional test wells, as in Union's opinion are required, may be drilled, but in any event unless Union shall develop production on said lands in quantities which it deems paying within a period of five (5) years from the first day of April, 1940, it will thereupon quitclaim to the respective Owners, as their interests may appear, all of its right, title and interest in and to the oil, gas and other hydocarbon substances in the said lands and the rights in connection therewith granted to Union by the deed hereinabove referred to.

"3. In the event any of said test wells demonstrate that oil, gas or other hydrocarbon substances can be produced from said lands in such paying quantities, Union will, within said five-year period, determine which of said lands it wishes to retain hereunder for the purpose of further exploration and of development for oil, gas and other hydrocarbon substances. Thereupon all of said lands which Union does not so elect to retain under this agreement shall be by it quitclaimed to the respective Owners thereof free and clear of all claims of whatsoever kind by Union, excepting such rights-of-way for pipe lines and pole lines as shall be necessary or desirable for Union's operations on retained lands, and as shall then be in use or shall be selected by Union.

"4. In the event, however, that at any time during said five-year period or afterwards Union shall determine to its own satisfaction that any portion of said lands is not capable of producing oil, gas or other hydrocarbon substances in quantities deemed paying by Union, it shall quitclaim to the Owner or Owners thereof all of its right, title and interest in and to said lands, subject to said rights-of-way, and thereupon such lands shall no longer be subject to this agreement.

"5. All owners of lands subject to this agreement shall be entitled to participate in the payments made on account of the value of production as hereinafter set forth, unless and until such lands shall be quitclaimed.

"All owners of lands hereinabove described shall be entitled to share in payments on account of production obtained from wells located on said lands, only from and after the date of their signing this agreement; provided, however, that to become entitled to any participation hereunder such owners must sign this agreement within said five-year period."

Union agreed, subparagraph (a), to pay to each signatory owner of lands 10% of the value of the oil and gas produced from the lands, and the value of 40% of the gasoline and other substances extracted from such gas after specified deductions, and to pay any damage caused by its operations. The agreement also contained this provision:

"The right to receive payments under subparagraph (a) hereof shall at all times be and remain appurtenant to the lands in respect of which such payments accrue and shall be and remain inseparable from the ownership of such lands. Any attempt to separate such rights and ownerships, respectively, shall be without effect hereunder and shall not be binding upon Union; * * *."

The agreement was recorded July 2, 1940.

C. August 11, 1940, Lucy died and Gold, a son of Luther and Lucy, was appointed administrator with-the-will-annexed of Luther's estate. August 30, 1940, Lucy's will was admitted to probate and executors were appointed.

D. April 11, 1941, the probate court, in the estate of Luther, confirmed the sale of "the property" to plaintiffs, in consideration of $5,500. April 12, 1941, the administrator executed and delivered a deed conveying to plaintiffs "all the right, title, and interest of the decedent Luther Lindauer at the time of his death, and all right, title, and interest that the estate may have subsequently acquired by operation of law or otherwise" in and to "the property." The estate of Luther did not own, possess, nor have any right to any interest, nor did it thereafter acquire any interest in "the oil rights of the property." The deed did not convey to plaintiffs any interest in the oil rights.

E. Part of the property owned by Lucy at the time of her death was the right to receive a quitclaim deed from Union, conveying to her all of Union's right, title, and interest in and to the oil rights if Union elected, pursuant to the agreement of April 1, 1940, to quitclaim such rights "during Lucy's lifetime." Such right constituted a part of Lucy's estate. The final decree of distribution made September 1, 1941, in Lucy's estate, distributed to defendants Gold E. Lindauer, Genevieve M. Hough, and Gus L. Lindauer, deceased father of defendants Luther Lindauer and Dolores Lindauer Olivarez, and they became the owners of, the oil rights. Upon the death of Gus L. Lindauer, defendants Luther Lindauer and Dolores Lindauer Olivarez succeeded to his interest.

F. On December 1, 1941, pursuant to the agreement of April 1, 1940, Union elected to quitclaim to Lucy and executed a deed by which it quitclaimed "unto Owner, its heirs, successors and assigns," all of its right, title, and interest in the realty. This deed was recorded December 5, 1941, and contemporaneously therewith an executed duplicate copy was mailed to Lucy at her address appearing in the agreement of April 1, 1940, and was received by defendants.

G. None of the defendants has conveyed any of his interest in the oil rights and defendants are the owners thereof.

The allegations of the cross-complaint are substantially those of the answer, with these additions:

1. On May 27, 1903, W. J. Hole and wife were the owners of the fee title to the realty; and on that date, by deed recorded June 6, 1903, conveyed to H. T. Rudisill the oil rights together with the right to enter on the property for the purpose of extracting, etc., the substances constituting the same.

2. On March 12, 1904, Rudisill by deed recorded March 29, 1904, conveyed the oil rights together with the right of entry for extraction, etc., to Union.

3. June 19, 1919, W. J. Hole and wife, by deed recorded July 25, 1919, conveyed to La Habra Heights Company the surface rights in the realty "excepting and reserving" the oil rights. The oil rights were then owned by Union.

4. July 17, 1935, La Habra Heights Company, by deed recorded July 27, 1935, conveyed such surface rights to Luther Lindauer. This deed "did except and reserve" the oil rights.

5. The transaction by which plaintiffs acquired the deed from the administrator with-the-will-annexed of the estate of Luther was consummated through an escrow with a title company as escrow holder. On April 24, 1941, said escrow holder, in writing, advised plaintiffs that in the property to be conveyed the oil rights constituted "an exception and reservation" and would not be conveyed by said deed. On April 28, 1941, plaintiffs, in writing, approved the "exception and reservation" of the oil rights.

6. Cross-complainants are the owners of the oil rights and plaintiffs have no right, title or interest therein.

Defendants, in support of their contention that the answer states a defense and the cross-complaint a cause of action, argue that the right to receive a quitclaim deed from Union was a personal right of Lucy's; that the effect of delivering and recording the deed after her death was to vest the equitable title to the oil rights in defendants; that while a deed which names a dead person as grantee does not pass the legal title, equity will enforce the deed in favor of the successors of the dead person; that defendants as devisees of Lucy are her successors; that the deed from Union did not convey title to the oil rights to plaintiffs as successors of Luther in the surface rights, and that neither the defense nor the cause of action pleaded in the cross-complaint is barred by either section 318 or 319 of the Code of Civil Procedure. Plaintiffs argue that the law will not permit Lucy as executrix of Luther's will to acquire a personal interest in real property which would not pass to a purchaser at a probate sale of such property; that Lucy bargained away rights in real property held in Luther's estate under probate administration; if the deed from Union to Lucy is a nullity, title did not pass and defendants have no interest in the property; that all rights of Lucy's estate in the agreement of April 1, 1940, were transferred to plaintiffs by the deed of the administrator of Luther's estate; and that the defense and the cause of action attempted to be stated are barred by sections 318 and 319 of the Code of Civil Procedure.

[1–4] On appeal from a judgment entered on an order sustaining a demurrer to a pleading without leave to amend, the allegations of the pleading must be regarded as true. A motion for judgment on the pleadings performs the office of a general, not a special, demurrer; and where the answer, fairly construed, states a good defense, a motion for judgment on the pleadings should be denied, and, in this case, if the cross-complaint states facts sufficient to constitute a cause of action the motion should have been denied. Other rules applicable to consideration of a general demurrer to a pleading and to consideration of a motion for judgment on the pleadings have been stated many times and need not be repeated. MacIsaac v. Pozzo, 26 Cal.2d 809, 812–813, 161 P.2d 449; Toney v. Security First Nat. Bank, 108 Cal.App.2d 161, 167, 238 P.2d 645; Hardy v. San Fernando Valley C. of C., 99 Cal.App.2d 572, 577, 222 P.2d 314; Wirin v. Horrall, 85 Cal.App.2d 497, 500–501, 193 P.2d 470; Smith v. Beauchamp, 71 Cal.App.2d 250, 256, 162 P.2d 662; Gallagher v. California Pac. T. & T. Co., 13 Cal.App.2d 482, 486, 57 P.2d 195.

[5–8] In a suit to quiet title, general allegations or denials of ownership are, as a rule, sufficient. But when a party undertakes to plead his title specially, as well as generally, and the special allegations reveal the weakness of his title or that he has no title, their effect is to nullify the general allegations and denials. Martin v. Hall, 219 Cal. 334, 337–338, 26 P.2d 288. See also Ephraim v. Metropolitan Trust Co., 28 Cal.2d 824, 833, 172 P.2d 501. Where an allegation of ownership is expressly predicated on specific averments, the allegation of ownership is a mere conclusion of law and may be disregarded. Peninsula Properties Co. v. County of Santa Cruz, 34 Cal.2d 626, 629–630, 213 P.2d 489. Since the answer and the cross-complaint allege the facts, specifically and with great particularity, on which defendants' claim of ownership of the estate in the oil and gas is predicated, if those allegations show that defendants are not the owners, the demurrers were properly sustained and the motion for judgment on the pleadings was correctly granted.

Summarized, the facts specifically alleged in the answer and in the cross-complaint are that at the time of Luther Lindauer's death he was the owner of the estate in the surface and Union was the owner of the estate in the oil and gas; Lucy Lindauer was the sole devisee named in Luther's will; while acting as executrix of Luther's will Lucy made the agreement with Union; Lucy died; later the administrator of Luther's estate sold the interest his estate had in the realty to plaintiffs; thereafter Union quitclaimed the estate in the oil and gas to the "Owner, its heirs, successors and assigns."

[9–11] It must be taken as true that Luther was not the owner of the estate in the oil and gas at the time of his death; he was the owner of the estate in the surface. It is settled in this state that an owner of the fee title to land may sever all or a part of the estate in the oil and gas from the estate in the surface. Standard Oil Co. v. John P. Mills Organization, 3 Cal.2d 128, 132, 43 P.2d 797. See annotation 29 A.L.R. 586; Jilek v. Chicago, W. & F. Coal Co., 382 Ill. 241, 47 N.E.2d 96, 146 A.L.R. 880. The estate in the oil and gas,—if of unlimited duration, as in the case at bar,—is a freehold interest, an estate in fee, and real property. Dabney-Johnston Oil Corp. v. Walden, 4 Cal.2d 637, 648–650, 52 P.2d 237. On the death of Luther, testate, title to the estate in the surface vested in Lucy, subject to administration of Luther's estate. Prob.Code, §§ 28, 107, 120, 300; Estate of Kalt, 16 Cal.2d 807, 811, 108 P.2d 401, 133 A.L.R. 1424. When Lucy made the agreement with Union, she was the owner of the estate in the surface subject to administration, and executrix of Luther's will. As owner of the estate in the surface, Lucy had the right during administration of Luther's estate to contract with respect to the assets of the estate—the estate in the surface—subject to the control of the probate court to sell such assets for the purpose of administration of the estate. United States F. & G. Co. v. Mathews, 207 Cal. 556, 559–560, 279 P. 655; Moffit v. Rosencrans, 136 Cal. 416, 418–419, 69 P. 87; Estate of Meyer, 107 Cal.App.2d 799, 809, 238 P.2d 597; Wood v. Long, 44 Cal.App. 185, 190, 186 P. 415. The question is, did the rights and benefits of the agreement with Union inure to Lucy, individually, or to the owner of the estate in the surface, whoever the owner might be at the time the rights and benefits accrued?

Manifestly, Union made the agreement with Lucy because she was then the owner of the estate in the surface. Defendants so concede. They also concede that if the agreement between Union and Lucy "definitely shows it was the intent of the parties thereto to vest the oil rights in the record owner of the surface rights, if Union elected to quitclaim, or that said rights to receive the oil rights ran with or are appurtenant to the land, then the judgment should be affirmed," but say that "if the contract clearly shows an intent to quitclaim to Lucy Lindauer or if the contract is so ambiguous that it cannot be ascertained therefrom whether the word 'Owner' as used in the clause respecting quitclaiming means Lucy Lindauer or the record owner of the surface rights, when Union elected to and did quitclaim, then the demurrers should have been overruled and the motion for judgment on the pleadings denied and the ruling of the trial court clearly requires a reversal." They say the word "Owner" in the agreement was intended "as a description of the person of Lucy Lindauer," and that it does not mean "the owner of the surface rights, whoever might be such owner at the time of the quitclaim deed." They argue that if it cannot be said that the word owner, as used in the agreement, definitely means either Lucy or the owner of the surface rights, whoever such person might be, then it is so uncertain that evidence would be admissible to show the meaning intended.

The agreement is not ambiguous or uncertain. It is clear, definite, and certain, and says without equivocation that if Union elects to quitclaim it will do so to the owner of the land. It specifically says it is between Union and the "owners" of the lands described; and that whenever the term "lands" is used, it shall be taken to mean, unless the context shall otherwise so provide, the lands described or a portion thereof, and that "lands subject to this agreement" shall be taken to mean land forming part of the lands described "which belong to an Owner or Owners" who have signed the agreement and which have not been quitclaimed by Union. The agreement was manifestly between Union and the owners of the estates in the surface in the lands subject thereto. It was not an agreement with Lucy, individually, separate and apart from her ownership in the estate in the surface. The rights and benefits accruing from the agreement inured to her as owner of the estate in the surface subject to administration of Luther's estate.

Plaintiffs argue that the right to receive the quitclaim deed from Union was appurtenant to and ran with the land. Defendants argue that while the agreement made the right to receive payments thereunder appurtenant to the land, it did not make it right to receive a quitclaim deed appurtenant. We think it did. The estate in the oil and gas when owned by Union was a profit *à prendre*. Dabney-Johnston Oil Corp. v. Walden, 4 Cal.2d 637, 649, 52 P.2d 237; 3 Tiffany Real Property, 427, § 839. When Union made the agreement with Lucy, it granted to the owner of the land the right to receive future royalties, an incorporeal hereditament, and an interest in land. Callahan v. Martin, 3 Cal.2d 110, 124, 43 P.2d 788, 101 A.L.R. 871. It also agreed that the owner of the land should receive a quitclaim deed to the estate in the oil and gas, a grant, should Union elect to quitclaim. MacFarland v. Walker, 40 Cal.App. 508, 512, 181 P. 248.

[12] Civil Code section 1462 reads: "Every covenant contained in a grant of an estate in real property, which is made for the direct benefit of the property, or some part of it then in existence, runs with the land." A transfer in writing is a grant. Civil Code, § 1053. The agreement was a grant within the meaning of section 1462. Cf. Rockefeller v. Smith, 104 Cal.App. 544, 547, 286 P. 487. The covenant to quitclaim was contained in a grant of an estate in real property. Under section 1462 the general test determinative of whether a particular covenant runs with the land, is whether it is "made for the direct benefit of the property". The phrase "made for the direct benefit of the property" means, among other things, "any covenant which affects the title to real property or any interest or estate therein of the covenantee. A covenant made for the direct benefit of the land is one which is intended to restore to the covenantee or the owner of the land some right with respect thereto which he has parted with *pro re nata* or for a special purpose. * * * [I]f the covenant is one which concerns the land itself, or in any manner or measure affects its title or any interest therein, then it is, within the meaning of that phrase as it is employed in section 1462, 'made for the direct benefit of the real property' to which it relates." Sacramento Suburban Fruit Lands Co. v. Whaley, 50 Cal.App. 125, 130–131, 194 P. 1054, 1056, in which a covenant in a mortgage for release of a mortgage lien of any 10 acre lot or more for which $125 an acre had been paid, was held to be a covenant for the unfettering, *pro tanto*, of the title, for the direct benefit of the land—and therefore a covenant running with the land. See annotation 93 A.L.R. 1027. Richardson v. Callahan, 213 Cal. 683, 3 P.2d 927, holds that a covenant in an oil and gas lease to keep the premises free from liens arising from operations on the property is a covenant running with the land. The court gave as examples of such covenants, 213 Cal. at page 688, 3 P.2d at page 929, "to insure, to repair, to deliver up possession, to renew a lease, to exercise an option to purchase, to restrict alienation, to develop mineral resources on a royalty basis, are all such as run with the land." Coburn v. Goodall, 72 Cal. 498, 14 P. 190, holds that a

covenant to surrender demised premises, with improvements thereon at the expiration of the term, is a covenant running with the land. In the case at bar the covenant to quitclaim was not merely personal in nature; it was for the unfettering of the title to the estate in the oil and gas; it created an interest in the owner of the estate in the surface which she did not have before it was made—the return of title to the estate in the oil and gas to the owner of the estate in the surface—it was made for the direct benefit of the property, and was a covenant running with the land. See Stanislaus Water Co. v. Bachman, 152 Cal. 716, 727–728, 93 P. 858, 15 L.R.A.,N.S., 359; Weill v. Baldwin, 64 Cal. 476, 480, 2 P. 249; Washburn v. A. F. Gilmore Co., 116 Cal.App. 370, 373–374, 2 P.2d 506; Miller & Lux v. San Joaquin Agr. Co., 58 Cal.App. 753, 209 P. 592. A covenant intended to benefit the land is incident to and runs with it, and whoever becomes the owner of the land is entitled to the benefit of the covenant. 7 Cal.Jur. 728, § 15.

At the time Union made and recorded the quit-claim deed of the estate in the oil and gas on December 1, 1941, Lucy was dead. Defendants say that "a deed to dead man is a nullity," Hunter v. Watson, 12 Cal. 363, 376. See also Copeland v. Fairview Land Etc. Co., 165 Cal. 148, 162, 131 P. 119; that the quitclaim deed did not pass title to the estate in the oil and gas, but that equity will enforce it in favor of the heirs of the deceased grantee. The argument is predicated on the erroneous premise that Lucy was the grantee named in the deed. The material parts of the deed read:

"This indenture, made this *1st* day of *December*, 194*1*, by and between *Union Oil Company of California*, a corporation, hereinafter referred to as 'Union', First Party, and *Lucy Lindauer* hereinafter referred to as 'Owner', whether one or more, Second Party,

"Witnesseth:

"That for and in consideration of the sums of One Dollar ($1.00) and other good and valuable consideration to it in hand paid by Owner, receipt whereof is hereby acknowledged, Union does hereby remise, release and forever quitclaim unto Owner, its heirs, successors and assigns, all of its right, title and interest in and to that certain land situate in the County of Los Angeles, State of California, described as follows, to-wit: [description]."

[13–15] A deed is to be construed in favor of vesting title. Civ.Code, § 1069; Younger v. Moore, 155 Cal. 767, 773, 103 P. 221; 4 Tiffany Real Property, 58, § 978. The deed should be construed to give effect to the intention of the grantor—that is, to pass title to the estate in the oil and gas to the then owner of the estate in the surface. This construction is reinforced by consideration of the agreement from which it clearly appears that on Union's election to quitclaim, it would do so to the then owner of the estate in the surface. Union agreed to quitclaim "to the respective Owners (of the lands), as their interests may appear," and "to the respective Owners" of the lands, and to the "Owner or Owners" of the lands. Patently, this meant to the owner of land at the time Union elected to quitclaim and not to the owner at the time the agreement was made. It is not necessary that a grantee in a deed be mentioned by name. If the designation or description is sufficient to identify the person or persons intended, the deed is effectual. The designation of the grantee in the operative clause of the deed as "Owner, its heirs, successors and assigns" was sufficient to pass title to the then owner of the estate in the surface, although Lucy was dead at the time. Schade v. Stewart, 205 Cal. 658, 272 P. 567; Cf. Sparks v. Humble Oil & Refining Co., Tex.Civ.App., 129 S.W.2d 468, 471; Black v. Brown, 129 Ark. 270, 195 S.W. 673. The operative or granting clause controls over the caption. 9 Cal.Jur. 254, § 127; Cecil v. Gray, 170 Cal. 137, 140, 148 P. 935; MacFarland v. Walker, 40 Cal.App. 508, 512, 181 P. 248; Loughridge v. Ball, Ky., 118 S.W. 321; Parks' Ex'rs v. Parks, 286 Ky. 233, 150 S.W.2d 687. It is apparent that the only reason the name of Lucy was put in the caption as second party was that she was the owner of the land at the time the agreement was made. This is obvious since the caption says, "Lucy Lindauer hereinafter referred to as 'Owner', *whether one or more,* Second Party." (Emphasis added.)

Hogan v. Page, 2 Wall. 605, 69 U.S. 605, 17 L.Ed. 854, is analogous. The court stated that a difficulty had occurred at the land office in respect to the form of patent certificates and patents, arising out of applications to have them issued in the name of an assignee of the original grantee, thereby imposing upon the office the burden of inquiring into the derivative title presented by the applicant. As a result a formula was adopted of issuing the patent to the original grantee "or his legal representatives." The formula was held to embrace representatives of the original grantee in the land by contract, such as assignees or grantees, as well as by operation of law.

In Ready v. Kearsley, 14 Mich. 215, a deed to "Stewart, or to his legal heirs and representatives" was upheld. The court, in an opinion written by Mr. Justice Cooley, said:

> "The deed is to Stewart or his heirs, and it is supposed to fall under the condemnation of that rule of the common law, that a grant made to J. S. or W. S. in the disjunctive, is void for uncertainty: [Citing authorities.]
>
> "It is evident, however, that the reason upon which the case instanced rests, does not apply to this deed. A grant to J. S. or W. S. is void from the manifest impossibility of determining which shall take when the grantor has failed to express his intent. But no such difficulty can arise in the case of a grant to J. S. or to his heirs. If J. S. is living, he has no heirs; and no two parties can claim adversely as grantees under the deed. The manifest intent here was to vest the title in Stewart, if living, and in his heirs or devisees, if he were then dead. Conveyances in this form by public officers or boards have not been uncommon, for the reason that such conveyances are usually made at a period subsequent to that when the right to the conveyance accrued; and it is not always known when the deed is made, that the party entitled is living."

There is no doubt but that Union intended a conveyance, and that it had in mind some person or persons to whom title to the estate in the oil and gas should pass. There also can be no doubt that by the phrase "Owner, its heirs, successors and assigns" it intended to point out and designate the particular person or persons who should take the estate direct from Union at the time the deed was made. See Bremner v. Alamitos Land Co., 11 Cal.App.2d 150, 153, 53 P.2d 382. Construing the deed and the agreement together it is clear that such person or persons was the then owner or owners of the land—the estate in the surface. The death of Lucy did not affect the legality of the quitclaim deed. The deed conveyed the estate in the oil and gas to the then record owner of the estate in the surface.

[16–18] The property to which a devisee acquires title is subject to the control of the superior court for the purposes of administration, sale or other disposition. Prob.Code, § 300. A conveyance of real property made by an executor or administrator, pursuant to an order confirming its sale, conveys "all the right, title, interest and estate of the decedent in the premises at the time of his death, and if prior to the sale, by operation of law or otherwise, the estate has acquired any right, title, or interest in the premises, other than or in addition to that of the decedent at the time of his death, such right, title, or interest also passes by such conveyances." Prob. Code, § 786. The statute contemplates that for the purpose of sale an estate may acquire a right, title, or interest in property of the estate between the death of a decedent and a sale of the property. The estate in the surface was an asset of the estate in the hands of Lucy as executrix, subject to sale. The rights which Lucy acquired as a result of the agreement with Union were in the nature of profits or proceeds which arose by reason of the ownership of the estate in the surface and were likewise assets of the estate. See Estate of De Bernal, 165 Cal. 223, 235, 131 P. 375. The consideration which passed to Union by the agreement did not pass from Lucy as an individual. It consisted of rights in the land which were assets of the estate. As we have said, upon the death of a testate, title to his realty passes to his devisees subject to the limitations of administration. One of the statutory limitations on the right of the devisee is the power of the probate court to sell the realty. Estate of Benvenuto, 183 Cal. 382, 386, 191 P. 678. The power of the probate court to sell cannot be affected by any agreement the devisee, Lucy, may make, any more than she could free the estate from its liability for the debts of the deceased husband. The rights which were acquired from Union ran with the land, were for the benefit of the estate, and were assets of the estate. Lucy could exercise no greater rights with respect to the estate in the surface than she had as devisee; and since the estate which passed to her on Luther's death was subject to administration and sale for the purposes thereof, and was actually sold to plaintiffs for such purposes, any benefits and rights arising out of the agreement with Union inured to the benefit of plaintiffs, the purchasers at the probate sale. Under the plain terms of the statute, the title that passed to plaintiffs on the conveyance to them by the administrator of Luther's estate, conveyed the title of Luther at the time of his death and the rights which the estate acquired by reason of the agreement between Union and Lucy, including the right to receive a deed from Union should it elect to quitclaim.

The fact that at the time plaintiffs purchased from the estate of Luther, April 24, 1941, the title company in its report on the title advised them that the oil rights "constituted an exception and a reservation," is of no consequence. On April 24, 1941, the estate in the oil and gas was vested in Union, and, of course, would show as an exception in a report on the title. Union did not make the quitclaim deed of the estate in the oil and gas until December 1, 1941.

[19–23] Defendants at the oral argument and in a memorandum filed thereafter suggest that plaintiffs' cause of action is barred by laches. Laches is an affirmative defense, and one who relies on it must plead facts constituting such laches where, as here, there is an opportunity to do so. Phoenix Mutual L. Ins. Co. v. Birkelund, 29 Cal.2d 352, 363, 175 P.2d 5. No facts are pleaded in either the answer or the cross-complaint showing laches. There is no allegation that plaintiffs had any notice or knowledge that defendants claimed any interest in the property prior to the filing of the complaint. See McKenna v. Ping, 105 Cal.App.2d 752, 755, 234 P.2d 246. Laches is not mere delay, but delay that works a disadvantage to another. A person is guilty of laches only where he has, by his conduct or negligence and delay, induced or suffered another to do or abstain from something, whereby the latter might be injured should he be allowed to enforce his rights. Taber v. Bailey, 22 Cal.App. 617, 623, 135 P. 975. There is no averment that defendants have been injured or have suffered any prejudice by reason of any delay in the bringing of the action. Lapse of time alone is not sufficient to bar a suit to quiet title.

The appeals from the orders sustaining the demurrers and granting the motion for judgment on the pleadings are dismissed. The judgment is affirmed.

SHINN, P. J., and WOOD, J., concur.

119 Cal.App.2d 393

PAXTON v. ALAMEDA COUNTY et al.

No. 15382.

District Court of Appeal, First District, Division 1, California.

July 28, 1953.

Rehearing Denied Aug. 27, 1953.

Hearing Denied Sept. 24, 1953.

Action for injuries to plaintiff when sheathing on roof of building being constructed for defendant county pursuant to specifications prepared by defendant architect, gave way as plaintiff was carrying buckets of hot tar thereon. The Superior Court in and for the County of Alameda, Thomas J. Ledwich, J., entered judgment for plaintiff and defendants appealed. The District Court of Appeal, Fred B. Wood, J., held that evidence did not sustain implied finding that architect had been negligent with respect to specifications prepared by him, but evidence was sufficient to warrant imposition of liability on county under the Public Liability Act.

Judgment against architect reversed; otherwise affirmed.

1. Negligence ⚿134(5)

In action for injuries to plaintiff when sheathing on roof of building designed by defendant architect gave way as plaintiff was carrying buckets of hot tar thereon, wherein defendant was charged with negligence in specifying one-inch by six-inch sheathing with a spread of 30 inches between the rafters, evidence of plaintiff's expert, when considered with evidence on behalf of defendant, was insufficient to support an implied finding that defendant had negligently specified sheathing material which was of insufficient strength.

2. Evidence ⚿570

Generally, the opinion of an expert is worth no more than the reasons upon which it is based.

3. Negligence ⚿134(5)

Mere deviation by architect from an alleged customary practice of placing rafters no more than 24 inches apart when using one-inch by six-inch sheathing, if such was in fact the customary practice, did not establish that spacing of such sheathing with a spread of 30 inches between the rafters was negligence in connection with injuries to workman when sheathing gave way as he was walking thereon, when preponderance of expert evidence was that use of sheathing in such manner was reasonably safe.

4. Negligence ⚿44

An architect who made computations as to loads which sheathing on roof would be called upon to bear and strength and allowable stress of various materials, in accordance with the applicable requirements of building laws and the standards of good practice in his profession and his community, and who specified a material which, according to the computations, allowed a wide margin of safety between stresses which would be received and those the material was capable of bearing, was not negligent with respect to injuries to workman when sheathing gave way as he was walking thereon.

5. Counties ⚿144

Where architect who designed building through the roof of which plaintiff stepped when carrying buckets of tar thereon was not negligent in preparing plans and specifications, county board of supervisors could not have been negligent, with respect to workman's injuries, in approving such plans and specifications.

6. Counties ⚿223

In action for injuries to plaintiff when sheathing on roof of building being constructed for county gave way as plaintiff was carrying buckets of hot tar thereon, wherein it was contended that considerable amount of sheathing of lower grade than specified by architect for county was actually used and that county was chargeable with notice thereof, evidence supported implied finding that sheathing of lower grade than specified was used, and that such use resulted in dangerous or defective condition which was proximate cause of plaintiff's injury. Gen.Laws, Act 5619, § 2.

7. Counties ⚿223

In action for injuries to plaintiff when sheathing on roof of building being constructed for county gave way as plaintiff was working thereon, evidence warranted conclusion that architect retained by county to prepare specifications and to direct and supervise the erection and completion of the construction work had notice of use of sheathing of lower grade than specified, resulting in a dangerous condition, and that architect was a "person having authority to remedy such a condition" on behalf of county, within contemplation of public liability statute. Gen.Laws, Act 5619, § 2.

8. Counties ⚿223

In action for injuries to plaintiff when sheathing on roof of building being constructed for county gave way as plaintiff was working thereon, wherein it appeared that architect retained by county had the authority to remedy the use by general contractor of sheathing inferior to that called for by specifications, evidence warranted finding that discovery by architect of inferior lumber on ground, destined for the roof, was a circumstance sufficient to put a prudent man on inquiry, and that county's architect was negligent in not making another inspection of roof until after sheathing was in place, covered with tar and gravel. Gen.Laws, Act 5619, § 2.

9. Counties ⚷224

The rule that a dangerous or defective condition must be conspicuous or notorious for a public agency, such as the county, to be liable in absence of actual notice, does not apply as a matter of law to a building in the course of construction under the supervision of an architect retained by the county. Gen.Laws, Act 5619, § 2.

10. Counties ⚷144

Under provision of Public Liability Act, liability on part of county for injuries to plaintiff when sheathing on roof of building being constructed for county gave way because of use of defective sheathing, of which county's architect should have had notice, was not dependent on negligence of county through its architect being the sole proximate cause of the injury, and it could not be relieved from responsibility for its negligence by any negligent failure of general contractor to comply with specifications. Gen.Laws, Act 5619, § 2.

11. Counties ⚷223

In action for injuries to plaintiff when sheathing on roof of building being constructed for defendant county gave way as plaintiff was working thereon, wherein it appeared that defective sheathing had been used and that county's architect should have had knowledge thereof for a reasonable time to enable him, as person having authority to remedy such condition, to have remedied the condition, evidence supported implied finding that plaintiff had not assumed the risk of defective sheathing being used. Gen.Laws, Act 5619, § 2.

12. Counties ⚷224

In action for injuries to plaintiff when sheathing on roof of building being constructed for defendant county gave way as plaintiff was carrying buckets of hot tar thereon, wherein it appeared that defective sheathing had been used and that county's architect should have had knowledge thereof for a reasonable time to enable him, as person having authority to remedy such condition, to have remedied the condition, evidence made question for jury on whether plaintiff had been contributorily negligent. Gen.Laws, Act 5619, § 2.

13. Witnesses ⚷282½

In action against county for injuries to plaintiff when sheathing on roof of building being constructed for county gave way as plaintiff was working thereon, wherein it appeared that at time of trial plaintiff wore casts upon his arms as result of accident which happened on another construction job, sustaining of objection to further question on cross-examination, as to whom plaintiff was working for at time of second injury, was not error when attorney for county had proceeded with such line of inquiry, and had then voluntarily dropped inquiry without comment and proceeded to other phases of case.

14. Appeal and Error ⚷928(4)

Where county, on appeal from judgment adverse to it in negligence action, had furnished a record which did not disclose source of any of the instructions, it was not entitled to assert error in the giving of instructions.

15. Damages ⚷699(4)

In action under Public Liability Act for injuries to plaintiff when sheathing on roof of building being constructed for county gave way as plaintiff was carrying buckets of hot tar thereon, evidence was sufficient to warrant the giving of instruction concerning loss of time by plaintiff and impairment of earning power in the future. Gen.Laws, Act 5619, § 2.

16. Trial ⚷194(20)

Instruction that, if plaintiff's power to earn money had been impaired by injury, jury should award such sum as would reasonably compensate him for such loss of future earning power, if any, followed by instruction that, as to some of the instructions, their application was dependent upon light in which jury viewed the evidence, and that instructions as to particular rules of law were not to be taken as an indication that such rules were necessarily applicable, was not in the nature of a direction to jury to find and award future damages, but instructions were given contingently, for use only if jury should find physical disability and impairment of future earning power.

◆

Gardiner Johnson, John A. Sproul, San Francisco, for appellants, Kent & Hass, Thomas J. Kent and Andrew T. Hass.

Robert E. Burns, Crimmins, Kent, Draper & Bradley, San Francisco, for California Council of Architects, as amicus curiae, on behalf of appellants Thomas J. Kent, Andrew T. Hass and Kent & Hass.

Donahue, Richards, Rowell & Gallagher, James E. Gallagher, Joseph T. Richards, Oakland, J. F. Coakley, Dist. Atty., R. Robert Hunter, Asst. Dist. Atty., Richard H. Klippert, Deputy Dist. Atty., Oakland, for appellant Alameda County.

Anderson & Peck, Milner J. Anderson, Edward F. Peck, Gordon W. Nelson, Oakland, for respondents.

FRED B. WOOD, Justice.

Amos Paxton was injured while applying a tar and gravel surface to the roof of a livestock pavilion which was in course of construction at Alameda County Fair Grounds. He was carrying two 50-lb. buckets of hot tar along the roof toward the place of intended application. At a certain point the sheathing under his left foot gave way. He fell through up to his thigh, sustaining injuries to his left arm, wrist and hand from the spilling of hot tar. He was in the employ of a roofing sub-contractor at the time. He brought this action and recovered judgment for $25,000 against the County of Alameda and against Andrew T. Hass and Thomas J. Kent, individually and as copartners, the architects who designed the pavilion and prepared the plans and specifications for it. The defendants have appealed.

As to the architects, plaintiff claims that Hass was negligent in specifying 1″ x 6″ sheathing with a spread of 30″ between the rafters, that such was too thin a covering for such a span, resulting in a dangerous and defective condition for workmen who were to apply the tar and gravel surface, facts which Hass knew or should have known.

As to the county, plaintiff claims that it was equally negligent in this respect because its governing body, the board of supervisors, approved the plans and specifications; additionally, that a considerable amount of sheathing of lower grade than specified was actually used and the county was chargeable with notice thereof through agents appointed by it to supervise and inspect the work of construction as it progressed.

In support of the appeals the several defendants and the California Council of Architects as amicus curiae advance various points which present the following issues: (1) Does the evidence sustain the implied finding that the defendants were negligent? (2) Was the failure of the general contractor to comply with the specifications as to the grade of lumber used a supervening act which broke the causal connection? (3) Did plaintiff fail to exercise due care for his own safety? (4) Were the damages awarded excessive in amount? (5) Did the trial court commit prejudicial error (a) by allowing the county to cross-examine defendant Hass, (b) by, assertedly, refusing to permit inquiry concerning plaintiff's second injury, and (c) by giving its instruction to the jury concerning future losses?

(1) *Does the evidence sustain the implied finding that the defendants were negligent?*

As to the architect,[1] the issue is framed by the allegations of the complaint that the plans and specifications were so carelessly and negligently drawn that they called for construction and use of materials that were unsafe and dangerous and that the construction based thereon was dangerous and unsafe "in that the materials specified * * * for the sheathing thereon was of insufficient strength to support workmen such as plaintiff who would go thereon."

---

[1] Defendant Hass prepared the plans and specifications for the pavilion under contract with the County of Alameda but it was stipulated during the trial that Hass, Kent and the copartnership of Kent and Hass be treated as one for the purposes of this action.

The test used during the course of the trial for determination of the negligence, if any, of the defendant architects is reflected by the instruction thereon to which none of the parties has taken exception: "By undertaking professional service to a client, an architect impliedly represents that he possesses, and it is his duty to possess, that degree of learning and skill ordinarily possessed by architects of good standing, practicing in the same locality. It is his further duty to use the care ordinarily exercised in like cases by reputable members of his profession practicing in the same locality; to use reasonable diligence and his best judgment in the exercise of his skill and the application of his learning, in an effort to accomplish the purpose for which he is employed. * * * In determining whether the defendants architects' learning, skill and conduct fullfilled the duties imposed by law, as they have been stated to you, you are not permitted to set up arbitrarily a standard of your own. The standard is that set by the learning, skill and care ordinarily possessed and practiced by others of the same profession in the same locality, at the same time. It follows, therefore, that the only way you may properly learn that standard is through evidence presented in this trial by other persons in the field of architecture, called as expert witnesses. * * * Accordingly, in considering your verdict as to the liability of the defendants architects, you are entitled to consider only evidence, if any, which would support that specific charge of alleged negligence, namely, the charge that said architects were negligent in specifying sheathing of insufficient strength to support the workmen who would go on it."

The plans and specifications called for Douglas Fir select, merchantable, seasoned sheathing 1″ x 6″ (sized four sides, making a net dimension of 25/32″ x 5⅝″) laid solid horizontally across the rafters and nailed with two nails at each bearing; the rafters to be 2″ x 4″ spaced 32″ apart measured from center to center.

The only testimony which tended to indicate negligence in the specification of the materials was that of Guy L. Rosebrook.[2] He testified that he was and had been a licensed architect for 25 years, engaged in drawing plans and specifications for 35 years. He had done buildings of every kind; about 150 millions worth in the last ten years; his practice was all over the United States, including Alameda County; he happened to live in Alameda County and had an office in Oakland. He had been at the County Fair Grounds; had been through this building but did not pay any attention to its construction. He was familiar with the custom and practice of good building in the County of Alameda. He was shown photographs of the pavilion (Exhibits 1, 2, 4, and 5; Exhibits 4 and 5 portrayed the rafters and the sheathing from the inside of the building looking upward). He was not shown the plans and specifications.

In response to the hypothetical question "If you are determining custom and good practice in building, if I told you there was a 32 inch span between the rafters of 1 by 6 inches—1 inch by 6 inch sheathing, would that be good building practice in the County of Alameda?" (Objected to as not a correct statement of the facts in evidence), he said "If I understand your question correctly, the rafters are spaced 32 inches on centers and the 1 x 6 is 30 inches—no, it is not good practice. I have never seen it done in the 35 years of my business."

Defendants claim that this question and answer amounted to the expression of an opinion that it is not good practice to lay 1″ x 6″ sheathing (across a 30″ span) with the sheathing boards 30″ apart instead of being laid solid, edge to edge. Such an interpretation is literally possible but the questions and answers which followed convince us that the witness' opinion was predicated upon sheathing laid solid, edge to edge, across the rafters, and that the jury and the trial judge so understood him.

---

[2] Several of plaintiff's witnesses testified that they had observed the sheathing in place on this roof and that some of it was of lower grade than select merchantable. Such testimony did not indicate that the material specified was inferior, defective, dangerous, or that its use was not in accord with good practice.

We observe that this hypothetical question failed to include, as an element, the type or grade of the lumber (Douglas Fir, select merchantable) which the specifications called for. That left open the possibility that Rosebrook had in mind roofing boards of a tensile strength much lower than specified. However, later on he said that examination of the plans and specifications would be of no help to him in determining the safety of 25/32″ x 5⅝″ sheathing with a thirty inch span; that he based his opinion upon sheathing of those dimensions with that span between the rafters. In effect he said that, under those circumstances, lumber of the highest tensile strength would be unsafe.

Rosebrook further testified that he would not consider that such construction would provide a safe place for roofers to walk upon. He would consider it dangerous. He would consider it safe if one used 2″ sheathing instead of 1″. He had never seen a 32″ span on a house; 24″ is common, usual practice. The F.H.A. will not permit any further spanning on any house. The 24″ span is not limited to homes; it applies to any roof; 24″ is the customary spacing for rafters. He would not know if there were any other buildings in Alameda County that had a 32″ span. There might be such.

His attention was directed to the fact that the county building ordinance permitted 2″ x 4″ rafters to be spaced 12, 16, 24, or 32 inches apart. He asked what kind of sheathing did the ordinance specify for those several spacings, but did not receive an answer. In his opinion, for a 30″ span, 2″ sheathing instead of 1″ would be safe. He apparently had no basis for his opinion as to safety except what he termed "customary practice." Asked how he would go about determining the type of material which could be employed when the rafters are placed on 32″ centers, he replied, "In the first place, that isn't customary practice" and "I would have no reason to figure it because we just don't do it."

The legal significance of Rosebrook's testimony can best be determined if first we review the pertinent testimony of the other expert witnesses in the case.

Defendant Hass testified that he was an architect licensed by the state and had been such ever since 1922. He started the practice of architecture "on his own" in 1925 and had been practicing architecture continuously since then in Oakland, Alameda, Berkeley, and San Francisco.

In February, 1948, he was employed by the County of Alameda to prepare and did prepare a set of plans and specifications for this hog and sheep shelter or pavilion to be erected on the Alameda County Fair Grounds at Pleasanton. During that period rules and regulations concerning the construction of such a building were in effect, the Uniform Building Code of 1946, adopted as a county building ordinance by the County of Alameda. It is used throughout the county; it is the standard of the county and is applied in Alameda County.

The county building ordinance was not put in evidence. Portions of it were read in. Section 2211 provided in part: "Wherever a composition roofing is used, the roof construction shall be solidly sheathed with wood, sheathing to be not less than twenty-five thirty-seconds of an inch thick, or with plywood not less than that set forth in Table No. 31-B."

Section 2305 of the ordinance read as follows: "Roofs shall be designed for a vertical live load of 20 pounds per square foot of horizontal projection applied to any and all slopes, except as hereinafter provided.

"Where the rise exceeds 12 inches per foot no vertical live loads need be assumed, but the roof shall be designed for the dead load and for a wind load of 15 pounds per square foot of vertical projection."

Under § 3203, Table 32-A showed the permissible spacing of rafters, with reference to 1″ sheathing. For a 2″ x 4″ rafter, it permitted 32″ center spacing. That was a maximum spacing.

Table 25–A of the ordinance at first specified 1,200 pounds per square inch as the maximum fibre stress for Douglas Fir; later, 1,450 pounds.

Hass took into consideration these provisions of the ordinance, and the stresses the material would be subjected to, in determining the type and spacing of the sheathing, so as to specify timber sufficient and in compliance with the law for the purpose for which intended, having in mind that workmen would go on this roof to apply a tar and gravel surface. Using select merchantable Douglas Fir 1″ x 6″ with a span of 32″, he determined the stress was approximately 249 pounds per square inch. He stated that the county ordinance permitted a maximum fibre stress of 1,200 pounds to the square inch for such material under such circumstances. When he started his work on this job he used 1,200 pounds as the permissible stress and then changed to 1,450, learning of the change in that regard in the Uniform Building Code. He testified that upon either basis (a permissible stress of 1,200 or of 1,450 pounds) he came out way under the permissible stress. Plaintiff examined Hass concerning formulas used in computing such stresses. Apparently he used the formula WL/8 to determine the bending moment, based upon a uniform load. He said that for a concentrated load the formula would be WL/4, which if he had used it would have doubled the stress; that a concentrated load is one that is permanently suspended from a given point. He did not consider WL/4 applicable here. No evidence controverting or tending to disallow the soundness or accuracy of Hass' computations has been brought to our attention, nor have we discovered any.

Hass said that this type of construction has been employed by others than himself; that it is used and accepted in Alameda County; and is the type that would be ordinarily used for a roof over a sheep and hog shelter.

John F. Tulloch testified that he had been engaged in business in Alameda County for the last thirty years. He held a state license as a B–1 building contractor and a license as an engineering contractor. He was engaged primarily in the construction of factories, warehouses and various types of industrial and engineering construction. He examined the plans and specifications here involved and expressed the opinion that a building of the type therein described and built according to those specifications, with 1″ x 6″ select merchantable sheathing nailed with two nails at each bearing, would present no hazard; that it is standard practice; that 1″ x 6″ select merchantable sheathing nailed with two nails at each bearing, with a net span of 30″, is entirely safe and is prescribed and permitted by practically all building codes in operation; that in expressing this opinion he had in mind the fact that roofers would be going on this sheathing to install tar and gravel. As reasons for his opinion, he stated that the conditions described meet the requirements of the Uniform Building Code, 1946 edition (referring particularly to § 2211 and to Table 32–A of the code); that most of the commercial buildings of this type in this area usually have a roofrafter spread of 24″, center to center, using the roof as a diaphragm, putting the sheathing on diagonally at an angle of 45 degrees, resulting in a greater span than here, a span of 31 and a fraction inches, somewhat weaker than when the span is 30″. Up to the time of the Long Beach earthquake of 1933 nearly all sheathing where applicable was laid on roof rafters spaced at 32″ on centers. At that time the Building Conference Code officials revamped the Building Code to provide (where necessary to use the roof as a diaphragm for the support of the building; not every roof is so used) for diagonal sheathing on rafters spaced at 24″ so that the roof would act as a "diaphragm to transfer lateral forces produced by earthquakes or cyclones, or something else pushes these forces out to the walls of the column so that they can be transferred back to the ground." The state was in on the consultation which resulted in this change. This code was enacted into a law in Alameda County by ordinance.

Asked upon cross-examination in respect to 1″ x 6″ select merchantable sheathing with a 30″ span, what weight the center of such a board would carry in pounds, Tulloch said he could not answer, not being an engineer. Asked if he knew whether it would carry a 160-pound man with 80 pounds of tar, he said, "Well, in answer to that question—that happens millions of times on the West Coast every year with the same types of roofs." He had laid 1″ x 6″ sheathing at right angles to rafters spaced at 32″, never diagonally; had laid sheathing diagonally only when the rafters were spaced at 24″. Asked concerning the formulas WL/4 and WL/8, Tulloch said that WL/4 is used in computing stress where you have a concentrated load.

Robert James Fisher, a licensed civil engineer qualified to use the title "structural engineer," who had worked as a structural engineer since 1919, operating under his own name since 1936, principally in the San Francisco Bay area, *testified substantially to the same effect as did Tulloch.* He examined the plans and specifications here involved and testified that the sheathing specified is the best grade obtainable on the market; that in carrying out this type of construction there would be presented no condition which would be hazardous or dangerous, he had done many jobs with spacing equal to or greater than this. He had made calculations and found the stress on the sheathing here specified to be 254 pounds per square inch, which is between one-fourth and one-fifth of the 1,200 pounds which this building code allows for Douglas Fir lumber. For a movable or impact load, there is a factor of safety of six, given by the Western Lumbermen's Association. That is, where the allowable stress is 1,200 pounds per square inch you can multiply it by 6, giving an allowable stress of 7,200 pounds per square inch for a movable or impact load. He described a concentrated load as a load concentrated on a spot for an indefinite period, a long term period. The formula for a concentrated load, WL/4, would give stresses double what they would be for a movable or impact load, such as a man walking across the roof, for which the computation formula is WL/8. He said a different formula would be used for the type of impact load such as a railroad car going over a bridge or a moving crane in a warehouse, where there is a continuous flow of movement, but one does not figure that in a building. He found nothing hazardous in the type of construction here specified, bearing in mind the movements back and forth of a man weighing about 160 pounds, carrying two tar buckets, neither of which would exceed 50 pounds in weight. For a five-minute load it would carry up to 1,848 pounds. He based his opinion upon the stresses he found in this material, coming to only 254 pounds per square inch, with the allowable safety factor of six. Based upon his knowledge and experience, he found that this type of construction, the material specified, the length of the span, the thickness of the sheathing, and the various factors he had testified to, were in accordance with normal accepted standards of construction for this type of work.

Joseph Francis Ward, a registered and acting architect for 28 years in the San Francisco Bay area and Alameda County, examined the plans and specifications here involved and testified that they call for construction in accordance with the accepted custom and practice in Alameda County, construction which would not in any way be hazardous, bearing in mind that workmen such as roofers would be employed to go on this roof to apply tar and gravel. He based his opinion on general experience and on recognized and accepted formulas employed by persons in his profession for determining factors of safety. He explained how he arrived at that conclusion. Among the significant factors, he observed that there are different stresses for different types and grades of lumber. He said that laying this sheathing at right angles to rafters spaced 32″ apart on centers would be stronger than laying it at a 45° angle on rafters spaced 24″ apart.

[1–3] We conclude that Rosebrook's testimony was too insubstantial and incomplete to support an implied finding that Hass negligently specified sheathing material that was of insufficient strength. He admitted that in formulating his opinion he made no computation of the strength of the material he had in mind, or the stresses it would bear. He declined the opportunity to indicate how he would go about making such a computation, retreating with the statement that "it isn't customary practice" to put 1″ sheathing on rafters spaced 30 inches apart, "I would have no reason to figure it because we just don't do it." This retreat he made after being confronted with a provision of the ordinance which sanctioned 32″ spacing on centers, a provision with which he apparently was not familiar. The ordinance did not sanction 32″ spacing under all circumstances and conditions. It was necessary for an architect to determine and compute the various kinds and amounts of loads a particular roof would be called upon to carry and to select and specify a type and grade of lumber of sufficient strength to bear those loads with a margin of safety. It was also the customary practice in this community for architects to make such computations and determinations. Such is the testimony of all the other experts in the case. That evidence is not in any substantial degree gainsaid by Rosebrook's statement "I would have no reason to figure it because we just don't do it," upon which his opinion finally rested. That opinion would seem to have no greater weight than if made by a carpenter untrained and inexperienced in computing and determining loads and stresses and the relative tensile strength of various types and grades of lumber. Such an opinion, also, does not take into account the practice of laying 1″ x 6″ sheathing diagonally across rafters spaced at 24″ when a roof is used as a brace against the forces produced by earthquake shocks; nor does it contradict the testimony of other experts in the case concerning that practice and the fact that in such a case the span of the sheathing slightly exceeds the 30″ span here specified. It has been said that it is "a general rule that an opinion is worth no more than the reasons upon which it is based", Long Beach City High School Dist. of Los Angeles v. Stewart, 30 Cal.2d 763, 773, 185 P.2d 585, 590, 173 A.L.R. 249, a rule which seems applicable here. Mere deviation from "customary practice" does not, under the circumstances of our case, prove that the resulting condition was dangerous or defective. In Valentine v. Hayes, 67 Cal.App. 650, 228 P. 57, 58, upon a denial of a petition for rehearing, the court held that evidence that a certain ladder was not maintained "in the usual and customary manner and place" did not necessarily show negligence or that the place of employment was unsafe. The court said, "the mere fact that the usual custom has been departed from does not, in itself, prove that the place of employment was unsafe, if the facts are without dispute that the system actually used was in fact reasonably safe * * *." 67 Cal.App. at pages 653–654, 228 P. at page 59. In our case, the mere fact that the use of 1″ x 6″ boards across a 30″ span was not "customary practice," according to Rosebrook, does not in itself prove a dangerous or defective condition in the face of the otherwise uncontradicted evidence that such use of such boards was reasonably safe.

[4] Thus we have here a picture of an architect who carefully computed the loads the sheathing would be called upon to bear and the strength and allowable stress of various materials. He then specified a material which those computations convinced him had a wide margin of safety between the stresses it would receive and those it was capable of bearing. These computations he made in compliance with the applicable requirements of the building laws and in accordance with the standards of good practice in his profession and his community. That, we think, would negative a basis for a finding of negligence even if he had made some mistakes in his computations and there is no evidence that he made any such mistakes; instead, the experts who did compute confirmed his method of computing and the results of his computations.

It becomes unnecessary to consider defendants' contention that Hass' compliance with the requirements of the building laws precluded the legal possibility of negligence, including the question whether those were maximum or minimum requirements.

[5] The reasoning which leads to the conclusion that there was insufficient evidence to support a finding that the architect was negligent in preparing the plans and specifications leads inevitably to the same conclusion concerning the asserted negligence of the county board of super-

visors in approving those plans and specifications.

Concerning the liability of the county, there is an additional factor to consider. The case was tried upon the theory that the county might be liable if sheathing of insufficient strength was actually used in the construction of the roof, whether of the type and grade specified or of a lower type or grade than specified in the plans and specifications.

The jury was instructed[3] that plaintiff's cause of action, if any he had, must meet the requirements of the Public Liability Act (§ 2 of Stats. 1923, ch. 328, p. 675, Deering Act 5619), which was read to the jury and its requirements explained. As to the element of notice to the county of a dangerous or defective condition, if any, the jury was informed that "the duty on a county to repair or remove a dangerous or defective condition in or on public property does not originate until the person or persons having authority to remedy the condition receive notice thereof. Actual notice consists of express information of the fact. But when a person does not receive such express information, if he does have actual notice of other circumstances sufficient to put a prudent man on inquiry as to the particular fact, and if by prosecuting such inquiry he would learn of such fact, he has constructive notice of the fact itself. The legal effect of that constructive notice is the same as if he had actual notice," and that if "an inherently dangerous or defective condition was created through the carrying out of a plan adopted and authorized by the governing body of the defendant county, no further proof than proof of that fact is needed to charge the county with notice of that condition."

The statute imposes liability upon a county "for injuries to persons * * * resulting from the dangerous or defective condition of public * * * buildings * * * in all cases where the governing or managing board of such county * * * or other board, officer or person having authority to remedy such condition, had knowledge or notice of the defective or dangerous condition of any such * * * building, and failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice, to remedy such condition or * * * to take such action as may be reasonably necessary to protect the public against such dangerous or defective condition." Deering Act 5619, § 2.

[6] Our examination of the record indicates that the evidence and the reasonable inferences which may be drawn therefrom are sufficient to support implied findings that sheathing of a lower grade than specified was used in the construction of the roof, that such use of such sheathing resulted in a dangerous or defective condition which was a proximate cause of plaintiff's injury, that architect Hass was the person having authority to remedy such condition, that he had notice of such condition and for a reasonable time after receiving such notice failed and neglected to remedy the condition.

The very fact of plaintiff's breaking through the roof, in the circumstances under which it occurred, was evidence of a dangerous or defective condition. His two assistants had taken rolls of felt onto the roof; his practice was to spread them over the roof so they would be where he was going to use them. He was engaged in carrying buckets of hot asphalt along the ridge to the place where it was being applied. Along the way he encountered a roll. He had a few extra rolls because a job might run over. He took two steps aside to avoid the roll and on the second step his left foot broke through a sheathing board and he fell through up to his thigh. When he was extricated he looked down and saw a broken board. It was splintered and jagged and he thought he saw a knot there.

Three qualified graders of lumber testified that the sheathing on this roof was of inferior quality. Thomas Jacobsen classified some of it as grade 2 or better, with a sprinkling of grade 3. He inspected all the boards there as he walked through the building. In grading lumber, he said the elements considered are the size of knots, the size of pitch pockets, the grain of the board, the coarseness of the grain. Allen McAllister observed some sheathing of grade 4, some of grade 3, and some of grade 2; the larger the number, the lower the grade; the size of knots and other objectionable qualities are less in a higher grade lumber; select or clear is the highest grade, it would have the smallest and the least number of knots. He observed in this roof several boards that had large knots, pitch pockets and splits. In select merchantable there can be hardly any knots; if any, they must be small (from one-half inch to smaller) and solid. Splits could occur after the sheathing was in place for a period of time, in lumber of a poor grade. He observed knots as large as 3 inches and a branch knot as large as the width of the board. Select merchantable is the highest grade. No. 1 comes next. Abelino Bueno examined the sheathing in place and found select merchantable, No. 1, No. 2, No. 3, and one or two pieces of No. 4. Some had splits. Some had large knots; the largest 3½ inches. He said weather conditions could cause splits in lumber that had a lot of pitch in it; the sun would open it up.

---

[3] The record shows that the parties stipulated that the court might instruct the jury orally. It does not show the source of any of the instructions; i.e., whether given on the court's own motion or at the request of a party.

[7] There is evidence that Hass was a "person having authority to remedy such a condition" on behalf of the county. A contract dated February 24, 1948, executed by and between the county and Hass, in addition to committing to him the preparation of the plans and specifications for this building, made it his power, duty, responsibility and jurisdiction to define the meaning of the drawings and specifications, such interpretations and definitions to be final; to direct and supervise the erection and completion of the construction work to the end that such work be completed in strict conformity with the drawings and specifications and in a good and workmanlike manner; to order the correction or removal of all defective work and materials and all work and materials not strictly conforming to the plans and specifications; to see that said work be constructed and completed in strict accordance with the plans and specifications adopted therefor; to make such inspections as were necessary to enable him to properly advise the county.

It is significant that this was a contract between Hass and the county which made Hass the responsible agent or representative of the county, with these important powers, duties and responsibilities to exercise on behalf of the county. This expression of these functions of Hass was implemented by the following statements which appeared in the specifications: "All questions in regard to the interpretation of the scope or meaning of the plans or specifications and the adjustment of discrepancies within or between the plans and specifications shall be referred to the Architect of the Board [of Supervisors] and his decision thereon shall be final. The Board will be represented by its Architect, who shall have general supervision of the performance of the work in strict accordance with the plans and specifications of the contract or contracts of which these specifications form a part. In order that the Board may act upon expert advice, and upon good procedure, all communications from the contractor to the Board will be through the Architect, and all communications and instructions from the Board to the contractor will be through the Architect. The Board reserves the right to alter this procedure without the consent of the contractor."

Hass testified that he assumed general supervision of the work in accordance with these specifications and made inspections from time to time while this building was being constructed. In the course of his inspections he noticed some deviations and instructed the general contractor's foreman thereof; deviations on all parts of the job, wherever he ran into any. He made inspections of the roof of this building during the early part of its construction. He observed deviations in the sheathing for the roof. They related to the grade of sheathing. He made this inspection while the sheathing was on the ground before any work was done on the roof. He told the foreman that these deviations would not be accepted and that the lumber would have to be regraded or other sheathing obtained. He saw the roof being started. By the time of his next visit the roof had been completed, the tar and gravel was on it. Shown a picture which portrayed the underside of the sheathing in place on the roof, he said that sheathing did not look like the sheathing he saw going into the roof. He said that a 1½″ knot would be the largest permissible in 1″ x 6″ select merchantable lumber and that a loose knot would not be allowable.

[8, 9] The jury could reasonably have found that the discovery of inferior lumber on the ground, destined for the roof, would "put a prudent man on inquiry," and that Hass was therefore negligent in not making another inspection until after this sheathing was in place, covered with the tar and gravel. In respect to what constituted a "reasonable time" after notice, within which to remedy a condition, the jury, told to "consider all the circumstances involved and shown by the evidence," well may have considered inspection prior to the tar and gravel work reasonably necessary under the circumstances. Among "these circumstances" was the very fact that this roof was being constructed, the sheathing would soon be laid and workmen would have to walk back and forth across the sheathing to surface it with tar and gravel. Hass had the duty of inspection commensurate with the job at hand. There is no occasion here to apply the rule that a dangerous or defective condition must be conspicuous or notorious for a public agency such as a county to be liable in the absence of actual notice. That rule is appropriate when the wear and tear of the ordinary use of a sidewalk develops a dangerous or defective condition. It does not apply as a matter of law to a building in course of construction under the circumstances shown by the evidence in this case.

The county in support of the claim that it had neither knowledge nor notice of any dangerous or defective condition, argues that the board of supervisors employed one Carlton Fletcher as an inspector of construction on this job, that Fletcher was unacquainted with the grades of lumber or with the details of structural design and did not discover any dangerous or defective condition prior to the accident; indeed, may not have gone on the roof until after the accident.[4] We do not deem this point well taken. The evidence fails to indicate that Fletcher was a building inspector in the usual sense of that term, with power to reject substandard materials and disapprove or remedy improper methods of construction. Instead, he appears to have functioned as an administrative assistant to the manager of the County Fair, reporting to him "in a general way" the progress of work on various buildings under construction. The manager was interested in seeing that the buildings were completed in time for the County Fair, which was soon to commence. We find no evidence that the appointment of Fletcher or the functions given him superseded or diminished in the slightest degree any of the powers, duties, authority or jurisdiction vested in Hass by the contract of February, 1948, between Hass and the county.[5]

[10] (2) *Was the failure of the general contractor to comply with the specifications as to the grade of lumber a supervening act which broke the causal connection?* This point is presented by the California Council of Architects as amicus curiae, not by any of the parties upon this appeal. The negligence of the county through its board, officer or person having authority to remedy the dangerous or defective condition need not be the sole proximate cause of the injury. Nor has our attention been directed to any evidence showing that the county

---

[4] Such an argument might tend to indicate that the board negligently chose an incompetent inspector and thereby violated the "rules governing constructive notice" which "require reasonable diligence in making inspections for the discovery of unsafe or defective conditions." Perry v. City of San Diego, 80 Cal.App.2d 166, 170, 181 P.2d 98, 101.

[5] While it may seem anomalous to hold the principal (the county) and not the agent (Hass) liable, the reason is that the cause of action against Hass was narrowly limited to alleged "specification" of inferior material, but was not thus limited as against the county.

was not responsible for the condition of this building; i. e., no showing that at the time of the accident the county did not, in respect to this building, owe plaintiff the duties defined and imposed by the Public Liability Act. Accordingly, the liability, if any, of the general contractor (not a party to this action) has no bearing upon the issues here involved.

(3) *Did plaintiff fail to exercise due care for his own safety?*

[11] The county claims that as a roofer of 14 years' experience plaintiff must have been acquainted with the hazards attendant upon that kind of work; hence, he assumed those risks. But a defective roofing board was not necessarily, as a matter of law, such a hazard. Asked if it were not customary, before applying roofing materials, to go up on a roof and check to see if there were knot holes, the plaintiff said, "We don't do that. The person who builds the building usually does that." On this occasion he asked for the carpenter foreman to see if the building was ready and the foreman told him it was ready to be roofed. That evidence tends to support the implied finding that plaintiff did not assume the particular risk here involved. It does not furnish a basis for a reviewing court to hold, as a matter of law, that the county sustained its burden of proving that plaintiff assumed the risk.

[12] The county further claims that plaintiff contributed to his injury by not wearing gloves and by wearing a short-sleeved instead of a long-sleeved shirt.[6] Counsel for the county asked the plaintiff: "Mr. Paxton, you are familiar with the Industrial Accident Commission rule that says that all roofers working on kettles or carrying buckets of hot tar should at all times wear gloves, also full length sleeves fastened at the wrist, and at no time should any roofer work without a shirt—" Plaintiff replied: "The men on top don't usually do that. The man who runs the kettle has to have a long shirt on. The men working on top of the roof, we never practice that." It was his understanding that the regulation applied to the man at the kettle, not to the men carrying buckets on the roof.

It would appear that counsel was reading from an advisory, not a mandatory, portion of a state safety order. 8 Cal.Adm.Code 1686. That section, in mandatory terms, prescribes certain requirements in respect to "roofing buckets and operations." For example, it says that tar buckets "shall" be made of certain materials; carrying buckets "shall" be of the same construction and not over a certain size; and that the carrying of buckets of hot tar up ladders is "prohibited." It then tenders this suggestion: "*Advisory:* Roofers working on kettles or carrying buckets of hot tar *should* at all times wear gloves, also full length sleeves fastened at the wrist, and at no time *should* any roofer work without a shirt." (Emphasis added.) The "advisory" portion, clearly, is not a mandate upon which to predicate negligence as a matter of law, when the advice is not followed. Nor does it appear that plaintiff's understanding that this advice did not apply to him at the time was other than bona fide. There is nothing here to take the issue of contributory negligence out of the realm of fact, for determination as a matter of law.

(4) *Were the damages awarded excessive in amount?* This is a point urged by the architects, not by the county. It is not necessary to decide the question in view of our determination that the architects are not liable under the issues presented by the complaint. However, we have examined the evidence as to the nature and extent of plaintiff's injuries and do not perceive a basis for holding the award excessive.

(5) *Did the court commit prejudicial error during the course of the trial?*

(a) The architects claim it was error to permit the county to interrogate Hass, when on the witness stand, regarding his contract of February, 1948, with the county. Our conclusion that the architects are not liable makes it unnecessary to decide this issue. This disposition of the question carries no inference that we deem the allowance of those questions in any way erroneous.

---

[6] That, of course, would have no bearing upon the cause of the accident, a defective board which gave way.

(b) *Did the trial court refuse to permit inquiry concerning plaintiff's second injury, and, if it did, was such refusal prejudicially erroneous?*

[13] At the trial, which commenced September 7, 1951, plaintiff wore casts upon his arms. In response to questions asked by counsel for the county, he testified that these casts had nothing to do with the injuries received on the roof; it was another accident which happened "about ten weeks ago," on a construction job. To the next question, "For whom were you working at the time," an objection was made and sustained. The cross-examiner, without giving any indication of why he thought that question material, proceeded with this line of inquiry and brought out the facts that the second injury was not a burn, had nothing to do with tar; the skin was not cut, bruised or torn; both wrists were broken; plaintiff was working for the Fidelity Roofing Company. The cross-examiner then dropped this line of inquiry without comment and went into other phases of the case with the witness.

The county suffered no curtailment here. Indeed, it got the answer to the very question to which, when first asked, an objection was made and sustained. It successfully pursued this line of inquiry as far as it desired at the trial. There is no merit in this point.

(c) *Did the trial court commit prejudicial error by instructing the jury concerning loss of time and impairment of earning power in the future?*

[14] The county contends it was error to give instructions on this subject because, as it claims, there was no evidentiary basis therefor. The county is in no position to complain. It has furnished a record which does not disclose the source of any of the instructions, whether given at the request of the plaintiff or one or all of the defendants, or upon the court's own motion. See Sutter Butte Canal Co. v. American R. & A. Co., 182 Cal. 549, 554, 189 P. 277; Buckley v. Shell Chemical Co., 32 Cal.App.2d 209, 216–217, 89 P.2d 453; Leenders v. Cal. Hawaiian, etc., Corp., 59 Cal.App.2d 752, 759, 139 P.2d 987.

[15] The asserted lack of evidence is based upon the absence of medical testimony concerning plaintiff's physical condition and the fact that the plaintiff had resumed work and was receiving the same rate of pay as at the time of the accident. It was "not necessary to produce an expert witness on the subject of * * * future earning ability." Castro v. Giacomazzi Bros., 92 Cal.App.2d 39, 46, 206 P.2d 688, 693. Although plaintiff had resumed work at the same rate of pay as before, he was working for a different employer, a friend of his who was giving him a lighter type of work, one which did not involve the carrying of heavy buckets of tar; also, that his left arm is smaller now and doesn't have the strength in it; that his elbow and wrist continue to bother him and that he cannot grasp things with his left arm, not having the strength in his fingers and wrist and elbow that he had prior to the accident. Here was sufficient evidence to go to the jury under the instruction complained of. Parsell v. San Diego Consol. G. & E. Co., 46 Cal.App.2d 212, 216, 115 P.2d 539; Lang v. Barry, 71 Cal.App.2d 121, 126–127, 161 P.2d 949; Paolini v. City & County of S. F., 72 Cal.App.2d 579, 591, 164 P.2d 916. See, also, Loper v. Morrison, 23 Cal.2d 600, 611, 145 P.2d 1; Buswell v. City & County of San Francisco, 89 Cal.App.2d 123, 132, 200 P.2d 115.

[16] Moreover, the instructions on this subject were not at all in the nature of a direction to the jury to find and award future damages. For example, the court said: *"if you find* that plaintiff's power to earn money has been impaired by the injuries, such sum as will reasonably compensate him for such loss of future earning power, *if any."* (Emphasis added.) In addition, the judge advised the jury he was giving instructions embodying such rules of law as might be necessary to assist in arriving at a verdict, and that "as to some of these instructions, their application depends upon the light in which you view the evidence. The fact that the Court gives you instructions as to particular rules of law must not be taken by you as an indication that such rules are necessarily applicable. Where there is a conflict of evidence, the

question as to whether a particular rule of law is applicable depends frequently and solely upon the conclusion as to what the facts are, and the jury are the sole judges of the facts." Thus it is clear that the court gave these instructions contingently for use only if the jury should find physical disability and impairment of future earning power. See Castro v. Giacomazzi Bros., supra, 92 Cal.App.2d 39, 46, 206 P.2d 688; Anderson v. Freis, 61 Cal.App.2d 159, 166, 142 P.2d 330; Parsell v. San Diego Consol. G. & E. Co., supra, 46 Cal.App.2d 212, 216, 115 P.2d 539. We find no error, prejudicial or otherwise, in the giving of the questioned instructions.

That portion of the judgment which awards damages and costs in favor of plaintiff against defendants Kent and Hass, a co-partnership, Thomas J. Kent and Andrew T. Hass, is reversed; the remainder of the judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; SCHAUER, J., dissenting.

---

119 Cal.App.2d 509

MEYER et al. v. PAROBEK et al.

Civ. 4571.

District Court of Appeal, Fourth District, California.

Aug. 4, 1953.

Action by landlords of bankrupt corporation against chattel mortgagees of corporation's property located on leased premises, and against others, for declaratory relief and to recover rental for use and occupancy of the premises. The Superior Court, San Diego County, L. N. Turrentine, J., entered judgment for plaintiffs, and the chattel mortgagees appealed from such judgment and from order denying new trial. The District Court of Appeal, Mussell, J., held that where one of the mortgagees requested that the corporate assets remain intact on the leased premises to facilitate the sale thereof, and agreed to pay cost of moving such property in event that plaintiffs had opportunity to rent the premises to some other tenant, relationship between plaintiffs and the mortgagees was sufficient to support action for use and occupation.

Appeal from order dismissed; judgment affirmed.

1. Use and Occupation 🔑9

In action by landlords of bankrupt corporation against chattel mortgagees of corporation's property located on leased premises, to recover rental for use and occupation of the premises, evidence sustained finding that one of the mortgagees requested of landlords that the corporate assets remain intact on the premises occupied by the corporation to facilitate the sale thereof, and that such mortgagee agreed to pay cost of moving such property in event that landlords had opportunity to rent the premises to some other tenant.

2. Use and Occupation 🔑1

Where one of several chattel mortgagees of property of bankrupt corporation requested corporation's landlords to permit the corporate assets to remain intact on premises occupied by corporation to facilitate the sale thereof, and agreed to pay cost of moving such property in event that landlords had opportunity to rent premises to some other tenant, relationship between landlord and the chattel mortgagees was sufficient to support landlords' action for use and occupation.

3. Use and Occupation 🔑8

A landowner who brings suit for use and occupation of property need only allege his ownership of land, occupation of land by defendant, reasonable value of use of property for period of occupation, and that such sum is unpaid.

4. Landlord and Tenant 🔑7, 183, 200(1)

In ordinary course of business, occupancy of premises by one person with consent of owner creates relation of landlord and tenant, and, in absence of an understanding to contrary, implies agreement on part of tenant to pay a reasonable rent for such occupation.

5. Action 🔑28

An action will lie for recovery of reasonable value of use and occupation of real property irrespective of question of whether such use was tortious or wrongful, as tort, if any, may be waived and an action based upon implied assumpsit maintained to recover value of use for time of occupation, where no special damages are sought.

6. Use and Occupation 🔑3

Fact that landlords of bankrupt corporation served notice on chattel mortgagees of corporation's property located on leased premises to remove the property would not destroy landlords' right to recover, as against such mortgagees, reasonable rental for such premises during the time they were used by mortgagees, at mortgagees' request, to house corporation's fixtures and equipment.

7. Use and Occupation 🔑9

In action by landlords of bankrupt corporation against chattel mortgagees of corporation's property located on leased premises, to recover rental for use and occupation of the premises, the rental charged for the premises while occupied by the corporation, although not conclusive as to the reasonableness thereof, was sufficient evidence to support finding as to reasonable value of the use and occupancy.

8. Appeal and Error 🔑981

New Trial 🔑99

An order granting a new trial on ground of newly discovered evidence is a matter largely in discretion of trial court and will not be disturbed unless an abuse of discretion clearly appears.

9. New Trial 🔑104(1), 108(1)

The newly discovered evidence which will constitute a ground for new trial must not be merely cumulative and must be sufficient to indicate that a different result is probable.

10. New Trial 🔑108(1)

Where it did not appear that admission of alleged newly discovered evidence would have resulted in a different judgment by trial court, denial of motion for new trial on ground of such evidence was not an abuse of discretion.

11. Appeal and Error 🔑110

Order denying motion for new trial is nonappealable.

◆

David A. Block, San Diego, for appellants.

Raymond F. Feist, Oceanside, for respondents.

MUSSELL, Justice.

The facts are set forth in a stipulation. Plaintiffs were the owners of premises, known as 509, 511 and 515 Vista Way in Oceanside, leased to Dye-Trans Color Photo, Inc., a corporation. Defendants and appellants Balkema, Ostrow and Russell loaned to the corporation the sum of $25,000 and in return received from it a promissory note, secured by a chattel mortgage on the fixtures and equipment of the corporation. On or about August 1, 1950, the corporation ceased operations due to financial difficulties and the said fixtures and equipment were left on the premises. Shortly thereafter defendant Ostrow, who was also a director of the corporation, spoke to plaintiff Elmere Meyer in regard to the disposition of the fixtures and equipment. It was stipulated herein that Ostrow would testify that he told Meyer that the corporate assets should remain intact at 515 Vista Way to assist in the sale thereof; that the corporate assets should be moved from 509 and 511 to 515 Vista Way and that he held $90 which he would pay to remove the property. It was also stipulated that Meyer would testify that Ostrow told him that it was his desire that the corporate assets remain intact to facilitate a sale thereof, and that he held $90 which he would pay for the cost of said moving should Meyer have the opportunity to rent the premises at 509 and 511 to some other tenant. Plaintiffs did re-rent the premises at 511 on or about June 1, 1951, and at that time moved the equipment therein to 509. Defendants commenced an action to foreclose their chattel mortgage on or about November 10, 1950, served a notice of forfeiture of the lease on the corporation and secured a default judgment of foreclosure on or about November 24, 1950.

The sheriff took possession of the fixtures and equipment but did not proceed immediately with the sale thereof as the State of California questioned the validity of the chattel mortgage. Whereupon the defendants' attorney instructed the sheriff to hold up the sale and informed him that negotiations would be attempted with a view to making a private sale of the property. Attempts to sell the property thereafter were unsuccessful and on or about April 23, 1951, plaintiffs gave notice to the corporation and the defendants that they would remove all the personal property and would have the same stored in a warehouse at the expense of the said Dye-Trans Color Photo, Inc. and the defendants, such removal to be accomplished on May 5, 1951. Plaintiffs, however, did not immediately move the fixtures and equipment because of the request of some of the defendants who were attempting to consummate a deal for the sale of the fixtures and equipment without the necessity of moving them from the premises. Dye-Trans Color Photo, Inc. was adjudged a bankrupt on or about July 13, 1951. The trustee in bankruptcy sold the fixtures and equipment and from the proceeds received from the sale, compromised the claim of defendant chattel mortgage holders by payment to them of part of the purchase price and the assignment to them of a conditional sales contract.

Plaintiffs' complaint is for declaratory relief and to recover rental for the premises. Since all conflicting claims to the property involved were disposed of before trial, the only issue tried was as to the liability of defendants for use and occupation of the premises.

[1-3] The trial court found that plaintiffs did not receive any rental for their property from November 1, 1950, to June 1, 1951, on 511 Vista Way, the reasonable rental of which was $770 for said period, and for the period from November 1, 1950, to July 13, 1951, on 509 and 515 Vista Way, the reasonable rental value of which was $1,899.50 for said period. Defendants appeal from the judgment against them in the sum of $2,669.50 and first contend that there was no relationship between the parties which would give rise to a liability on the part of appellants for rent for use and occupancy. This contention is without merit. The evidence supports the trial court's finding that defendant Ostrow requested that the corporate assets remain intact on the premises occupied by said corporation to facilitate the sale thereof and that said defendant agreed to pay the cost of moving the equipment in the event that plaintiffs had an opportunity to rent the premises at 509 and 511 Vista Way to some other tenant. The relationship between the plaintiffs and defendants was sufficient to support the action for use and occupation. As was said in Richmond Wharf & Dock Co. v. Blake, 181 Cal. 454, 457-458, 185 P. 184, 185:

> "A landowner, who brings a suit for the use and occupation of his property, need only allege his ownership of the land, occupation of said land by defendant, the reasonable value of the use of the property for the period of occupation, and that such sum is unpaid."

In Ellingson v. Walsh, O'Connor & Barneson, 15 Cal.2d 673, 675, 104 P.2d 507, 509, it is held that:

> "Tenancies in property need not necessarily be created by valid leases. One may become a tenant at will or a periodic tenant under an invalid lease, or without any lease at all by occupancy with consent."

[4] And in Ross v. City of Long Beach, 24 Cal.2d 258, 263, 148 P.2d 649, 652, where it is said:

> "Furthermore, in the ordinary course of business the occupancy of premises by one person with the consent of the owner creates the relation of landlord and tenant, and in the absence of an understanding to the contrary, implies an agreement on the part of the tenant to pay a reasonable rent for such occupation. 32 Am.Jur. p. 349. It is presumed that in business transactions between individuals the ordinary course of business has been followed. Code Civ.Proc., § 1963, subd. 20."

Defendants argue in this connection that they never occupied plaintiffs' premises and never acquired ownership or title to the equipment involved so that at no time was there ever any relationship which would make defendants responsible for the use and occupancy of plaintiffs' property. However, defendants had the right to the possession of the property upon default under the chattel mortgage had they chosen to exercise it. The evidence is that the corporation in fact abandoned said equipment and allowed it to remain on the premises. Thereafter defendants carried on negotiations in an attempt to dispose of the property in place in order to obtain a better price for it.

[5, 6] It is argued that if there was any such relationship which could give rise to a liability on the part of appellants for rent for use and occupancy, it could not have arisen until the time that the holding of the appellants became adverse to that of respondents, which would not have been until April 23, 1951, on which date respondents first gave appellants notice requiring removal of all personal property upon the premises belonging to the corporation and appellants. This argument is likewise without merit. "An action will lie for recovery of the reasonable value of the use and occupation of real property irrespective of the question of whether or not the use thereof by the occupant was tortious or wrongful. In such a case the tort, if any, may be waived and an action based upon implied assumpsit is maintainable to recover the value of the use of the real property for the time of such occupation, where no special damages are sought." Herond v. Bonsall, 60 Cal.App.2d 152, 155, 140 P.2d 121, 123. The fact that plaintiffs served notice on defendants to remove the property would not destroy plaintiffs' right to recover reasonable rental therefor during the time the premises were used by defendants, at their request, to house the fixtures and equipment.

[7] It is next contended that there is no evidence to support any finding as to the reasonable value of the use and occupancy. The record shows the agreed rental charged for the premises while occupied by the color photo corporation, and while the rental charged the corporation is not conclusive as to the reasonableness thereof, it is sufficient evidence under the facts of this case to support the finding of the trial court.

[8–10] Finally, it is argued that the court erred in denying defendants' motion for a new trial on the ground of newly discovered evidence. The evidence relied on in this case was that plaintiff filed a claim in the bankruptcy of Dye-Trans Color Photo, Inc. in which they asserted that the color photo corporation was indebted to plaintiffs for rent up to June 1, 1951. An order granting a new trial on the ground of newly discovered evidence is a matter largely in the discretion of the trial court and will not be disturbed unless an abuse of discretion clearly appears. Such evidence must not be merely cumulative and must be sufficient to indicate that a different result is probable. Celli v. French, 107 Cal.App.2d 599, 602, 237 P.2d 536. It does not appear that the admission of the newly discovered evidence would have resulted in a different judgment by the trial court and no abuse of discretion appears.

[11] The attempted appeal from the order denying the motion for a new trial is dismissed. Chichester v. Seymour, 28 Cal.App.2d 696, 698, 83 P.2d 301.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

119 Cal.App.2d 655

McKENNA v. FINE et al.

Civ. 19786.

District Court of Appeal, Second District, Division 1, California.

Aug. 11, 1953.

Suit to quiet title to realty and for ejectment, wherein a cross-complaint for slander of title was filed. From a judgment in favor of defendant on the complaint and on her cross-complaint and from order denying motion for new trial and to vacate judgment and enter different judgment, complainant appealed. On motion to dismiss the appeal, the District Court of Appeal, Per Curiam, held that vague affidavit of court reporter that he had been unable to do his work properly due to ill health was insufficient to excuse delay in filing reporter's transcript.

Appeal dismissed.

Appeal and Error ⚷627(2), 628(2)

Where reporter's transcript had not been filed more than ten months after entry of judgment and more than eight months after filing of notice of appeal, vague affidavit of court reporter that he had been unable to do his work properly due to ill health was insufficient to excuse delay, and, in absence of showing as to when deposit was made for reporter's transcript or what steps had been taken by appellant to accelerate preparation of record on appeal, appeal must be dismissed for failure to procure filing of record within time allowed by rules on appeal. Rules on Appeal, rules 4(a, c, d), 10(a).

◆

Catherine A. McKenna, in pro. per.

Lawrence L. Otis, Gilbert E. Harris, James F. Healey, Jr., Harold Arman, Walter Home, Los Angeles, for respondent Katharina Lennert Lehman.

PER CURIAM.

Defendant, cross-complainant and respondent Katharina Lennert Lehman, moves to dismiss the appeal of plaintiff, cross-defendant and appellant.

The complaint was filed December 28, 1950, seeking a decree quieting title to real property and for ejectment. Cross-complaint for slander of title was filed August 23, 1951. Judgment was entered September 18, 1952, in favor of named defendant on the complaint and also in her favor on her cross-complaint in the sum of $10,340.44 plus interest at 7% from August 17, 1951, to date of entry of judgment. Notice of entry of judgment was filed September 22, 1952, and served on plaintiff in propria persona and on her associate attorney. Notice of appeal was filed November 20, 1952, from judgment and from order denying motion for new trial and to vacate and set aside judgment and enter different judgment.

Notice and request to clerk to prepare clerk's and reporter's transcript on appeal was filed December 1, 1952, and a copy was mailed by the clerk December 15, 1952, to court reporter. Clerk's transcript was filed April 1, 1953. No reporter's transcript has been filed.

On July 28, 1953, respondent moved to dismiss appeal upon the ground that appellant had failed to perform the acts necessary to procure the filing of the record within the time allowed therefor. Rules 4a, c, d, Rules on Appeal.

Appellant asked to be excused for delay in the filing of reporter's transcript because of illness of the court reporter. The latter filed an affidavit purporting to set out facts sufficient to excuse the delay. His plea of ill health for a year is qualified by his statement "That during that period I have worked in court intermittenly for short periods but I felt I could not do my work properly." The other matters set out in the affidavit are so indefinite and incomplete that it does not constitute adequate support for his concluding sentence, "I feel that if anyone is to blame in this matter it is not Mrs. McKenna."

The education and experience which are a prerequisite to appointment as an official court reporter of the superior court justify our inference that if facts were available which would furnish more adequate support to appellant, they would have been included in the affidavit. No physician's affidavit as to the reporter's condition has been filed nor has any certificate showing what days the reporter has worked during the period in question. Appellant has not made any showing by affidavit or otherwise as to when the deposit was made by her for the reporter's transcript or as to steps if any taken by her to accelerate the preparation of her record on appeal. It is especially significant that she did nothing in this regard until respondent moved to dismiss the appeal. Because of the lapse of time, in the absence of any sufficient showing that the delay was not the fault of appellant the motion to dismiss the appeal under Rule 10a, Rules on Appeal, is granted.

The appeal is dismissed.

---

119 Cal.App.2d 461

PERRY v. PERRY.

Civ. 19360.

District Court of Appeal, Second District, Division 1, California.

July 31, 1953.

Action to collect child support and alimony allegedly due and unpaid. The Superior Court, Los Angeles County, entered judgment for plaintiff and defendant appealed. The District Court of Appeal, Doran, J., held that the order of New Jersey court granting alimony and child support to divorced wife and minor children was in personam and in absence of personal service upon husband within state or personal appearance of husband was not entitled to full faith and credit.

Reversed.

1. Judgment 🔑17(3), 818(2)

Constructive service on nonresident is not effective to permit court to render valid judgment in personam which will be within protection of full faith and credit clause, or be valid in state where rendered.

2. Judgment 🔑523

A "judgment in personam" can result only from personal obligation following person wherever he may be and enforceable wherever he may be found, whereas "judgment in rem" is one which may be pronounced upon status of some particular subject matter.

See publication Words and Phrases, for other judicial constructions and definitions of "Judgment in Personam" and "Judgment in Rem".

3. Divorce 🔑328

Order of New Jersey court granting alimony and child support to divorced wife and minor children was in personam and in absence of personal appearance of husband or personal service upon him within state was not entitled to full faith and credit in subsequent California proceeding for sum due and unpaid under alimony and child support order.

John Oliver, Los Angeles, Robert P. Dockeray, Burbank, for appellant.

No appearance for respondent.

DORAN, Justice.

The respondent's "Complaint for Money", filed herein, alleges that on June 6, 1947, the Chancery Court of Bergen County, New Jersey, made an order modifying a previous order of November 23, 1946, and directing that appellant husband pay to the respondent wife, the sum of $25 per week for support and maintenance of the minor children of the parties. It is further alleged that the sum of $3,012.41, with interest, remains due and unpaid.

Appellant's answer, by way of affirmative defense, alleges that at the time the supposed order was made, the husband was a resident of the State of New York; that no order for publication of notice was ever made by the New Jersey court, and that no process was served upon appellant in the State of New Jersey, and that appellant had never appeared in person or by attorney at the hearing. At the trial of the instant action, an affidavit of service was introduced in evidence showing that the notice of hearing of the petition to modify the original order was served upon appellant not in the State of New Jersey where the matter was pending but in the State of New York.

The trial court found that all material allegations of the complaint were true, and that those of appellant's affirmative defense were untrue, and rendered judgment as prayed. It is the appellant's contention that "The New Jersey Court acquired no jurisdiction to make an order in personam against appellant"; that the order in question directing payment of $25 per week for the children's support being in personam, and based upon personal service outside the State of New Jersey, was invalid, therefore was not entitled to full faith and credit in California.

As authority for the above position, appellant cites the classic case of Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565, holding that a personal judgment rendered in a state court, in an action upon a money demand against a non-resident of the state, without personal service within the state, the defendant's personal appearance, is without validity.

[1] In Comfort v. Comfort, 17 Cal.2d 736, 741, 112 P.2d 259, 262, the court, following Pennoyer v. Neff, said: "It is a fundamental rule of jurisdiction that constructive service on a nonresident is not effective so as to permit a court to render a valid judgment *in personam* which will be within the protection of the full faith and credit clause, or, in fact, that will be valid in the state where rendered". In the Comfort case it was held that a sister state injunction which purported to restrain the prosecution of a California divorce action, was by nature, *in personam,* as against the contention that it merely operated upon the *res,* namely the marriage status, and where not predicated upon personal service or appearance, the order was invalid.

Following the Comfort opinion just mentioned, Glaston v. Glaston, 69 Cal.App.2d 787, 160 P.2d 45, 48, decided that a New York judgment "effected a separation * * * from bed and board without terminating the marriage, * * * is not entitled to be enforced in California against respondent herein as a money judgment, with respect to the alimony therein granted and now remaining unpaid", where the New York judgment was based on constructive service only.

[2] A judgment *in personam,* as distinguished from one *in rem,* as defined in 31 Am.Juris. p. 97, "can result only from some personal obligation which follows the person wherever he may be and which may be enforced wherever he may be found", while a "judgment in rem is one which may be pronounced upon the status of some particular subject matter".

That the order entered by the New Jersey court requiring appellant to pay $25 per week for child support, is one *in personam,* can hardly be doubted. The attempt to enforce this order in California clearly recognized its personal nature, a money "obligation which follows the person wherever he may be and which may be enforced wherever he may be found". As expressed in 17 Am.Juris. p. 580, "The enforcement of a foreign decree for alimony raises questions different from those concerned with the validity of a foreign divorce decree. So far as such an action relates to alimony and costs it is a proceeding *in personam.* No judgment for alimony which has the effect of a personal judgment can be registered against a non-resident served only by publication or by service outside the state, in other words, without personal jurisdiction of the defendant".

No authority has been presented which attempts to distinguish between the payment of money for child support and the payment of alimony. In either case the result is the same, the defendant is saddled with a financial obligation of a personal nature which, if valid, can be enforced in any state where the defendant may be located. This being so, the defendant is entitled to insist that such a judgment be predicated upon personal service within the state which seeks to impose such obligation. To hold otherwise would be to violate the fundamental requirement of due process, and to give an unwarranted, extra-territorial effect to the judicial process of the issuing state.

[3] Since the full faith and credit doctrine does not require that a California court recognize an order issued in New Jersey unless the latter court possessed jurisdiction to make such order, and since the record herein, by way of the affidavit of

service, indicates that the only service of process on the defendant was had not in New Jersey but in the State of New York, the trial court was in error in recognizing the New Jersey order requiring the defendant to make a money payment, and in predicating a California judgment thereon.

The judgment is reversed.

WHITE, P. J., and DRAPEAU, J., concur.

119 Cal.App.2d 637

PEOPLE v. TULLOUS.

Cr. 2440.

District Court of Appeal, Third District, California.

Aug. 10, 1953.

Hearing Denied Oct. 1, 1953.

Prosecution for attempted robbery and for violation of Dangerous Weapons Control Act. The Superior Court, Sacramento County, Raymond Coughlin, J., found defendant guilty on both counts and defendant appealed. The District Court of Appeal, Schottky, J., held that evidence was sufficient to sustain conviction.

Affirmed.

1. Criminal Law 🔑1144(13), 1159(3)

An appellate court, in reviewing evidence, must presume that the evidence in support of judgment is true and will resolve every substantial conflict in support of the judgment.

2. Criminal Law 🔑1159(2)

The weight of the evidence is for the jury or the trial court to determine.

3. Criminal Law 🔑566

Robbery 🔑24(1, 3)

Weapons 🔑17(4)

Evidence sufficiently identified defendant and sustained conviction for attempted robbery and for violation of Dangerous Weapons Control Act. Gen.Laws, Act 1970, § 1 et seq.

Albert L. Wagner, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., and Gail A. Strader, Deputy Atty. Gen., for respondent.

SCHOTTKY, Justice.

On the afternoon of August 29, 1952, between the hours of 3:00 and 3:30 p. m., a man entered the Western Cafe located at 2001 K Street in Sacramento. After entering the cafe he brandished a .22 caliber revolver and stated to the bartender, a Mr. Rossi, "This is a holdup and give me all of the cash you have and put it in a sack," or words to that effect. The bartender started sacking the money, and upon one of the patrons in the place stating to the man that he must be joking, the would-be robber fired a shot over the patron's head into the wall above the back bar. The proprietor of the cafe and one or two of the patrons became frightened and ran from the barroom, and the would-be robber apparently became frightened also and fled from the cafe without obtaining any money. He went to a 1942 Plymouth green coupe parked near the side door of the cafe and drove away from the scene of the attempted robbery. Later in the afternoon defendant appeared at police headquarters and inquired if he was being sought. He was arrested and placed in several lineups from which a number of persons identified him as the would-be robber.

On September 25, 1952, information was filed charging the defendant with the crimes of attempted robbery and violation of the Dangerous Weapons Control Law. He entered pleas of not guilty and was tried by the court sitting without a jury, a jury having been waived, and was found guilty on both counts. Defendant made a motion for a new trial which was denied.

At the trial, four witnesses identified defendant as the man who entered the cafe and attempted the robbery, and also testified that they had so identified defendant from police lineups. There is some variation in the testimony of the identifying witnesses as to what defendant was wearing at the time of the attempted robbery, and as to the exact time during which the robbery was attempted. All of the witnesses positively identified the defendant. It was also testified to that the car used by the defendant during the attempted robbery and seen by several witnesses had been borrowed by defendant from a local used car lot about the time of the attempted robbery, and returned by him thereafter.

The defendant testified that he had arrived by bus from Tacoma, Washington, around 1:30 p.m. in the afternoon of August 29, 1952, and had called his mother to tell her that he was in town. He stated that his mother had informed him that police officers had just been at her home looking for defendant in connection with the attempted robbery, and that upon receiving this word from his mother he went to the police station and inquired if he was being sought.

Defendant has appealed from the judgment of conviction and from the order denying his motion for a new trial, and the sole ground urged by him for a reversal of the judgment and order is that the evidence is insufficient to support a finding that he was the man who committed the crimes charged. He argues that there were discrepancies in the testimony of the various witnesses and that they did not sufficiently identify him as the man who committed the offenses charged. Practically the entire brief of appellant is devoted to an argument as to the facts and conclusions that should be drawn therefrom. Respondent in reply asserts that the evidence upon the issue of identity is sufficient to support the judgment.

[1] An appellate court, in reviewing evidence, must presume that the evidence in support of the judgment is true and will resolve every substantial conflict in support of the judgment. 4 Cal.Jur.2d, Appeal and Error, sec. 575.

[2, 3] The weight of evidence is for the jury or trial court to determine, and where, as in the instant case, four eyewitnesses testified positively that appellant was the man who entered the cafe, brandished a gun and left in the green coupe, there is no reasonable basis for appellant's argument that the evidence is insufficient to support the judgment. Even granting that there were discrepancies in the testimony of the various witnesses as to details relating to identity, the evidence must be considered sufficient to establish that appellant was guilty of the offenses charged. It was for the trial judge who heard the testimony and observed the witnesses to believe or discredit the testimony of the witnesses, and the trial judge must have believed the people's witnesses when he rendered the verdict of guilty.

As this court said in the recent case of People v. Carter, 116 Cal.App.2d 533, at page 540, 253 P.2d 1016, at page 1021:

> "However, as pointed out by respondent, identification is a matter for jury determination, and the record shows that the identification of appellant by both Lane and Perez at the trial was without qualification. Any want of positiveness would go only to the weight of the testimony and the question was one for the jury to determine."

Also, in People v. Harris, 87 Cal.App.2d 818, at page 823, 198 P.2d 60, 63, the court said:

> "It is not required that one accused of crime be identified to an absolute certainty or positively or in a manner free from inconsistencies. If the testimony of the identifying witnesses is worthy of credence and convinces the jury, the latter's finding is final unless the trial judge should with his intimate knowledge of the witness' behavior upset the verdict. [Citing cases.] It is not essential that the witness be free from doubt as to one's identity. He may testify that in his belief, opinion or judgment the accused is the person who perpetrated the crime. The want of positiveness goes only to the weight of the testimony. [Citing cases.]"

See, also, People v. Coley, 61 Cal.App.2d 810, 143 P.2d 755.

Judgment and order are affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

BARR v. BARR.

Civ. 15458.

District Court of Appeal, First District, Division 2, California.

Aug. 10, 1953.

Rehearing Denied Sept. 8, 1953.

Hearing Denied Oct. 8, 1953.

Action wherein a wife was granted a divorce and was awarded custody of the parties' son. The Superior Court, City and County of San Francisco, Clarence W. Morris, J., subsequently entered an order which awarded the father of the child custody of such child with rights of visitation in child, and the mother of the child appealed. The District Court of Appeal, Dooling, J., held that record did not establish that trial court prejudged case.

Order affirmed.

1. Divorce ⚷312.6(9)

Where mother of minor, who had been awarded custody of minor in action in which she was granted divorce from minor's father, conceded in trial court, on hearing on motion for change of custody to minor's father, that father's home was a proper home for minor, mother could not claim injury from alleged action of trial judge in prejudging such issue in favor of father.

2. Divorce ⚷312.5

On motion for change of custody of minor to father from mother who had been awarded custody of minor when she was granted a divorce, record did not establish that trial judge had prevented mother from showing that second wife of father of minor was influencing minor against his mother.

3. Divorce ⚷312.5

On motion for change of custody of minor to father from mother who had been awarded custody of minor when she was granted a divorce, record did not establish that trial court prejudged case.

◆

Coffey & Velasquez, San Francisco, for appellant.

Paolini & Paolini, San Francisco, Fahey, Castagnetto & Gallen, Daly City, for respondent.

DOOLING, Justice.

Appellant, hereinafter called the mother, appeals from an order modifying her final decree of divorce from respondent, hereinafter called the father. In the original decree the mother was awarded the custody of the parties' only son. By the order appealed from the father is awarded custody with rights of visitation in the mother. Both parents have remarried and at the time of the hearing the boy was eight years of age.

The sole complaint on appeal is that the trial judge prejudged the issue and by reason thereof appellant was prevented from having a fair trial.

The motion for change of custody was presented to the trial court upon conflicting affidavits, the report of a domestic relations investigator for the court, oral testimony and an interview by the judge with the boy in his chambers.

At the time the oral hearing commenced the judge had before him the investigator's report. At the outset of the hearing counsel for the father suggested that he would like to present the evidence of the father and his present wife to supplement matters in the investigator's report which the investigator "could not have observed."

The judge, addressing himself to this statement of the father's attorney, asked him in what way he felt the report to be incorrect or not complete, saying: "You couldn't make a better showing than she has made for you, and I am in accord with it, in agreement with it. * * * My own thought is that in all cases of this type, that a boy is much better off with his father, assuming he is a fit and proper person, as in this case is very clearly indicated than he would be with his mother. A boy, in my opinion should be with the father rather than the mother because I have found in a great many instances that they are inclined to become tied to their mother's apron strings to a point where it isn't for the best interests of the boy. So there isn't any showing that you can make here that is going to satisfy me any more than I am now satisfied that this man and his present wife have a wonderful home for him, and are fit and proper people to have him."

This statement was addressed to the offer of additional proof by the *father's* attorney and its effect was to suggest to him that after reading the investigator's report the judge felt that the burden of going forward with the proof was on the mother.

When the mother's attorney stated to the court that he believed he could make a counter-showing on the character of the father's home, the following occurred:

> "What is your thought on it? What is your opinion? That I am wrong? * * * How wrong am I, 5 per cent, 10 per cent? How wrong am I?"

We can find no prejudice in this when taken in connection with what immediately followed. Counsel for the mother replied: "Well, I believe that the boy's mind is being poisoned." The judge replied: "I haven't reached that point yet. I am simply saying at this moment, nothing else—nothing derogatory to the mother * * * I am simply finding at this time that this man * * * offers a home which is ideal in every respect." To this counsel for the mother answered: "As to the home, yes, your Honor; that's perfectly all right."

[1] Having conceded in the trial court that the father's home was a proper one for the child, appellant can hardly claim injury from any prejudging of that issue. Appellant does assert, however, that she was prevented by the court from showing that the father's present wife was poisoning the boy's mind. The record does not bear out this assertion. Before any evidence was introduced on this subject, the matter was commented on by the court in the following language: "The only interest that I have * * * is not the mother, nor is it the father * * * I am interested in the welfare of this child. If he's being influenced by his father contrary to what he should do, so far as the mother is concerned, then I'd be very disappointed in him * * * if I found that the mother was influencing the boy against the father, or the father against the mother, I wouldn't tolerate it for a moment."

The only evidence on this subject presented by the mother was given by her in the following passage in which she was interrogated by the judge:

> "The Court: Do you feel that his father is influencing him against you?
>
> "The Plaintiff: No, I feel his wife is.
>
> "The Court: Well, you have no reason to say that.
>
> "The Plaintiff: He has told me so.
>
> "The Court: Told you what?
>
> "The Plaintiff: The things that she has said, especially about my mother. She doesn't like my mother; she tries to turn him against his grandmother."

[2] The court then passed on to other matters and counsel for the mother asked no questions of her then or later directed to this particular matter. There is no basis in the record for the complaint that the judge prevented whatever showing the mother desired to make, or indeed that she had any further evidence which she wanted to produce, on this subject.

Complaint is also made that the court refused to hear evidence on the question of the step-mother's fitness as it might be affected by the fact that her daughter by a former marriage was not living with her. The record shows the following:

> "Q. How long was your daughter with you?
>
> * * * * * *
>
> "The Witness: She left a few years ago; four and a half years ago.
>
> "Mr. Paolini: Your Honor, I can't see the relevancy—
>
> "The Court: Unless you've got something on your mind, Counsel, you'd better desist from this line of questioning.
>
> "Mr. Dalo: All right, that's all."

This amounted to no more than a statement by the court that unless counsel could show the relevancy ("unless you've got something on your mind") the objection was sustained. Counsel neither suggested the relevancy of the inquiry, nor made an offer of proof. Instead he acquiesced in the ruling.

Complaint is also made of the refusal to hear two witnesses "on the question of the cleanliness of the boy." The court suggested a stipulation that they would testify that from their observations the boy was neat and clean. This stipulation was made without objection.

At the close of the oral hearing the parties agreed that the judge should see the boy in his chambers the next day. No transcript of this interview was made, nor did counsel ask to have a reporter present. The order appealed from was made seven days later. Since counsel for appellant limits the attack on the order to the grounds herein considered there is no reason to discuss the sufficiency of the evidence, further than to state that the boy was spending considerable portions of each week in the father's home which caused the investigator to report: "This certainly isn't the best plan having the boy go three different times a week with his father, as he is certainly not receiving sufficient stability in either home."

In Weil v. Weil, 37 Cal.2d 770, at pages 784–786, 236 P.2d 159, at page 167, the Supreme Court reviewed the cases, including Pratt v. Pratt, 141 Cal. 247, 74 P. 742, and Rosenfield v. Vosper, 45 Cal.App.2d 365, 114 P.2d 29, upon which appellant relies, dealing with the asserted prejudging of issues by the trial judge and concluded:

> "Each of the cited cases in which trial judges have been found guilty of misconduct * * * has differed substantially from the others; none of them can be a controlling precedent in a new situation in which new fact questions are presented."

[3] We have examined the transcript with particular care to find any instance where appellant had not been permitted to develop any relevant facts and we have found no such instance. That the judge did not in fact prejudge the case is indicated by his refusal to decide the matter until he had talked to the boy himself, and we have pointed out no record was made or requested of that interview so that we have no knowledge of what it developed. On the whole record we cannot hold that any prejudice is disclosed which would justify a reversal.

Order affirmed.

NOURSE, P. J., concurs.

---

119 Cal.App.2d 560

PERIN v. NELSON & SLOAN et al.

Civ. 4574.

District Court of Appeal, Fourth District, California.

Aug. 6, 1953.

Cement finisher brought action against employers of driver of cement truck to recover for injuries sustained by cement finisher when driver backed truck onto cement finisher's foot. The Superior Court of San Diego County, Joe L. Shell, J., entered judgment adverse to employers, and they appealed. The District Court of Appeal, Mussell, J., held that evidence authorized giving of instruction on last clear chance doctrine.

Judgment affirmed.

1. Negligence ⟹83.1

Whether doctrine of last clear chance applies in a particular case depends entirely on existence or nonexistence of elements necessary to bring it into play.

2. Negligence ⟹136(32)

Question whether last clear chance doctrine applies is controlled by factual circumstances and must ordinarily be resolved by fact-finder.

3. Negligence ⟹138(3)

An instruction on last clear chance doctrine is proper when there is evidence showing that plaintiff has been negligent and, as result thereof, is in position of danger from which he cannot escape by exercise of ordinary care, and that defendant has knowledge that plaintiff is in such situation, and knows, or in exercise of ordinary care should know, that plaintiff cannot escape from such situation, and that defendant has last clear chance to avoid accident by exercising ordinary care, and fails to exercise ordinary care, and accident results thereby, and plaintiff is injured as proximate result of such failure.

4. Negligence ⟹122(1)

In order to recover under last clear chance doctrine, plaintiff was not required to show that his inability to escape from threatened danger was a physical impossibility, since doctrine applies equally if plaintiff was wholly unaware of his danger, and for that reason was unable to escape.

5. Automobiles ⚿227(1)

Fact that driver of cement truck thought that he had plenty of room to back up without striking cement finisher would not relieve employers of driver from liability under last clear chance doctrine for cement finisher's injuries sustained when struck by truck.

6. Negligence ⚿83.7

Where one sees another in a position, which is in fact dangerous, he may not rely on dullness to excuse him from not realizing the danger of the position, and he is not relieved from liability under the last clear chance doctrine because he failed to realize the danger.

7. Automobiles ⚿245(91)

In action against employers of driver of cement truck by cement finisher to recover for injuries sustained when driver backed truck onto cement finisher's foot, evidence authorized submission of last clear chance doctrine.

8. Trial ⚿203(1)

Court has duty to instruct on every theory of the case finding support in the evidence.

9. Negligence ⚿83.1

Where all elements of the last clear chance doctrine are present, the continuous negligence rule does not operate to the exclusion of the last clear chance doctrine.

◆

John W. Holler, San Diego, for appellants.

Walter Wencke, San Diego, for respondent.

MUSSELL, Justice.

This is an action for damages for personal injuries sustained by plaintiff when a truck operated by one of the defendants' employees was backed onto plaintiff's foot. At the time of the accident plaintiff, who was a cement finisher, was engaged in smoothing and finishing a slab of cement which had been poured from defendants' transit mix truck. The area being poured was about 20 feet square. Plaintiff was on his knees at the south edge of the square reaching out to the north as far as he could, his feet approximately 24 inches from the cement, when the driver backed the truck onto plaintiff's left foot, imbedding it in the ground and injuring it. Plaintiff heard the noise of the truck and an order to "back it up", but he was intent on his work and did not see the truck when it was being backed.

The driver testified that after he had poured cement in the east side of the square, he was told to back up; that he then backed his truck slowly; that as he started backing, he saw plaintiff smoothing off the cement and "figured he had plenty of room to back up;" that it appeared to him that plaintiff was out of range of the wheels; that during all the time he was backing, he was watching plaintiff; that plaintiff was then on his knees on the ground smoothing the cement and did not look up at him.

The cause was tried before a jury and a verdict was returned in favor of plaintiff. Defendants appeal from the judgment thereupon entered.

While defendants state in their brief that a reversal of the judgment is sought on the grounds that the evidence is insufficient to sustain the judgment and that plaintiff was guilty of contributory negligence as a matter of law, their argument is directed to the contention that the trial court committed prejudicial error in instructing the jury on the doctrine of last clear chance.

[1–3] The elements of this doctrine are set forth in Daniels v. City & County of San Francisco, 40 Cal.2d 614, 619, 255 P.2d 785, 788, where it is said:

> "Whether or not the doctrine of last clear chance applies in a particular case depends entirely upon the existence or nonexistence of the elements necessary to bring it into play. Such question is controlled by factual circumstances and must ordinarily be resolved by the fact-finder. Girdner v. Union Oil Co., 216 Cal. 197, 199, 13 P.2d 915; Hopkins v. Carter, supra, 109 Cal.App.2d 912, 915, 241 P.2d 1063. An instruction stating the doctrine is proper when there is evidence showing: '(1) That plaintiff has been negligent and, as a result thereof, is in a position of danger from which he cannot escape by

the exercise of ordinary care; and this includes not only where it is physically impossible for him to escape, but also in cases where he is totally unaware of his danger, and for that reason unable to escape; (2) that defendant has knowledge that the plaintiff is in such a situation, and knows, or in the exercise of ordinary care should know, that plaintiff cannot escape from such situation, and (3) has the last clear chance to avoid the accident by exercising ordinary care, and fails to exercise the same, and the accident results thereby, and plaintiff is injured as the proximate result of such failure.' Girdner v. Union Oil Co., supra, 216 Cal. at page 202, 13 P.2d at page 917; also Selinsky v. Olsen, supra, 38 Cal.2d 102, 104, 237 P.2d 645; Peterson v. Burkhalter, 38 Cal.2d 107, 109–110, 237 P.2d 977."

[4] In the instant case the uncontradicted evidence shows that plaintiff was in a position of danger. There is also evidence to support an inference that he was totally unaware of his danger and for that reason unable to escape. Plaintiff was not required to show that his inability to escape from his threatened danger was a physical impossibility. The doctrine applies equally if he was wholly unaware of his danger, and for that reason unable to escape. Gillette v. City and County of San Francisco, 58 Cal. App.2d 434–442, 136 P.2d 611.

[5, 6] There is substantial evidence that the driver of the truck had knowledge and knew, or in the exercise of ordinary care should have known, that the plaintiff could not escape from the situation because he was totally unaware of the approach of the truck. As noted, the driver testified that he was watching the plaintiff during the entire time that the truck was being backed up. Even though the driver "figured that he had plenty of room to back up", defendants were not relieved from responsibility for the accident. As stated in Gillette v. City of San Francisco, supra, 58 Cal.App.2d at page 444, 136 P.2d at page 616:

> "'As held in a number of cases, where a person sees another in a position which is in fact dangerous, he may not rely upon dullness to excuse him from not realizing the danger of the position (Basham v. Southern Pac. Co., 176 Cal. 320, 168 P. 359); and if he sees the dangerous situation he must use reasonable diligence in analyzing the same (Starck v. Pacific Electric Ry. Co., 172 Cal. 277, 156 P. 51, L.R.A. 1916E, 58), knowledge of danger being imputed where the circumstances are such as to convey to the mind of a reasonable man that the plaintiff is in a position of peril (Harrington v. Los Angeles Ry. Co., 140 Cal. 514, 74 P. 15, 63 L.R.A. 238, 98 Am.St.Rep. 85).' Nicolai v. Pacific Electric Ry. Co., 92 Cal.App. 100, 267 P. 758, 761; Paulos v. Market Street Ry. Co., supra [136 Cal. App. 163, 28 P.2d 94]."

[7, 8] There was also substantial evidence that the truck driver had the last clear chance to avoid the accident by the exercise of ordinary care. Under the circumstances and conditions described in the record before us, the jury was entitled to determine whether the driver was aware, or in the exercise of ordinary care should have been aware, of plaintiff's danger and had the last clear chance to avoid the accident. There was substantial evidence as to all of the elements necessary to the application of the doctrine of last clear chance and the instruction on the doctrine was properly given. It was the duty of the court to instruct on every theory of the case finding support in the evidence. Daniels v. City & County of San Francisco, supra, 40 Cal.2d 614, 255 P.2d 785.

[9] Defendants contend that plaintiff was guilty of contributory negligence as a matter of law and that his negligence was continuing up to the time of the accident. However, where, as here, all of the elements of the last clear chance doctrine are present, the continuous negligence rule does not operate to the exclusion of the last clear chance doctrine. Gillette v. City of San Francisco, supra, 58 Cal.App.2d at page 440, 136 P.2d 611.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

119 Cal.App.2d 530

DOMINGUEZ ESTATE CO. v. LOS ANGELES TURF CLUB, Inc.

Civ. 19495.

District Court of Appeal, Second District, Division 3, California.

Aug. 5, 1953.

Hearing Denied Oct. 1, 1953.

Action to recover sum which defendant had allegedly agreed to pay as a compromise of claim of plaintiff that defendant had induced a third party to breach his lease of property from plaintiff. The Superior Court of Los Angeles County, Orlando H. Rhodes, J., entered judgment from which defendant appealed. The District Court of Appeal, Parker Wood, J., held that evidence supported finding that a bona fide controversy existed as to the liability of defendant for allegedly inducing third party to breach the lease, thereby affording sufficient consideration for defendant's promise of settlement, and that plaintiff and defendant had in fact made an oral agreement to settle and compromise plaintiff's claim.

Judgment affirmed.

1. Torts 🔑12

An action will lie for unjustifiably inducing a breach of contract.

2. Compromise and Settlement 🔑6(2)

A promise given in consideration of the settlement or compromise of a dispute or controversy, the event of which is uncertain or doubtful, is founded upon a sufficient consideration.

3. Compromise and Settlement 🔑23(3)

In action to recover sum which defendant had allegedly agreed to pay as a compromise of claim of plaintiff that defendant had induced a third party to breach his lease of property from plaintiff, evidence supported finding that plaintiff had believed in good faith that defendant had unlawfully induced third party to breach his lease, and that a bona fide controversy existed as to liability of defendant for inducing such breach of lease, thereby furnishing a sufficient consideration for defendant's promise of compromise and settlement.

4. Appeal and Error 🔑991

In action to recover sum which defendant had allegedly agreed to pay as a compromise of claim of plaintiff that defendant had induced a third party to breach his lease of property from plaintiff, evidence made question of fact for trial court as to whether there was an oral agreement of settlement between plaintiff and defendant.

5. Compromise and Settlement 🔑5(3)

Oral agreement of settlement, under which defendant had allegedly agreed to pay a sum as compromise of claim of plaintiff that defendant had induced a third party to breach his lease of property from plaintiff, was not rendered invalid by fact that a written agreement embodying the terms of the oral agreement was contemplated, and was to be signed by defendant and the third party, when defendant and third party had refused to sign written agreement forwarded by plaintiff, unobjectionable either as to form or substance, after holding proposed agreement for approximately five months.

6. Compromise and Settlement 🔑18(1)

Where defendant had by oral agreement of compromise and settlement, agreed to pay plaintiff a sum in compromise of claim of plaintiff that defendant had induced a third party to breach his lease of property from plaintiff, defendant could not without plaintiff's consent, thereafter impose a condition upon its promise, to effect that the third party must contribute one-half of the settlement sum.

Victor Ford Collins and Arnold M. Cannan, Los Angeles, for appellant.

Frank P. Doherty and James L. Patten, Los Angeles, for respondent.

PARKER WOOD, Justice.

Action to recover $5,000 allegedly agreed to be paid to plaintiff in compromise of a claim made by plaintiff that defendant unlawfully induced a lessee of plaintiff to breach a lease. Defendant appeals from judgment in favor of plaintiff.

Plaintiff is the owner of 236 acres of land located at 190th Street and Western Avenue in Los Angeles County. On January 3, 1950, the plaintiff and one Curry, a promoter of industrial fairs, entered into a written lease which provided as follows: Curry leased said land for one year, commencing October 1, 1950 and ending September 30, 1951, for the purpose of conducting thereon a "World Transportation Fair." He agreed to pay a minimum cash rental of $25,000, payable in certain installments, including a payment of $2,000 when the lease was made and $5,000 on or before October 1, 1950. He also agreed to pay as additional rental five cents for each adult and two and one-half cents for each juvenile entering the fair as a spectator. Possession of the land should be delivered to Curry on October 1, 1950, provided he had paid the $5,000 installment due on that date. Curry agreed that he would commence to construct said fair promptly after October 1, 1950, and he would operate the fair from June 3, 1951 to September 30, 1951.

At the time the lease was made Curry paid the first installment of $2,000, and he represented to plaintiff that the total rental payable would exceed $50,000.

Defendant is the owner of 400 acres of land at Santa Anita Park in Arcadia, California, which is used principally for horse races. About March 31, 1950 (approximately three months after plaintiff and Curry made said lease), the defendant and Curry entered into a written lease which provided as follows: Curry leased approximately 200 acres of said land for the purpose of conducting thereon a World Transportation Fair. He agreed that he would commence to construct said fair promptly after the close of defendant's racing season in March, 1951, and he would operate the fair from May 30, 1951 to September 9, 1951. He agreed to pay a minimum cash rental of $35,000.

Curry did not commence the construction of the fair on plaintiff's land, did not operate the fair thereon, and did not pay any money to plaintiff except the first rental installment of $2,000.

Mr. Crawford, the general manager of plaintiff, testified that about April 3, 1950, he read in a newspaper of that date an article indicating that Curry had decided not to go ahead with the fair on plaintiff's land. That article, which was received in evidence, stated in substance that Santa Anita Park would be the site of the World Transportation Fair from May 30 to September 9, 1951, following the leasing of that property, during the off-racing season, to said Curry; after he had read that article, he received a letter from Curry, dated March 31, 1950, addressed to him as manager of plaintiff, which letter stated, in part:

> "This is to let you know, in advance of newspaper release, that I have today completed an agreement with the Los Angeles Turf Club, Inc. under terms of which they are extending to me use of the fifteen million Santa Anita Park as the new site of the World Transportation Fair.
>
> "While it is a matter of personal regret to me that the Torrance site [plaintiff's land] will, therefore, not be utilized as previously planned, the existing facilities at Santa Anita will reduce the cost of staging the fair by at least $509,000. I therefore, had no alternative but to accept the offer."

Mr. Crawford testified further that on April 4, 1950, the day after he received said letter, he called Curry by telephone (at Dallas) and told him that the letter had been received and he had read the newspaper article; he asked Curry what the reason was —he was under contract with plaintiff to produce the fair on plaintiff's property; Curry replied that he had been approached by representatives of defendant with an offer to conduct the fair on its grounds, which were already prepared, and the fair there would save him a great amount of money; about May 15, 1950, a real estate agent who negotiated the lease with plaintiff on behalf of Curry, told the witness that representatives of defendant had gone to Dallas to offer Curry the facilities of defendant for a fair similar to the one Curry agreed to conduct on plaintiff's property; at a meeting in June, 1950, when the real estate agent, his associate, Curry and the witness were present, Curry said that Jaynes and O'Dorisseo, representatives of defendant, had gone to Dallas and discussed the matter with Curry, and that a principal reason Curry had made the lease with defendant was that defendant had offered its facilities and offered to produce more publicity than he could hope to obtain by having the fair on plaintiff's property; Curry also said at that meeting that in any event defendant was going to conduct a fair of that character and it was offering Curry the first refusal; on June 23, 1950, he (witness) as manager of plaintiff, sent a letter to Curry, the Turf Club, and Jaynes, who was the manager of leasing operations of the Turf Club. That letter was to the effect that plaintiff and Curry had entered into the lease herein described, and that plaintiff would seek such redress as may be available against all persons who are parties to any unlawful arrangement which contributes to any breach of Curry's obligations to plaintiff under said lease. Mr. Crawford testified further that about July 1st, after that letter was sent, Mr. Collins (general counsel and assistant secretary of defendant) called the witness by telephone and asked on what theory plaintiff could show any liability of defendant; he (witness) replied that plaintiff had information that defendant's representatives had approached Curry, and that plaintiff's representatives had an idea that the breach of plaintiff's lease had been encouraged or was the result of an offer of defendant; about June 30, 1950, he (witness) received a letter from Mr. Collins. That letter was to the effect that when the defendant made the lease with Curry it had no information that plaintiff had a lease with Curry, that the lease between defendant and Curry was entered into in good faith, and defendant was proceeding in good faith in connection with the lease. Mr. Crawford testified further that Curry said he would not conduct the fair on plaintiff's property; that when he (witness) wrote the letter of June 23d, and at all times since then, he believed in good faith that plaintiff had a bona fide claim against defendant for damages by reason of its activities in connection with the lease transaction between plaintiff and Curry; plaintiff never consented to release Curry from his obligation under the lease; in the latter part of 1950 or early part of 1951, after plaintiff had been told by Mr. Doherty, one of the attorneys for plaintiff, that a compromise had been made with defendant, the plaintiff leased its said land to a farmer who has been in possession of it since that time.

On July 7, 1950, Mr. Doherty sent a letter to Mr. Collins wherein he stated the substance of plaintiff's lease, and that his understanding of the conditions under which the arrangement between defendant and Curry was made was at variance with the situation outlined in Mr. Collins' letter of June 30th, and that the theory as to liability on the part of defendant is the principle of unlawful interference with business relations.

After said letter of July 7th had been sent, Mr. Doherty and Mr. Patten, the other attorney for plaintiff, had a conversation with Mr. Collins in Mr. Collins' office.

Mr. Doherty (who did not participate in the trial) testified that said conversation was, in substance, as follows: He told Mr. Collins that after plaintiff had entered into a lease with Curry and that fact was made public by a notice in the press, two representatives of defendant went to Dallas to interview Curry; that plaintiff had information that Curry told the Turf Club of the existence of plaintiff's lease, and the Turb Club knew the lease was in existence and it offered a deal to Curry and induced him to breach the lease with plaintiff, and, on that, plaintiff had a claim against defendant. Mr. Collins said that defendant had no information that there was a lease between plaintiff and Curry, that defendant dealt with Curry at arm's length and without knowledge of plaintiff's lease, that defendant entered into the lease in good faith, and he was not the attorney for Curry. Mr. Doherty said that if Curry proceeded with the fair at the Turf Club, the plaintiff would file suit against Curry and would attach the gate receipts until plaintiff had been paid what was due it under the lease. Mr. Collins said that defendant was not liable, he would take the matter up with his people and see what could be done. He asked what plaintiff would expect in the way of a settlement. Mr. Doherty replied $25,000. Mr. Collins said they would not pay any such sum.

On October 10, 1950, Mr. Doherty sent a letter to Mr. Collins wherein he stated that the time has come when plaintiff must file a suit unless some satisfactory adjustment is made, and he asked that they (the attorneys) try to meet the following Monday. It appears that thereafter, for two or three weeks, the attorneys had telephone conversations regarding the matter.

Mr. Doherty testified that on November 9, 1950, Mr. Collins called him by telephone and said that the best offer we can make is $2,500 now and $2,500 in 30 days; the Turf Club to be responsible for the payments; he replied that he would take it up with the Dominguez Estate people (plaintiff) and see what they said in reply to his offer. Mr. Doherty also testified that he was talking to Mr. Collins solely as the representative of the Turf Club, because Mr. Collins had told him that he was not the attorney for Curry; that the two payments of $2,500 were in full settlement of plaintiff's claim against the Turf Club, —there was no discussion with Mr. Collins of any claim against Curry.

On November 10, 1950, Mr. Doherty sent a letter to Mr. Collins which stated, in part:

> "Yesterday you told me the best offer you were authorized to make is the following: $2500 now and $2500 in thirty days, the Turf Club to be responsible for the payments.
>
> "This morning I am authorized to accept the foregoing offer in full settlement of all claims of our people against the Turf Club and Mr. Curry and a mutual cancellation of the lease between our people and Mr. Curry. Briefly, it is a complete settlement where we acknowledge satisfaction of all claims against your people and you do likewise as against the Dominguez Estate Company, and all contractual relations between them are terminated and ended.
>
> "We will prepare the release unless you would prefer to do so.
>
> "I am sending this to you by messenger, today."

On November 17th (Friday), Mr. Doherty called Mr. Collins by telephone and told him that he had not received a response to the letter of November 10th. Mr. Collins replied that he had not received it, that he was leaving for New York on Sunday, and that in his absence Mr. Doherty should discuss the matter with Mr. Cannan (an attorney associated with Mr. Collins). On November 17th, after that conversation, Mr. Doherty sent a copy of the letter of November 10th to Mr. Collins.

Mr. Doherty told Mr. Cannan, in a telephone conversation on November 21st, that he was preparing a release and would send it to him to be executed by his people —that it was a signed release by the Dominguez people. On that day, he sent a letter to Mr. Cannan which stated as follows:

> "Pursuant to our telephone conversation of today, I have prepared and will enclose herewith three signed copies of a mutual release in the above-entitled matter. Will you please have all copies signed by the Turf Club and Mr. Curry and return one executed copy to us, together with check for $5,000.00, as mentioned therein.
>
> "It is understood, of course, that the signed copies which I am enclosing herewith shall be of no effect until they have been signed by the other two parties and until payment of the $5,000.00 mentioned in the agreement is made to Dominguez Estate Company."

A copy of the release, referred to in that letter, is set forth below.[1]

---

[1] "An Agreement executed November 21, 1950, between Dominguez Estate Company, a California corporation as First Party, and I. W. Curry, as Second Party, and Los Angeles Turf Club, Inc., a California corporation, as Third Party.

"Witnesseth:

"In consideration of the payment to the First Party of the sum of Five Thouand Dollars ($5,000.00), receipt of which hereby is acknowledged by the First Party, and in consideration of the mutual

On December 20th, Mr. Doherty sent a letter[2] to Mr. Collins stating, in part, that they had agreed upon a settlement almost six weeks ago and acted upon this basis, and had executed releases as requested by Mr. Cannan and they have been in Mr. Collins' office almost a month.

On January 6, 1951, Mr. Doherty sent a letter to Mr. Collins stating, in part, that: "Last November, you and I agreed on a payment of $5,000 in settlement of the whole lease matter and other aspects of the claim. $2,500 was to be paid promptly and $2,500 in thirty days. Your office requested us to prepare the releases. We prepared them, had them executed and forwarded to you. I told our people of the settlement and, as above stated, they

---

agreements herein made and set forth, the parties agree as follows:

"I

"The lease heretofore executed between the First Party and the Second Party and hereinafter more particularly described, hereby is terminated and cancelled and shall be of no further force or effect, and the Second Party releases and relinquishes and quitclaims to the First Party any and all right, title, interest or demand possessed or claimed by the Second Party in or to the property covered by said lease; and each and all of the parties to this agreement and the agents, employees and representatives of each and all of them are released from any and all liability, past, present or future, of whatsoever kind or character, by reason of or growing out of or arising or existing in connection with the execution of said lease or any of the terms or provisions thereof, or by reason of the breach or alleged breach or conduct or activity resulting in the breach or alleged breach, of any of the terms or provisions of said lease. Provided however, the First Party is and shall be entitled to keep and retain as its own the rental installment of Two Thousand Dollars ($2,000.00) paid by the Second Party to the First Party on the execution of said lease.

"II

"The lease referred to herein is that certain lease dated January 3, 1950, executed by and between the First Party, as Lessor, and the Second Party, as Lessee, covering certain real property in the County of Los Angeles, State of California, identified therein as follows:

"The property generally known as the World Transportation Fair property consisting of approximately 236 acres at the Southwest corner of 190th Street and Western Avenue, Los Angeles, California.

"In Witness Whereof, the First Party and the Third Party have caused this agreement to be executed in their respective names by their proper corporate officers thereunto duly authorized, respectively, and their respective corporate seals hereunto to be affixed, and the Second Party hereunto has subscribed his name on the date first hereinabove written.

"Dominguez Estate Company

"By J. R. Lacayo, M.D.
President

"By H. G. Arnold
Secretary

"(Corporate Seal)

"Approved
as to
Form

C. M. Crawford
Manager

"Los Angeles Turf Club, Inc.

"By——————
(Title)
"(Corporate Seal)"

I. W. Curry

[2] Letter of December 20, 1950: "While you were in the East Mr. Cannan talked several times about the payment to our people of the $5,000.00 agreed upon. He stated that Mr. Curry only had $2,000.00 and the Turf Club wanted to get $2500.00 from him and it would pay the remaining $2500.00. From what you told me day before yesterday, Mr. Curry is having difficulty in raising $2500.00, or has a hesitancy to make a contribution in the total sum of $2500.00. We agreed on a settlement almost six weeks ago and have prepared and acted on this basis. We have prepared and executed the releases as requested by Mr. Cannan, and they

confirmed it and executed the releases. Thereafter, they proceeded to handle the property * * * and shortly after our agreement, made a new lease. * * * We have a deal and you folks should not hold up the payment of the money * * *." There was no reply to that letter.

On January 17th, Mr. Doherty sent a letter to Mr. Collins stating, in part: "My people are at a loss to know why we cannot conclude and finish the deal we made last November, namely, $2500 at that time and $2500 in thirty days." There was no reply to that letter.

On February 1st, Mr. Doherty asked Mr. Cannan when the $5,000 was going to be paid, and Mr. Cannan replied that Mr. Collins "is doing the best he can," he is trying to get Curry to make a contribution of $2,500—that Curry was able to raise only $2,000. Mr. Doherty said that was a matter between the Turf Club and Curry and that plaintiff's deal was with the Turf Club. Mr. Cannan replied that if the Turf Club paid the $5,000 and Curry knew about it, then Curry would let the Turf Club hold the bag and would not make a contribution.

On February 17th, Mr. Doherty sent a letter to Mr. Collins stating that he had not received a return telephone call as requested by him, and he asked Mr. Collins if he (Mr. Doherty) should write Mr. Wilson (an officer of defendant) to the effect that unless the matter is settled within a reasonable time, it would be necessary to file suit for the $5,000. There was no reply to that letter.

Mr. Doherty testified that he had a telephone conversation with Mr. Collins on April 10th or 11th; Mr. Collins said that he was writing a letter but was telling the substance of the letter by telephone, in case the letter was not received; he said that the City of Arcadia had denied a permit to Curry to hold the fair, and that Curry and the Turf Club were not going to pay any money, and he was withdrawing his offer to pay $2,500. On April 11th, Mr. Collins sent a letter stating as follows:

> "By the time this letter reaches you I will have undoubtedly talked to you on the telephone but, in case we should miss each other, as we sometimes do, I thought I should write you and tell you that I have just been told that Curry has instructed me to withdraw the $2,500 offer of settlement to Dominguez."

On April 12th, Mr. Doherty sent a letter to Mr. Collins stating, in part: "In our negotiations with you we never at any time entertained any offer of $2500, or any other sum, made by you on behalf of Mr. Curry. When you called me and said that Mr. Curry could borrow $2500 from his mother-in-law, and would offer that in settlement, I told you that we had already reached an agreement with the Turf Club for the payment of $5,000 in the matter, and that we were expecting the Turf Club to live up to its commitment. I still expect the Turf Club to carry out its agreement. * * * While we hope that the Turf Club will make the payment before it becomes necessary for us to file suit * * * it is our purpose to bring an action for collection. * * *"

Mr. Doherty testified further that, in a conversation in March, 1951, Mr. Collins stated that Curry was making an application for a permit from the City of Arcadia; and that, in a conversation between him and Mr. Collins concerning the execution of the release, Mr. Collins stated that he wanted the release to include Curry because he did not want the agreement between the plaintiff and Curry to be in effect—it would involve litigation between the Dominguez Estate people and Curry, and in putting on the fair at the Turf Club such litigation would embarrass Curry.

Curry did not sign the release. It was stipulated that the claim of plaintiff was referred by the defendant to Mr. Collins,

have been in your office for almost a month. Our people inquire frequently why we have not turned the money over to them.

"I know your difficulties in a matter of this sort, and I know you are doing whatever is possible to expedite it. I do feel, however, that whatever differences exist between the Turf Club and Mr. Curry should be a matter to be adjusted between yourselves, and that the payment to us should not be held up."

who was defendant's assistant secretary and general counsel, with authority to contest or compromise the claim.

Mr. Collins testified that, in the telephone conversation on November 10, 1950, he told Mr. Doherty that he thought that this should be a complete settlement all around, and that it is going to be necessary to have a termination of the Curry-Dominguez lease and that will have to be signed by the Dominguez Company and Curry; Mr. Doherty asked who would prepare that; Mr. Collins replied that he was going to New York and he would appreciate it if Mr. Doherty would prepare it. Then the following questions were asked by the trial judge, and the following answers were given by Mr. Collins:

"Q. This is the conversation in which the amount had previously been agreed on? A. The conversation in which the amount was agreed upon.

"Q. Yes, I see. A. In which the amount was agreed upon.

"Q. Then this method of terminating the whole matter was discussed? A. That is correct. It was said at that time, your Honor, that the matter should be reduced to a written agreement."

The fair was not conducted on the grounds of the Turf Club.

The court found that between March 31, 1950, and November 10, 1950, a controversy existed between plaintiff and defendant concerning defendant's liability to plaintiff for the breach of plaintiff's lease by Curry; plaintiff was advised by counsel, and that plaintiff honestly and in good faith claimed and believed that defendant unlawfully had induced Curry to breach the lease with plaintiff and to refuse to comply with its terms, and that defendant was liable for damages suffered by plaintiff as a consequence thereof; plaintiff engaged attorneys to file a suit for damages against defendant for allegedly inducing Curry to breach his lease with plaintiff; defendant denied plaintiff's claims, but was desirous of avoiding litigation in connection therewith; defendant referred the matter of plaintiff's claims to one of its corporate officers and general counsel with authority to contest or compromise the same; negotiations relating to the claims were conducted between defendant's general counsel and plaintiff's attorneys over a period of several months; in such negotiations said counsel was informed by plaintiff's attorney that plaintiff had information on which plaintiff in good faith believed that defendant had induced the breach of plaintiff's lease by Curry, and that defendant was liable to plaintiff on account thereof; in such negotiations plaintiff's attorney informed said counsel that if Curry staged the fair on defendant's land, plaintiff planned to sue Curry for rentals of plaintiff's land and to attach the gate receipts to secure satisfaction of judgment; in order to settle and compromise said controversy, said general counsel, on behalf of defendant, made the oral agreement of compromise referred to in the findings; on or about November 10, 1950, plaintiff and defendant made an oral agreement to settle said controversy and to compromise plaintiff's claims against defendant, whereby defendant agreed to pay $5,000 in settlement of all said claims of plaintiff against defendant on account of allegedly inducing a breach of the lease by Curry; as a part of said agreement, defendant requested that plaintiff cancel the lease between plaintiff and Curry and not to take any action against Curry on account of the lease, and not to interfere with the production of the fair on defendant's land; plaintiff agreed to, and did, comply with said request; plaintiff, in reliance upon said oral agreement, released Curry from his obligations under the lease and relet said land on a basis less favorable than the terms of the lease with Curry.

[1-3] Appellant contends that the alleged agreement of settlement is invalid because there was no consideration for it; that there was no consideration, in that, there was no basis for plaintiff's claim. It is argued that there was no evidence showing any basis for a relief that defendant, at the time it made a lease with Curry, had any knowledge or notice of plaintiff's lease with Curry, or that defendant did anything to induce him to break his lease with plaintiff. "[A]n action will lie for

unjustifiably inducing a breach of contract." Imperial Ice Co. v. Rossier, 18 Cal. 2d 33, 39, 112 P.2d 631, 634. "A promise given in consideration of the settlement or compromise of a dispute or controversy the event of which is uncertain or doubtful, is founded upon a sufficient consideration." Baker v. Philbin, 97 Cal.App.2d 393 397, 218 P.2d 119, 121. It was also said in the case last cited, 97 Cal.App.2d at page 397, 218 P.2d at page 121: "The trial court found that the claim was asserted in good faith. This was a finding of good consideration for the compromise, even though the claimant might not have prevailed in a lawsuit based on the contract." In Kale v. Bankamerica Agr. Credit Corp., 2 Cal. App.2d 113, 37 P.2d 494, the plaintiff claimed an agistor's lien for hay furnished for sheep which were on land allegedly owned by plaintiff. The defendant therein wanted to move the sheep to other land, but plaintiff refused to allow them to be moved until his bill for hay had been paid; whereupon defendant agreed that if defendant would allow the sheep to be moved, defendant would pay the bill. Plaintiff therein, relying upon the promise, consented to the removal. It was said therein, 2 Cal. App.2d at page 116, 37 P.2d at page 495: "It is established by the findings that the sheep were not pastured upon the lands of plaintiff * * * and therefore plaintiff never acquired an agistor's lien upon the sheep. It would therefore be true as appellant alleges, that it would be entitled to judgment thereon, if that were all that was found. But the court went further, however, and found that '* * * said plaintiff then and there claimed in good faith to be entitled to the possession of said sheep * * *,' and that 'in settlement of said conflicting claims,' the corporation made the promise upon which the action was brought, which is sufficient to justify the final judgment * * *." In City Street Improvement Co. v. Pearson, 181 Cal. 640, at page 650, 185 P. 962, at page 966, 20 A.L.R. 1317, it was said: "Where there has been a compromise of doubtful claims, or concessions and benefits given and received in good faith, as consideration for a promise, the actual validity of the claims is immaterial; otherwise, as remarked by Mr. Wharton: 'There could be no compromise of litigation, since there is no litigation in which one or the other party, if the case be pressed to judgment, does not fail to make out his case.'" The evidence in the present case with respect to the activities of defendant, as shown by the letter sent by Curry to plaintiff's manager, and as shown by the oral statements of Curry and the real estate agent to said manager, was not admissible to prove that in fact the defendant did the things there recited, but the evidence was admissible to prove that statements that defendant did those things were in fact made to plaintiff. Stated in another way, such evidence was admissible to prove that plaintiff had certain alleged information that defendant did the things recited, but the evidence was not admissible to prove that in fact defendant did those things. That evidence presented a question of fact as to whether there was a basis for a bona fide belief or claim on the part of plaintiff that defendant induced Curry to breach his lease. The findings to the effect that plaintiff believed in good faith that defendant unlawfully induced Curry to breach his lease, and that a bona fide controversy existed as to the liability of defendant for allegedly inducing Curry to breach the lease, are supported by the evidence. The contention that there was no consideration for the alleged agreement is not sustainable.

[4, 5] Appellant also contends that no agreement of settlement was reached. It is argued that since the agreement was to be in writing and since the writing was not signed by Curry, the oral agreement was not valid. The defendant does not assert that the proposed written release signed by plaintiff did not include all that was agreed upon orally. The attorneys for plaintiff, in preparing the proposed written release, included therein, at the request of defendant, a provision to the effect that Curry released the plaintiff, and that plaintiff released Curry, from all obligations under the lease between Curry and plaintiff; and they included, at the request of defendant, a provision that Curry sign the proposed release. The proposed release, signed by plaintiff's authorized officers, was delivered

to defendant's general counsel on November 21, 1950. It has never been signed by defendant or Curry, but it has been retained by defendant since that date. After said date, plaintiff sent various letters to defendant's counsel urging that defendant comply with the agreement to pay the $5,000, but there was no written reply thereto. In conversations after said date, counsel for defendant stated that he was doing the best he could to get Curry to pay half of the agreed amount. Counsel for plaintiff said, in reply thereto, that the settlement was with defendant and not with Curry. It was not said in those conversations that Curry would not sign the release. On April 11th, about five months after the proposed release had been delivered to defendant, the plaintiff was notified by defendant's counsel that the city of Arcadia had denied a permit to operate the fair on defendant's land, and that defendant was withdrawing its offer to pay $2,500, and that Curry had "*instructed*" counsel for defendant to withdraw "the $2,500 offer of settlement." It does not appear that the failure of defendant to sign the release or to obtain the signature of Curry thereto was by reason of any unsatisfactory provision in the release. No objection was made by defendant or Curry to the form or substance of the document. The only reason assigned by defendant for its failure to sign the release or to obtain the signature of Curry was that the City of Arcadia denied Curry's application for a permit. The failure of Curry to sign was not in any manner the fault of plaintiff. No representative of plaintiff had communicated with Curry regarding the settlement of plaintiff's claim against defendant. Mr. Doherty, or his associate counsel, never saw Curry, or talked or communicated with him. It is to be assumed that defendant was in a position to communicate with Curry, and was communicating with him, in regard to the matter of signing the release, since the counsel for defendant said that he was trying to get Curry to pay half of the agreed amount, and since he also said (in his final letter) that Curry had "instructed" him to withdraw the offer of $2,500, and since it was defendant that wanted Curry to sign. Defendant asserts, however, that the duty to have Curry sign was upon plaintiff. Plaintiff did not need a release from Curry,—when the oral agreement was made on November 10, 1950, Curry had already repudiated the lease with plaintiff (8 months previously) as shown by his letter of March 31, 1950, and he had failed to make the payment due on October 1, 1950, and he had not performed in any way any of his obligations under the lease with plaintiff. Insofar as plaintiff was concerned, its lease with Curry had been as effectively terminated by Curry, by his letter and conduct, as if he had signed the proposed release, which was requested by defendant. The only reason assigned by defendant for its request that plaintiff sign a release of Curry (from his obligations under plaintiff's lease) was that if litigation were pending between plaintiff and Curry during the fair on defendant's land it would be embarrassing. Plaintiff did sign the release, and the only thing that remained to be done to avoid such embarrassment was for defendant and Curry to sign the release. As above indicated, it was not within the contemplation of plaintiff or defendant that plaintiff should do anything to obtain Curry's signature. It was defendant that brought Curry into the matter of the settlement of plaintiff's claim against defendant, and it was defendant that was in communication with Curry in regard to the settlement. Furthermore, the suggested matter of embarrassment to defendant, if litigation were pending during the fair, could not arise,—since Curry did not operate the fair. The claim of plaintiff against defendant existed irrespective of whether the fair was produced or whether Curry signed the release. After the oral agreement was made, plaintiff, relying on the agreement, leased its land to a farmer. The question as to whether there was an oral agreement of settlement between plaintiff and defendant was a question of fact for the trial court, and the court found that there was such an oral agreement. Even though it was contemplated that a written agreemen embodying the terms of the oral agreement would be entered into, the oral agreement was not vitiated merely because the defendant and Curry chose not to sign the proposed written agreement, as to which there was admittedly no objection either to form or substance. Especially, the oral agreement was not vitiated, under the circumstances here, where the defendant held the proposed written agreement about five months, without making any objection to any part of it, and finally chose not to sign it for the sole reason that Curry did not get a permit for the fair. In Johnston v. 20th Century-Fox Film Corp., 82 Cal.App.2d 796, at pages 820–821, 187 P.2d 474, at page 489, it was said: "The trial court found that the oral agreement of April 14, 1944, was binding on that date, although it was subsequently to be reduced to writing. It has been held repeatedly that when the respective parties orally agree upon all the terms and conditions of and agreement with the mutual intention that it shall thereupon become binding, the mere fact that a formal written agreement to the same effect is to be prepared and signed does not alter the binding validity of the original oral agreement." Appellant asserts that the letter of counsel for plaintiff, which accompanied the proposed written release, establishes that an agreement had not been reached. It (appellant) refers to the portion of the letter which states that "the signed copies [of the release] which I am enclosing herewith shall be of no effect until they have been signed by the other two parties and until payment of the $5,000.00 mentioned in the agreement is made." The oral offer of settlement which had been made by defendant had been accepted by plaintiff, and the sending of the proposed written release by plaintiff was an attempt to comply with defendant's request that there be a written release. The recital in the letter that the signed copies shall be of no effect until they have been signed by the other two parties is not to be interpreted, under the evidence here, to mean that the oral agreement theretofore made was ineffectual. The statement in the letter was that the signed copies should be of no effect until they were signed and the money was paid. It is understandable that plaintiff would not want its release of Curry, who did not participate in making the oral agreement, to be outstanding and effective unless Curry joined in the mutual release by affixing his signature thereto. The finding of the trial court that plaintiff and defendant made an oral agreement to settle and compromise plaintiff's claim against defendant, for allegedly inducing a breach of plaintiff's lease by Curry, is supported by the evidence.

[6] Even from defendant's point of view that it was to pay the $5,000 only in case Curry signed the agreement it still would have had no valid defense to the action. Its promise to pay plaintiff was not upon the condition that Curry contribute $2,500 of the amount. It imposed that condition which was no part of its agreement with plaintiff. It appears that Curry was willing to contribute $2,000 but that defendant would not reduce its demand. It therefore appears that the failure to obtain Curry's signature was due to its demand upon Curry with which plaintiff had nothing to do. Defendant's position seems to be that it does not have to pay plaintiff $5,000 because Curry refused to pay it $2,500. It could not impose a condition upon its promise which was not agreed to by the plaintiff and thus escape its liability.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

---

119 Cal.App.2d 556

PERRY v. FUTCH et al.

Civ. 19379.

District Court of Appeal, Second District,
Division 3, California.
Aug. 6, 1953.

Action for damages for breach of contract and fraud in connection with purchase by plaintiff of house from a defendant after false representations by other defendant. The Superior Court of Los Angeles County sustained objection to introduction of evidence after denying plaintiff's application to amend, and plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that an objection to the introduction of any evidence on ground that complaint fails to state cause of action is in nature of general demurrer to the complaint or motion by defendant for judgment on the pleadings, and it may be sustained only where the complaint alleges no facts which would have warranted judgment in plaintiff's favor.

Judgment reversed.

1. Pleading ⟹406(8), 428(2)

Where plaintiff brought action for damages for breach of contract and fraud, and defendant did not demur to the plaintiff's amended complaint on ground of misjoinder of causes of action or several causes of action not separately stated, and did not raise the point by answer, such objections were waived, and it was error to sustain objection to introduction of evidence if the complaint alleged facts which would have warranted a judgment in plaintiff's favor for either cause. Code Civ. Proc. §§ 430, 433, 434.

2. Fraud ⟹45, 46, 47

Allegations that material facts were misrepresented by the defendant, that the representations were known by the defendants to be untrue and were made with the intention of inducing plaintiff to purchase the property, and that the representations were believed by plaintiff and that he completed his purchase in reliance upon them, and that the difference between price paid and the value of what plaintiff received was $3,475, sufficiently stated the elements of actionable fraud.

3. Pleading ⟹428(4, 5)

An objection to the introduction of any evidence on ground that a complaint fails to state a cause of action, is in nature of general demurrer to the complaint or a motion by defendant for judgment on the pleadings, and it does not serve the purpose of a special demurrer, and the objection may be sustained anywhere the complaint fails to state a cause of action.

4. Pleading ⟹354(1)

A complaint should never be dismissed on objection of failure to state cause of action, unless it appears to a certainty that no basic right of action can possibly exist or no relief can possibly be granted.

S. L. Kurland, Los Angeles, for appellant.

No appearance for respondents.

SHINN, Presiding Justice.

When this action came on for trial defendants interposed an objection to the introduction of evidence upon the ground that plaintiff's amended complaint did not state facts sufficient to constitute a cause of action. The objection was sustained and judgment was rendered for the defendants. Plaintiff appeals.

The action is for damages. The complaint alleged that plaintiff agreed to purchase a residence from defendant Futch for $47,500; the agreement provided that the seller would provide a report of a licensed termite control operator showing the condition of the property with respect to termite infestation, dry rot and fungi and would pay for all work necessary to place the property in a condition free therefrom; defendant Futch represented that she had resided in the property for many years, that the house was in good livable condition, had no termite infestation, dry rot or fungi, and was free and clear of any defects. Defendant Futch employed defendant Herbert R. Packard, Jr., doing business as Packard Termite and Pest Control Co., to inspect the property and furnish a report; Packard furnished a report that the property was free from termite infestation, dry rot and fungi; the said representations were false and were known by each of the defendants to be false; the property was heavily infested with termites, dry rot and fungi; said facts were known to defendant Futch and were or reasonably should have been known to defendant Packard from a reasonable inspection of the property; said representations were made for the purpose of inducing plaintiff to purchase the property and were believed by plaintiff; in reliance upon the agreement and representations aforesaid plaintiff paid the purchase price of the property and went into possession; upon discovering the condition of the property plaintiff notified defendants thereof and demanded that they remedy the condition which they failed to do; plaintiff caused said condition to be removed and necessary repairs made at a reasonable cost of $3,475. There were other allegations of damage, namely, that plaintiff was required to expend $599 to repair holes in the roof; defendant Futch removed certain mirrors, plants and other articles of the reasonable value of $300; said defendant agreed to deliver possession on or before September 1, 1950 and failed to do so, to plaintiff's damage in the sum of $500. There was also an allegation that the actions of defendant Futch were willful and were committed with intention to oppress and defraud plaintiff and there was a request for $5,000 as punitive damages.

At the commencement of the trial defendants made a motion that plaintiff be required to elect between the claim of damages for fraud and those for damages for breach of contract. The motion was granted and plaintiff stated she would stand upon her cause of action for fraud. The court expressed the opinion that there was not a sufficient allegation of damage in that it was not alleged that the real property was worth less than the price paid, calling attention to section 3343 of the Civil Code. With the court's permission plaintiff amended her complaint to allege that the reasonable market value of the property at the time of the purchase was $44,025, being the difference between the price paid and the cost of ridding the property of termites, dry rot and fungi. The court then raised the objection that the complaint did not allege that plaintiff agreed to buy the property upon a representation that it was worth $47,500, "which is one of the elements necessary in a fraud action." Plaintiff then asked leave to amend by alleging that defendant Futch also represented that the property then had a reasonable market value of $47,500. This application to amend was denied, the court stating: "It is now an afterthought, merely because, in order to stay within the confines of an ex delicto action, those allegations must be made. I am satisfied if you make them, from your pleadings here, and your plaintiff attempts to testify to them, you will be impeached by his own pleadings here by not having mentioned anything about them before." Following these proceedings the objection to the introduction of evidence was sustained.

[1] It appears from the lengthy discussion of the several claims that when plaintiff elected to stand upon her claim of damages for fraud it was her intention not to pursue any claims arising out of breach of contract in the present action. The election was made after the court stated repeatedly that plaintiff could not in the same action seek damages for fraud and also damages for breach of contract. However this may be, if there was a misjoinder of causes of action, or if there were several causes of action not separately stated, it was error to sustain the objection to the introduction of evidence if the complaint alleged facts which would have warranted a judgment in plaintiff's favor. Misjoinder of causes of action and that they are not separately stated are grounds of demurrer, but if not raised by demurrer or answer are waived. Code Civ.Proc. §§ 430, 433, 434; Fellows v. City of Los Angeles, 151 Cal. 52, 60, 90 P. 137, and cases collected in 1950 Annotations to Deering's Code of Civil Procedure, p. 606. Defendants did not demur to the amended complaint nor raise the point by answer.

[2] The facts alleged were sufficient to state a cause of action for fraud against both defendants. It was alleged that material facts were misrepresented, the representations were known by the defendants to be untrue and were made with the intention of inducing plaintiff to purchase the property; the representations were believed by plaintiff and he completed his purchase in reliance upon them; the difference between the price paid and the value of what plaintiff received was $3,475. These are the elements of actionable fraud. Hobart v. Hobart Estate Co., 26 Cal.2d 412, 422, 159 P.2d 958.

[3, 4] An objection to the introduction of any evidence on the ground that a complaint fails to state a cause of action is in the nature of a general demurrer to the complaint or a motion by a defendant for judgment on the pleadings. It does not

serve the purpose of a special demurrer. The objection may be sustained only where the complaint fails to state a cause of action, and that is the sole question presented to the court. Miller v. McLaglen, 82 Cal.App.2d 219, 223, 186 P.2d 48, 53. It was also stated in the latter case: "A complaint should never be dismissed unless it appears to a certainty that no basic right of action can possibly exist or no relief can possibly be granted."

The judgment is reversed; plaintiff should be permitted to amend his complaint if he be so advised.

PARKER WOOD and VALLÉE, JJ., concur.

---

119 Cal.App.2d 503

CHURCHILL v. WHITE et al.

Civ. 4532.

District Court of Appeal, Fourth District, California.

Aug. 4, 1953.

Action for personal injuries which occurred in accident alleged to be a result of defendant's willful misconduct in driving at excessive speed on winding highway in San Diego County. Plaintiff filed notice of motion to change place of trial from San Diego County to Los Angeles County on grounds that convenience of witnesses and ends of justice would be promoted. The Superior Court, San Diego County, Turrentine, J., denied the motion and plaintiff appealed. The District Court of Appeal, Mussell, J., held that it was not abuse of discretion for trial judge to deny motion for change of place of trial where as a matter of law plaintiff's showing was insufficient to acquire change of venue.

Order affirmed.

1. Venue 🔑52(1)

A change of venue on the ground that change will be more convenient for witnesses is in the sound discretion of the trial court.

2. Venue 🔑68

On a motion for change of venue, the burden of proof is on the moving party to show inconvenience of witnesses.

3. Appeal and Error 🔑1024(3)

On motion for change of venue, where there were conflicting affidavits filed it was for trial court to determine conflict, and ruling of trial court is entitled upon appeal to same weight as a finding on conflicting evidence as to issues of fact, and when there is substantial evidence to support action of trial court, an order granting or refusing change of venue will not be disturbed.

4. Venue 🔑51, 52(1)

Under statute authorizing trial court, on motion, to change place of trial when convenience of witnesses and ends of justice will be promoted, it is not only necessary that convenience of witnesses be promoted but equally essential that ends of justice be promoted. Code Civ.Proc. § 397, subd. 3.

5. Venue 🔑70

In action for personal injuries sustained in automobile accident in San Diego County, evidence of defendant's witnesses as to condition of highway and place of accident were material to the issues, and plaintiff's affidavit, which stated her witnesses consisting of doctors and nurse residing in Los Angeles were material but did not set forth probative facts as to her condition nor cost of professional services required, so as to allow defendant to stipulate, was insufficient to require change of venue from San Diego to Los Angeles County. Code Civ.Proc. § 397, subd. 3.

◆

Mindlin & Levy, Los Angeles, for appellant.

Miller, Higgs, Fletcher & Mack, San Diego, for respondents.

MUSSELL, Justice.

This is an appeal from an order denying plaintiff's motion for a change of the place of trial from San Diego county to Los Angeles county.

The action is for damages for personal injuries sustained by plaintiff while riding as a guest in an automobile operated by defendant S. Barnett White. It is alleged that the wilful misconduct of said defendant in operating said automobile at a dangerous and excessive speed on a highway containing many curves and turns, near Warner Hot Springs in San Diego county, caused the automobile to leave the highway and strike a high embankment, thereby injuring plaintiff. The complaint was filed in San Diego county and after defendants had filed answers thereto, plaintiff filed a notice of motion to change the place of trial from San Diego county to Los Angeles county on the ground that the convenience of witnesses and the ends of justice would be promoted thereby. The motion was based on the records and files in the case and on the affidavits of plaintiff and her attorney. A counter affidavit was filed by one of the attorneys for the defendants. After arguments before the trial court, plaintiff's motion was denied and this appeal is from the order denying it.

It is stated in substance in the affidavits filed on behalf of plaintiff that the trial of the cause in Los Angeles will accommodate three named necessary and material witnesses, who are practicing doctors, residing and practicing in said city; that they are personally familiar with the condition of plaintiff and the treatment she received and will testify to the nature, extent and value of services performed by them; that each of said doctors is personally familiar with plaintiff's injuries and that none of them can or will attend a trial in San Diego county; that the trial of the cause in Los Angeles county will accommodate another material and necessary witness, namely, a nurse, residing in Los Angeles county, who attended plaintiff in Los Angeles during her illness suffered as a result of the accident and who would testify as to plaintiff's physical condition, the treatment received and the nature, extent and value of services performed by the witness; that said witness cannot and will not attend a trial in San Diego county because of her own illness and the travel distance involved.

The affidavit of defendants' counsel filed in opposition to the motion contains allegations that upon receipt of a statement by plaintiff's attorney of the amount and reasonable value of services rendered by plaintiff's nurse, and proper representations as to the accuracy of the figures and amounts paid, the defendants will be willing to stipulate as to the extent and reasonable value thereof as shown by the receipted bills or other evidence of payment; that it appears from the plaintiff's affidavit that said nurse is not now in a condition where her health will permit her to attend any trial in San Diego or Los Angeles county; that because of the nature of the action, it may become highly desirable or necessary to take the court or jury to the scene of the accident; that affiant expects to call as a witness a Mr. Shap, an employee of the road department of the county of San Diego, who resides in San Diego county, to establish the nature of the road on the highway in question; that the approximate location of the accident will become an issue in said action; that for the purpose of establishing the place of the accident affiant intends to call one Ralph J. Spice, the operator of the Julian Garage at Julian, California, to establish the location of the accident; that the said witnesses reside in San Diego county, more than 100 miles from the court house in Los Angeles county, and that said witnesses cannot be compelled to appear in said trial in Los Angeles county.

[1] A change of venue on the ground that the change will be more convenient for the witnesses is in the sound discretion of the trial court. 44 West's Calif.Digest, Venue, ⚿52(1), p. 333; Figley v. California Arrow Airlines, 111 Cal.App.2d 285, 286, 244 P.2d 472; Lyon v. Master Holding Corp., 50 Cal.App.2d 238, 240, 122 P.2d 947.

As was said in Di Giorgio Fruit Corp. v. Zachary, 60 Cal.App.2d 560, 563, 141 P.2d 8, 9:

> "In reviewing an order denying a motion for change of place of trial on the ground of convenience of witnesses the appellate court can only reverse the order upon a clear showing of

> abuse of discretion (Wrin v. Ohlandt, supra, 213 Cal. 158, 1 P.2d 991; Ayres v. Wright, 205 Cal. 201, 270 P. 453; 25 Cal.Jur. 884, 885) and 'a mere preponderance in the number of witnesses which either party expects to produce will not necessarily determine the order to be made'. 25 Cal.Jur. 885, 886; Scott v. Stuart, 190 Cal. 526, 529, 213 P. 947; Willingham v. Pecora, 44 Cal.App.2d 289, 112 P.2d 328."

[2] The burden of the proof is on the moving party to show the inconvenience of witnesses. Pacific Coast Title Ins. Co. v. Land Title Ins. Co., 97 Cal.App.2d 829, 835, 218 P.2d 573; People v. Spring Valley Co., 109 Cal.App.2d 656, 666, 241 P.2d 1069; Willingham v. Pecora, 44 Cal.App.2d 289, 295, 112 P.2d 328; Carr v. Stern, 17 Cal. App. 397, 408–409, 120 P. 35.

[3] It was for the trial court to determine any conflict in the affidavits filed and the ruling of the trial court upon issues of fact raised by conflicting affidavits is entitled upon appeal to the same weight as a finding on conflicting evidence as to issues of fact. Carruthers v. Crown Products Co., 89 Cal.App.2d 326, 328, 200 P.2d 819. And in Gordon v. Perkins, 203 Cal. 183, 186, 263 P. 231, it is stated that where there is substantial evidence to support the action of the trial court an order based upon conflicting affidavits, either in granting or refusing a change of venue, will not be disturbed on appeal.

In Scott v. Stuart, 190 Cal. 526, 529, 213 P. 947, 948, the following language appears:

> "It is no abuse of the trial court's discretion to deny a motion for a change of the place of trial made on the ground of the convenience of witnesses, if the affidavit of the defendant in opposition to the motion shows that his witnesses will be inconvenienced if the change be ordered. McNeill & Co. v. Doe, 163 Cal. 338, 125 P. 345."

This language was held applicable in People v. Spring Valley Co., supra, 109 Cal. App. at page 667, 241 P.2d 1069.

[4] In Willingham v. Pecora, 44 Cal. App.2d 289, 295, 112 P.2d 328, this court held that subdivision 3 of section 397 of the Code of Civil Procedure contains conjunctive conditions, both of which must occur before the moving party is entitled to change the place of trial; that it is not only necessary that the convenience of witnesses be promoted but equally essential that the "ends of justice" be promoted before the court is justified in granting the motion.

An examination of the affidavits filed herein and the entire record viewed in the light of the rules stated in the cases cited impels the conclusion that it cannot be said as a matter of law that the trial court abused its discretion in denying plaintiff's motion, and ruling, in effect, that plaintiff had failed to prove both of the conditions requisite to a change of the place of trial.

The counter affidavit filed by defendants' attorney shows that defendants' witnesses will be inconvenienced if the change is ordered and where, as here, the accident is alleged to have occurred by reason of the defendant's wilful misconduct in driving at a dangerous and excessive speed on a highway with many curves and turns, the evidence of defendants' witnesses as to the condition of the highway and the place where the accident occurred is material to the issues involved.

[5] Plaintiff contends that the showing made by defendants is legally insufficient to establish that the convenience of witnesses and the ends of justice would not be promoted by the granting of the motion. Plaintiff's argument in this connection is that the affidavit in opposition to her motion for change of venue is completely devoid of necessary probative facts bearing on the material issues of the case; that it fails to state what the testimony of defendants' witnesses might be or the manner in which they might have become familiar with the facts. It may be observed that the showing made by the plaintiff is subject to the same objection. Had her affidavits set forth the probative facts as to her condition, and the cost of the professional services required, the defendants might have been willing to stipulate thereto. In view of the allegations in the complaint relative to excessive speed of defendants' automobile on a highway alleged to contain many curves and turns,

testimony as to the condition of the highway and the place where the accident occurred is material to the issues involved. The reasonable inference to be drawn from defendants' affidavit is that the witness Shap, as an employee of the road department of the county of San Diego, was familiar with the condition of the highway in the area where the accident occurred and would be able to testify as to its nature, and that the witness Spice would likewise be able to testify as to the place where the accident occurred. It cannot be said, as a matter of law, that plaintiff's showing was sufficient to require a change of venue, and no abuse of discretion appears.

Order affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

---

119 Cal.App.2d 515

HOWARD PARK CO. et al. v. CITY OF LOS ANGELES et al.

Civ. 19640.

District Court of Appeal, Second District, Division 1, California.

Aug. 5, 1953.

Hearing Denied Oct. 1, 1953.

Owners of realty used as oil property brought mandamus proceedings against the City of Los Angeles, a municipal corporation, and others to enjoin city and its officers and employees from taking any further proceedings or issuing any documents in support of assessments against realty. The District Court of Appeal, White, P. J., held that assessment against realty in sanitary sewer district of city was not erroneous because of the fact that realty was used for oil production, so that sewer would not immediately benefit the realty and there was no early prospect of realty being converted to residence lots.

Alternative writ discharged, and peremptory writ denied.

1. Municipal Corporations 🔑493(1)

Board of Public Works of city did not unlawfully delegate its authority to make assessments against realty in sanitary sewer district because spreading of assessment was made by an employee or employees of city's Bureau of Assessments and was then adopted by board. Streets and Highways Code, § 5000 et seq.

2. Municipal Corporations 🔑439

Special use to which realty located in sanitary sewer district of city is put cannot be considered as affecting amount of benefits for which assessment is made, but amount of benefits is to be measured by benefit which would be received by realty if devoted to any use which might reasonably be made of it. Streets and Highways Code, § 5343.

3. Municipal Corporations 🔑437

It is inequitable and unfair to exempt realty in sanitary sewer district of city from assessment because a special use is voluntarily made of the realty by the owner, so that he does not benefit at the time from the improvement, since he may change his use of the realty in the future so as to reap the benefits of the improvement. Streets and Highways Code, § 5343.

4. Municipal Corporations 🔑437

Assesssment against realty in sanitary sewer district of city was not erroneous because realty was used for oil production, so that sewer would not immediately benefit the realty and there was no early prospect of realty being converted to residence lots. Streets and Highways Code, § 5343.

5. Constitutional Law 🔑290(3)

Demands of due process with respect to assessment of realty in sanitary sewer district of city are satisfied when owner of realty has right to be heard before city council, setting forth reasons why assessment should not be levied as ordered. Streets and Highways Code, § 5343.

6. Municipal Corporations 🔑493(6)

Decision of city council that assessment of realty in sanitary sewer district of city is proper, is final, unless court can plainly see that manifestly and certainly no benefit can or could reasonably have been expected to accrue to the realty from the improvement. Streets and Highways Code, § 5343.

7. Municipal Corporations ⚿**503**

If, from nature of improvement in sanitary sewer district of city, it can be said that lots to be assessed are susceptible to some substantial benefits from improvement, not depending on any special use to which lots are voluntarily presently being put, but if benefits would be received by lots if devoted to any use which might reasonably be made thereof, question of extent of benefits received is one which, in absence of fraud, gross injustice or demonstrable mistake, rests peculiarly in the determination of the assessing authorities, and their action will not be interfered with by the court. Streets and Highways Code, § 5343.

◆

Holbrook, Tarr & O'Neill, Los Angeles, for petitioners.

Ray L. Chesebro, City Atty., Bourke Jones, Asst. City Atty., and Alfred E. Rogers, Deputy City Atty., Los Angeles, for respondent, City of Los Angeles and Leon V. McCardle as City Treasurer.

Roscoe R. Hess, Los Angeles, for respondent, Meriwether Inv. Co.

WHITE, Presiding Justice.

Petitioners are the owners of a tract of land zoned for and being used for oil production purposes, a portion of the tract lying within the boundaries of a sanitary sewer district created pursuant to sections 5,000 et seq. of the Streets and Highways Code (formerly the Improvement Act of 1911), and known as the Athens Boulevard and Vermont Avenue Sewer District. Meriwether Investment Company has bought or undertaken to buy bonds to be issued for the financing of a sewer system in the district.

Petitioners sought a writ of mandate, alleging that the assessments against their property for the construction of a sewer were erroneous, in that the City of Los Angeles Board of Public Works "failed to exercise the duties imposed upon it by law to make the said assessments in accordance with the 'benefits' received" and illegally delegated its authority. Upon filing of the petition and the returns and answers of the respondents thereto, this court issued its alternative writ of mandate, enjoining the City of Los Angeles, its officers and employees, and the City Treasurer of Los Angeles, from taking any further proceedings or issuing any documents in support of the assessments against the property of petitioners, or proceeding with the issuance or delivery of any bonds in connection with such assessments, and directing that respondent Meriwether Investment Company desist from making any demands based upon the assessments complained of or from taking or receiving any bonds issued under such assessments.

Petitioners herein had previously filed a petition for a writ of mandate in the superior court, which petition was denied, as was a stay pending determination of an appeal taken from the order of the court below.

The parties in the proceeding just mentioned were not the same as in the instant proceeding. The Treasurer of the City of Los Angeles is named in the present action, but was not a party to the foregoing superior court proceeding. We therefore regard it as within our province in the matter now engaging our attention to consider only the matters expressly set forth in the petition now before us, because the facts having to do with the superior court action should be considered and determined on the appeal taken from the order therein entered.

Petitioners' basic contentions, as set forth in their petition, are as follows: First, that the Board of Public Works failed to comply with section 5343 of the Streets & Highways Code, in that said body did not assess against the lands of petitioners the cost of such improvement "in proportion to the estimated benefits to be received by each of the said several lots or parcels of land." Streets & Highways Code, § 5343, but proceeded in accordance with the provisions of the cited code, sections 5315 to 5327, requiring that street assessments be spread "in proportion to the frontage". Second, that the Board of Public Works unlawfully delegated its powers and duties to employees of said Board, to wit, employees in the Bureau of Assessments of the City of Los Angeles, who prepared an assessment list and diagram which was submitted to the Board, and which list and diagram and the assessments thereunder were allegedly computed "illegally and erroneously and in violation of law by application in proportion to the frontage owned by each property owner in said district of the cost at a rate per front foot * * * of the work". That in accepting from its employees the assessment list and diagram and not making any independent investigation of its own, but approving the list and diagram as submitted, the Board of Public Works illegally delegated its powers.

In answer to the alternative writ of mandate issued by this court respondents have, in addition to a return thereto, filed a demurrer urging that the petition for the writ herein does not state facts sufficient to constitute a cause of action for the issuance of the writ, and that the court is without jurisdiction of this action.

The cause having now been fully briefed and heard upon oral argument, the court has concluded that a peremptory writ of mandate should be denied and the alternative writ heretofore issued should be discharged.

[1] Taking up first the contention that the Board of Public Works (in its capacity as "Superintendent of Streets") unlawfully delegated its authority, in that the spreading of the assessment was made by an employee or employees of the city's Bureau of Assessments (specifically by a Mr. Creech), the answer to this argument is found in that, first, the members of the board could not be expected in person to do the work of spreading the assessment, nor is it contemplated by the law that they should do so. They approved and adopted the work of their subordinates, and thereby made the assessment the official act of the board. While the labor of preparing the assessment was borne by the employee, the board retained its discretionary power and judgment to approve, disapprove or modify the assessment. In a similar situation presented in Rutledge v. City of Eureka, 195 Cal. 404, 234 P. 82, 86, the court said:

> "It is apparent that the task of preparing the assessment here involved would have been impossible on the part of the respondent superintendent of streets without assistance. It is a matter of common knowledge that in large cities where street improvements are carried on extensively, the work here performed by Larson is done by an assistant skilled * * * in the office of the superintendent of streets or of the lawfully constituted board, commission, or officer exercising his functions. In such circumstances it has never been held, as far as we are aware, that the superintendent of streets or the board, commission, or officer acting lawfully in his stead has relinquished or delegated the statutory power to make the assessment when it appeared, as it does in this case, that the power to act officially was not delegated or relinquished and the act required to be done by the statutory officer was actually performed by him. When the superintendent of streets signed the certificate to the assessment roll he adopted the work of Larson as his own. See Witter v. Bachman, 117 Cal. 318, 49 P. 202. And having made and authenticated the assessment in his official capacity, it would not be competent for the superintendent of streets to repudiate it. Hadley v. Dague, 130 Cal. 207, 215, 62 P. 500."

With respect to the basic contention of petitioners, that the assessments of their lots were not made according to "benefits", —the logic of this contention would require that petitioners' lots not be assessed at all. Petitioners' argument is that the "benefit" to a parcel or lot is to be determined by ascertaining its market value before the improvement is made and determining its increased market value as a result of the improvement. Since petitioners' property is being used for oil production and there is no early prospect of its being converted to residence lots, the installation of the sewer would not enhance the value of the property as oil property. On the other hand, it is manifestly unfair that the property should escape assessment entirely merely because of the special use to which it is being put. It is to be remembered that the total benefit is to the district.

[2–4] We are constrained to hold that a special use to which property is put cannot be considered as affecting the amount of benefits, but, that such amount is to be measured by the benefit which would be received by the property if devoted to any use which might reasonably be made of it. It would be inequitable and unfair to exempt particular property from an assessment when a special use is voluntarily made of it by the owner, and which he may change at any time so as to reap the benefits of an improvement that does not, at the time an assessment is made, benefit him because of a special use to which he has voluntarily put his property.

Petitioners' contention that the assessment should be spread upon the basis of the amount of the increase in the market value is untenable, where, as in their case, the market value of their property was not affected by the improvement only because of the special use to which they had put it, and where such market value will remain unaffected only so long as such special and peculiar use continues. In the case of Louisville & N. R. Co. v. Barber Asphalt Paving Co., 197 U.S. 430, 434, 25 S.Ct. 466, 467, 49 L.Ed. 819, 821, 822, the Supreme Court of the United States had under consideration a situation where the railroad had a right-of-way for its main roadbed on a street which had the improvement of grading, curbing and paving. It was argued by the railroad that neither the right-of-way nor an adjoining lot would get any benefit from the improvement, but on the contrary would be hurt by the increase of traffic close to the railroad tracks. With respect to the area method of special assessments, Mr. Justice Holmes, speaking for the court, said:

> "There is a look of logic when it is said that special assessments are founded on special benefits, and that a law which makes it possible to assess beyond the amount of the special benefit attempts to rise above its source. But that mode of argument assumes an exactness in the premises which does not exist. The foundation of this familiar form of taxation is a question of theory. The amount of benefit which an improvement will confer upon particular land—indeed, whether it is a benefit at all—is a matter of forecast and estimate. In its general aspects, at least, it is peculiarly a thing to be decided by those who make the law. * * *
>
> "A statute like the present manifestly might lead to the assessment of a particular lot for a sum larger than the value of the benefits to that lot. The whole cost of the improvement is distributed in proportion to area, and a particular area might receive no benefits at all, at least if its present and probable use be taken into account. If that possibility does not invalidate the act, it would be surprising if the corresponding fact should invalidate an assessment. Upholding the act as embodying a principle generally fair and doing as nearly equal justice as can be expected seems to import that if a particular case of hardship arises under it in its natural and ordinary application, that hardship must be borne as one of the imperfections of human things. And this has been the implication of the cases."

In Butters v. City of Oakland, 263 U.S. 162, 44 S.Ct. 62, 64, 68 L.Ed. 228, there was involved an assessment under the Improvement Act of 1911 under the district plan, with assessments in proportion to the estimated benefits to be received by each parcel of land. It was urged that the costs might exceed the benefits, "* * * in which event the proportionate assessment of the estimated benefits may, in fact, be greater than the actual benefits received." The Supreme Court said: "The method of assessment provided for is an old and familiar one and embodies a principle too well established to be overturned by the suggestion of a theoretical possibility that there may not be an exact and mathematical relation between cost and benefit in particular instances."

It is noteworthy that section 5343 of our Streets & Highways Code provides that assessments for special improvements are properly spread upon the basis of "the estimated benefits to be received by each of the said several lots or parcels of land", but the validity of the proceedings does not depend upon the ability to show that the benefit to the property included in the assessment district will be equivalent to the burdens, Hansen v. Board of Trustees of Mill Valley, 74 Cal.App. 585, 590, 241 P. 572; Butters v. City of Oakland, supra, 263 U.S. 162, 44 S.Ct. 62, 68 L.Ed. 228.

In the case of Hansen v. Board of Trustees of Mill Valley, supra, 74 Cal.App. at page 590, 241 P. 572, it was held that in the absence of fraud or such abuse of discretion as is equivalent to fraud, the determination of the city council on the question of benefits is conclusive. In the case at bar we find no showing that would warrant a finding of fraud or such abuse of discretion as would be the equivalent thereof. The need for public improvements, the creation of districts to finance them, and the spreading of assessments to cover the costs thereof, are primarily confided to the legislative branch of government.

[5, 6] The principal contention of petitioners is that no benefits would accrue to their property from the particular public improvement here in question. It is of course true that assessments such as the one with which we are now concerned are imposed on the theory that the property adjacent to the improvement and involved in the assessment district will receive special benefit. But this is a matter which is for the determination of the legislative authority of the municipality. The demands of due process are satisfied when the property owner has a right to be heard before the city council upon the question, setting forth the reasons why the assessments should not be levied as ordered. Upon this the council must decide the question, and its decision is final unless the court can plainly see that manifestly and certainly no benefit can or could reasonably have been expected to accrue to the property in question. Duncan v. Ramish, 142 Cal. 686, 692, 693, 76 P. 661. With reference to a collateral attack in the courts upon the validity of an assessment, when the legislative body has acted in accordance with legal procedures, and where the ground of such attack is that the property of the particular individual was not benefited, the court in the case just cited, 142 Cal. at page 691, 76 P. 661, at page 662, had this to say:

> "The statement of the proposition is almost sufficient to refute any argument in favor of it. It is manifest that, if the taxing power is subject to review in this collateral manner any exercise of it would generally be declared invalid. And such a rule would produce inequality and unjust discrimination, for, owing to the uncertainty of human judgment and the varying ability to array evidence in different cases, one person would frequently succeed in evading payment of his portion of the expenses, while another, similarly situated in all respects, would be compelled to bear his share of the burden. The practical effect of the doctrine would be to prevent all compulsory public improvement of every description where the means of payment of the expenses are to be obtained by local assessment. It is contrary to the decisions of this court as well as other authorities. (Citing authorities.) * * *."

[7] An examination of section 5343 of the Streets & Highways Code at once reveals that while the test of benefits by comparison of the market value of the property before and after the improvement may be regarded as a fair test, it is not the exclusive test in arriving at "the estimated benefits to be received by each of the said several lots or parcels of land." We are persuaded that the correct rule is that if, from the nature of the improvement, it can be said that the lots to be assessed are susceptible to some substantial benefits from it—not depending upon any special use to which they are voluntarily presently being put, but if benefits would be received by

the property if devoted to any use which might reasonably be made thereof—the question of the extent of the benefits received is one which, in the absence of fraud, gross injustice or demonstrable mistake, rests peculiarly in the determination of the assessing authorities, and their action will not be interfered with by the courts.

For the foregoing reasons, the demurrers of respondents are sustained, the alternative writ heretofore issued is discharged, and a peremptory writ is denied

DORAN and DRAPEAU, JJ., concur.

Hearing denied; EDMONDS and SCHAUER, JJ., dissenting.

119 Cal.App.2d 570

PEOPLE v. LAMENDOLA.

Cr. 5025.

District Court of Appeal, Second District, Division 2, California.

Aug. 7, 1953.

Defendant was convicted on two counts of selling marijuana. The Superior Court of Los Angeles County, Thomas L. Ambrose, J., entered judgment on the verdict and an order denying motion for new trial, and defendant appealed. The District Court of Appeal, Fox, J., held that certain evidence was properly admitted as tending to impeach testimony of witness for defendant.

Judgment and order affirmed.

1. Witnesses ⇨389

Where police officers testified in prosecution for sale of marijuana that they were directed to defendant's place of business by certain young man who introduced one of the officers to the defendant and that the young man was present when the deals were made with defendant and accompanied that officer to pick up the first purchase, and the young man was called as a witness by defendant and denied any conversations or dealings with the officers concerning narcotics, it was proper to admit testimony of one of the officers concerning alleged conversations had with the young man concerning the narcotics for purpose of impeaching testimony of the young man. Health and Safety Code, § 11500.

2. Criminal Law ⇨1144(15)

Where evidence was introduced to impeach testimony of witness for defendant, and jury was instructed that testimony was offered solely for purpose of impeachment, it would be presumed that jury obeyed such instruction.

3. Criminal Law ⇨1037(1, 2)

Only when misconduct of prosecutor in argument to jury is of a flagrant character may it be reviewed on appeal without previous objection or request for admonition.

4. Criminal Law ⇨1037(1, 2)

Where certain evidence was admitted only to impeach testimony of a witness for defendant, and jury was so instructed, conduct of prosecutor in referring, in his argument to jury, to the impeaching testimony without mentioning that it was admitted solely for purpose of impeachment was not of such character that argument could be reviewed on appeal, in absence of any objection by defendant to the argument and in absence of any request for admonition to jury.

5. Criminal Law ⇨730(1)

Where prosecutor allegedly represented to jury that counsel for defendant, for a number of years in trying cases prosecuted by the prosecutor, had in every instance accused investigating officers of dishonesty, and counsel for defendant protested that the argument of the prosecutor was improper and an untrue personality argument, and court responded that he would take defense counsel's word for it and commented that court was sure that personalities between defendant's counsel and prosecutor would not influence a jury very much, defendant was not prejudiced.

6. Criminal Law ⇨722(3)

In prosecution for selling marijuana, prosecutor's reference to defendant as a "narcotic peddler" under the evidence in the case was not error. Health and Safety Code, § 11500.

Max Solomon, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., S. Ernest Roll, Dist. Atty., Jere J. Sullivan and Robert Wheeler, Deputy Dist. Attys., Los Angeles, for the People.

FOX, Justice.

Defendant was convicted on two counts of selling marijuana in violation of section 11500 of the Health and Safety Code. He appeals from the ensuing judgment and the order denying his motion for a new trial.

The sufficiency of the evidence to sustain the judgment is not challenged. It is, however, claimed that the court committed prejudicial error in admitting certain evidence for purposes of impeachment, and that the district attorney was guilty of misconduct in his argument.

[1, 2] Defendant operated a cafe and bar in North Hollywood. Officers testified to making the purchases of marijuana. Defendant denied their testimony. In detailing the circumstances leading up to the purchases the officers related that they were directed to defendant's place of business by Leo Aviles, a young man 19 years of age; that he had introduced Officer Neale to defendant as "a dealer" who "wanted to get some stuff (marijuana)"; that he was present when the deals were made, and accompanied Neale to pick up the first purchase. Leo was called as a witness by defendant. He denied having had any conversation with the officers about narcotics; denied the purchases, which Officer Neale testified were arranged in Leo's presence, and denied that he accompanied the officer to pick up the first purchase. On cross-examination he stated that he was living with his father on May 13, 1952, and that his father had some discussion about his hanging around defendant's place. He denied that he knew his father called the police concerning defendant's operations, and also denied that his father arranged for him to meet the police officers. He testified that he knew Officer Carsten, who was a very good friend of his father; that the officer had been at his father's home shortly before May 13th, and that he had talked to them on that occasion, but he did not recall "any special thing" they discussed. The prosecutor then asked Leo, in substance, if, in that conversation, he told Officer Carsten that he had been recently in defendant's cafe and that while there he observed two boys apparently buying food; that they walked past him and unrolled the package and stated to him that they had purchased six sticks (referring to marijuana); that another boy he was with made the statement that $1,800 worth of narcotics had just been brought in from Mexico for this defendant; and that he believed defendant's cafe was the distributing center for other dealers. He denied making such a statement. Leo also denied that his father told him to give Officer Carsten any information about the place; denied he told Officer Carsten that he would help clean up the place and get rid of that narcotic business; denied that he met or saw Officer Carsten on the night of May 13th. In rebuttal Officer Carsten testified that Leo did make the statements about defendant's cafe on the designated occasion; that his father told him if he could help Carsten "in cleaning up this place, I want you to do it"; that Leo said he would cooperate in every way possible, and that on May 13th he and his partner picked Leo up at his home and met the other officers working on the case. This evidence was admissible for it tended to impeach Leo's testimony. People v. Rich, 96 Cal.App.2d 579, 586–587, 215 P.2d 738; People v. Agajanian, 97 Cal.App.2d 399, 405, 218 P.2d 114. It was offered solely for this purpose and the jury was so instructed. It must be presumed the jury obeyed such instruction. People v. Dong Pok Yip, 164 Cal. 143, 147, 127 P. 1031.

Defendant also contends that "the district attorney committed prejudicial error in his argument to the jury: (1) in making reference to testimony admitted solely for impeachment purposes; (2) in misrepresenting to the jury that counsel for appellant, for a number of years in trying cases prosecuted by the same deputy, has in every instance accused the investigating officers of dishonesty, and (3) in stating his personal opinion of the guilt of appellant to the jury." There is no merit in any of these contentions.

[3, 4] It is true that the prosecutor, in his argument, referred to the conversation between Leo, his father, and Officer Carsten without mentioning that this conversation was admitted solely for the purpose of impeaching Leo's testimony. However, defendant failed to make any objection to this argument when it was made, and did not request the court to admonish the jury concerning it. He may not, therefore, raise this question for the first time on appeal. People v. Temple, 102 Cal.App.2d 270, 284, 227 P.2d 500; People v. Codina, 30 Cal.2d 356, 362, 181 P.2d 881. It is only when such misconduct is of a flagrant character that it may be reviewed on appeal without previous objection or request for admonition. See People v. Podwys, 6 Cal.App.2d 71, 75–76, 44 P.2d 377. There was nothing in the prosecutor's argument in this case to take it out of the general rule applicable to such matters.

[5] As to the second specification of alleged misconduct, counsel for defendant protested that the argument of the prosecutor was improper and "definitely a personality argument * * * that is not true." The court responded to defense counsel, "* * * I will take your word for it * * *" and then commented "I am sure the personalities between these two counsel won't influence the jurors very much." While the admonition might have been more specific, it was sufficient to indicate to the jury that such matters were not to be considered by them. Furthermore, there is no showing of prejudice and we are unable to see how any could have resulted.

[6] The final claim of misconduct relates to the prosecutor's referring to the defendant as a "narcotic peddler" in his closing argument. This characterization of defendant was, however, prefaced by the expression "based on the evidence in this case." Thus the prosecutor was simply stating his views of what the evidence established. He has a right to do this. People v. Weber, 149 Cal. 325, 340–341, 86 P. 671; People v. Patterson, 118 Cal.App.2d 45, 256 P.2d 992. In the Weber case the prosecutor stated to the jury [149 Cal. 325, 86 P. 677]: "We believe * * * that the evidence in this case * * * points unerringly, points accurately, beyond the possibility of mistake, to this defendant as the murderer of Mary Weber." In holding that this was a legitimate comment the court said, 149 Cal. at page 341, 86 P. at page 677: "It is, of course, improper for a prosecuting officer to assert his personal belief or personal conviction as to the guilt of an accused, if that belief or conviction is predicated upon anything other than the evidence in the case. But, upon the other hand, such prosecuting officer has the indisputable right to urge that the evidence convinces his mind of the accused's guilt. Indeed, it would be mere stultification if it were contended that the prosecuting attorney could argue to the jury that the evidence should convince their minds, although it did not convince his. A prosecuting officer, therefore, has the right to state his views, his beliefs, his conviction as to what the evidence establishes. [Citation.]"

The judgment and order denying the motion for a new trial are affirmed.

MOORE, P. J., and McCOMB, J., concur.

119 Cal.App.2d 564

GAINEY v. GAINEY.

Civ. 4589.

District Court of Appeal, Fourth District, California.

Aug. 6, 1953.

Hearing Denied Oct. 1, 1953.

Action by wife for separate maintenance. The Superior Court of San Diego County, Robert B. Burch, J., entered judgment for wife and thereafter granted husband's motion for new trial on ground of insufficiency of evidence to sustain judgment, and wife appealed. The District Court of Appeal, Mussell, J., held that, where evidence was conflicting, and there was evidence which would have supported judgment for moving party, the District Court of Appeal could not hold that trial court had abused its discretion in granting motion for new trial.

Order affirmed.

1. Marriage ⟹40(5, 11)

Where person has entered into two successive marriages, validity of second marriage is presumed, and party attacking validity of second marriage has burden of proving that first marriage had not been dissolved by death of spouse or by divorce or had not been annulled at time of second marriage.

2. Husband and Wife ⟹279(3)

Where parties, who had been living together as husband and wife, entered into separation agreement, whereby they released their claims against each other, their subsequent living together as husband and wife cancelled executory obligations of such agreement.

3. New Trial ⟹157

In action by wife for separate maintenance, wherein husband moved for new trial on ground of insufficiency of evidence and argued motion on grounds of newly discovered evidence and surprise but stated that he did not think he was arguing weight of evidence and was not raising question of error but might question judgment, defendant's remarks did not deprive trial court of its right to consider motion on any or all of grounds stated in notice of motion.

4. New Trial ⟹128(5)

In action by wife for separate maintenance, wherein husband stated insufficiency of evidence to justify judgment for wife as one of grounds in notice of motion for new trial, it was not necessary for husband to specify in detail respects in which it was claimed that evidence was insufficient.

5. New Trial ⟹70

In action by wife for separate maintenance, wherein husband moved for new trial on ground of insufficiency of evidence to sustain judgment for wife, and husband had some evidence that wife had never been divorced from prior husband, granting such motion was not an abuse of trial court's discretion.

6. New Trial ⟹157

Upon motion for new trial on ground of insufficiency of evidence to sustain judgment for wife in action brought by her for separate maintenance, trial court was empowered and required, upon hearing on motion, to reconsider and reweigh all evidence which was before it at trial and had power to draw inferences from such evidence opposed to those which were drawn by it at trial provided that such new inferences were not unreasonable.

7. Appeal and Error ⟹854(6)

Order granting motion for new trial must be upheld if any ground upon which it might have been granted is supported by evidence.

8. Appeal and Error ⟹979(2)

Where evidence was conflicting and there was evidence which would have supported judgment for moving party, the District Court of Appeal could not hold that trial court had abused its discretion in granting motion for new trial.

Clinton F. Jones, San Diego, for appellant.

Geo. A. Westover and E. V. Cavanagh, San Diego, for respondent.

MUSSELL, Justice.

This is an action for separate maintenance. Plaintiff married one Arthur Polk in Genessee county, Michigan, on or about April 12, 1935. Soon thereafter the parties to this marriage separated and did not live together thereafter. In 1936 plaintiff met the defendant herein in Flint, Michigan. They then went to Ohio, and settled near Youngstown. Plaintiff and defendant there bought and sold real property together as "husband and wife". They were known in the community as Mr. and Mrs. Gainey and held themselves out as husband and wife. In 1943 plaintiff and defendant returned to Michigan, where they continued to live together as husband and wife. In 1944 they came to California and lived together in San Diego until 1948. On February 10 of that year they separated and executed a property settlement agreement in which they acknowledged that they lived together for approximately 12 years as man and wife and that a marriage had never taken place between them. About six months after this separation the parties again lived together for approximately three weeks, separating permanently in August, 1948.

This action was filed on April 22, 1952. An order to show cause was issued and the trial of the action was commenced on May 15, 1952. Plaintiff testified that she married Arthur Polk in 1935 and that in 1939 he secured a divorce from her and that she had not seen Mr. Polk since; that she received copies of the divorce papers in 1939 and that the date of the divorce was February 6, 1939; and that the defendant had the papers in his possession and read them. However, plaintiff also testified that she did not have copies of the divorce papers; that she did not remember what court granted the divorce; that she did not remember whether the papers which she received were certified or not and stated that she was never served with a complaint by her husband. No further proof as to the claimed existence of the divorce decree was offered in evidence.

The trial court found, in part, "that no impediment existed preventing the plaintiff and defendant from consummating their marriage while they resided in Ohio in 1939, and that when they came to California in 1943, they had the status of husband and wife."

[1] The cause was apparently tried on the theory that a presumption of validity attached to the Gainey common-law marriage. The trial court's finding was supported by the presumption which is stated in Re Estate of Smith, 33 Cal.2d 279, 281, 201 P.2d 539, 540, as follows:

> "It is well established that when a person has entered into two successive marriages, a presumption arises in favor of the validity of the second marriage, and the burden is upon the party attacking the validity of the second marriage to prove that the first marriage had not been dissolved by the death of a spouse or by divorce or had not been annulled at the time of the second marriage. (Citing cases.) That burden is sustained if the evidence, in the light of all reasonable inferences therefrom, shows that the first marriage was not so dissolved or annulled." (Citing cases.)

[2] The court further found that the parties had entered into a separation agreement on February 10, 1948, releasing their claims against each other, but that thereafter, in July and August of that year, they resumed living together as husband and wife and that such resumption cancelled the executory obligations of the separation agreement. This finding is supported by substantial evidence and is not herein seriously attacked.

Following the entry of judgment for plaintiff, defendant filed notice of intention to move for a new trial on the grounds of irregularity in the proceedings; accident or surprise; newly discovered evidence, material for the defendant, which he could not with reasonable diligence have discovered and produced at the trial; insufficiency of the evidence to justify the judgment; and error in law occurring at the trial and excepted to by the defendant.

In support of this motion defendant filed his affidavit, stating in substance that he was not personally acquainted with said Arthur Polk; that he had made numerous inquiries and had been unable to learn Polk's place of residence; that he had made inquiries in the state of Michigan in various counties to ascertain whether there was on record an action for divorce or annulment or other proceedings terminating the marriage of plaintiff to said Polk; that on numerous occasions plaintiff had informed him that she was not divorced from Polk and that he relied upon such statements and did not therefore ask for a continuance of the case at the time of trial; that since the trial of the action he has made numerous inquiries and has received through the mail certificates of clerks of various courts in Michigan, Ohio, Illinois and Iowa certifying that no such divorce or annulment appears in the records of their respective courts; that he has recently located individuals in Flint, Michigan, who were acquainted with the said Polk and secured affidavits from them stating that they had recently talked with the said Arthur Polk, who, at that time stated to them that he knew of no divorce or annulment or other termination of the marriage with the plaintiff herein and that he had never instituted any action for the purpose of terminating said marriage; that within the last several days he was able to locate the said Arthur Polk and has received an affidavit from him.

The affidavit of Arthur LaVerne Polk, which was attached to defendant's affidavit, is dated July 22, 1952, and Polk states therein that he married plaintiff in Flint, Michigan, on April 12, 1935, and "that at no time, or at all, has he ever filed for or obtained any decree of divorce or annulment from the said Alice Sophronia Haywood Polk; that he has no knowledge or has he ever been notified in any manner of any action for divorce or annulment applied for or granted, by the said Alice Sophronia Haywood Polk, against him. So far as he knows at this time, he is still married to the said Alice Sophronia Haywood Polk."

The other affidavits attached to that of the defendant show that the affiants are acquainted with the said Arthur Polk and that he had stated to them that he was not divorced from the plaintiff herein.

The statements made in these affidavits filed by the defendant were not contradicted by affidavits filed by the plaintiff, or otherwise.

The trial court granted defendant's motion for a new trial on the ground of the insufficiency of the evidence to sustain the findings and judgment and ordered a new trial on all issues. Plaintiff appeals from this order and first contends that defendant, at the time of his motion for a new trial, abandoned all grounds for a new trial except surprise and newly discovered evidence. This contention is based on the statements of counsel for defendant in his oral argument on the motion.

[3, 4] It is true, as stated by plaintiff, that defendant's counsel argued that the motion should be granted on the grounds of newly discovered evidence and surprise and stated that he did not think he was arguing the weight of the evidence. However, when asked by the court if the motion was on the grounds of newly discovered evidence and not errors of law, he replied, "That is about right. I haven't raised the question of error at the trial. I might question the judgment, but I raise no question of any error." He did not state that he was abandoning his rights to a new trial on the ground of insufficiency of the evidence and we cannot hold as a matter of law that his remarks deprived the court of its right to consider the motion on any or all of the grounds stated in the notice of motion. Insufficiency of the evidence to justify the judgment was stated as one of the grounds in the notice of motion and it was not necessary to specify in detail the respects in which it was claimed that the evidence was insufficient. Sanders v. Toberman, 192 Cal. 13, 15, 218 P. 394. Counsel's statement that he might question the judgment indicates that he was not waiving his rights in that respect.

[5–7] Plaintiff also argues that it was an abuse of discretion for the court to grant defendant's motion for a new trial on the grounds of insufficiency of evidence. This argument is without merit. The trial court was empowered and required, upon the hearing of the motion for a new trial, to reconsider and reweigh all of the evidence which was before it at the trial, and had power to draw inferences from the evidence opposed to those which were drawn by it at the trial, provided that they were not unreasonable. People v. One 1947 Cadillac, 109 Cal.App.2d 504, 240 P.2d 1035. The order must be here upheld if any ground upon which it might have been granted is supported by the record. Mercantile Trust Co. v. Sunset Road Oil Co., 176 Cal. 451, 456, 168 P. 1033.

[8] In the instant case there was a conflict in the evidence at the trial as to whether plaintiff had been divorced from her husband, Arthur Polk. After considering the affidavits filed by defendant in support of his motion, particularly the affidavit of Arthur Polk, stating that he had not secured a divorce from plaintiff, it was apparent to

the trial court that "justice had miscarried". Upon reviewing and reconsidering the evidence, the court then granted the motion for a new trial on the ground of insufficiency of the evidence. Where, as here, the evidence was conflicting and there is evidence in the record which would support a judgment for the moving party, we cannot hold that the trial court abused its discretion in granting the motion. Hames v. Rust, 14 Cal.2d 119, 124, 92 P.2d 1010; Sweeley v. Leake, 87 Cal.App.2d 636, 640, 197 P.2d 401.

The order granting a new trial is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

UPPER v. SUFFERN et al.

Civ. 19281.

District Court of Appeal, Second District, Division 1, California.

July 20, 1953.

As Modified on Denial of Rehearing

Aug. 11, 1953.

Hearing Granted Sept. 17, 1953.*

Action for personal injuries sustained in automobile collision. The Superior Court, Los Angeles County, entered judgment on verdict for plaintiff, and subsequently denied defendants' motion for judgment notwithstanding verdict, but granted defendants' motion for new trial. Plaintiff appealed from order for new trial, and defendants appealed from order denying judgment notwithstanding verdict, and from original judgment. Subsequently, defendants' appeal from order denying judgment notwithstanding verdict was dismissed, and plaintiff's appeal from order for new trial was dismissed because of failure to file brief. The District Court of Appeal, Scott, J. pro tem., held that where plaintiff's appeal was abandoned, rendering reason for defendants' cross-appeal from original judgment nonexistent, but defendants persisted in cross-appeal, and record indicated that an affirmance of judgment would be a miscarriage of justice, plaintiff's abandonment of appeal would be regarded as withdrawal of any objection plaintiff might have to consideration of evidence in light which would permit reversal of judgment and trial de novo.

Judgment reversed and cause remanded for new trial.

1. Appeal and Error 🔑1195(1)

Where, on dismissal of defendants' attempted appeal from order denying judgment notwithstanding verdict without prejudice to defendants' appeal from original judgment, court stated that appeal from original judgment would necessarily present any question of sufficiency of evidence or possible judicial errors, and in that respect benefit both parties by furnishing a "final determination of the rights involved", quoted words meant no more than matters legally determined on such appeal would become law of case and would be controlling on trial court thereafter.

2. Appeal and Error 🔑165

Where defendants, whose motion for judgment notwithstanding verdict was denied after entry of judgment for plaintiff, did not then avail themselves of their right to appeal from original judgment, but instead made alternative motion for new trial, which was granted, defendants were precluded from appeal until plaintiff filed her appeal, which then permitted defendants to file their cross-appeal. Rules on Appeal, rule 3(a); Code Civ.Proc. § 629.

3. Appeal and Error 🔑1176(1)

An appellate court will not preclude further proceedings below by directing entry of final judgment unless clear from record that losing party on appeal will be unable to make an additional substantial showing in support of his case.

4. Appeal and Error 🔑989

When judgment is attacked as being unsupported by evidence, power of appellate court in passing on the question begins and ends with determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support verdict.

---

* Case dismissed Feb. 4, 1954.

5. Appeal and Error ⊂⇒930(1)

On appeal from judgment for plaintiff in negligence action, all conflicts in evidence must be resolved in favor of plaintiff and all legitimate and reasonable inferences indulged in to uphold judgment, if possible.

6. Appeal and Error ⊂⇒996

When two or more inferences can be reasonably deduced from facts, reviewing court is without power to substitute its deductions for those of jury.

7. Appeal and Error ⊂⇒1178(1)

Where plaintiff, by failing to file brief, abandoned her appeal from order granting new trial on ground of insufficiency of evidence, rendering nonexistent the reason for defendants' cross-appeal from original judgment for plaintiff, but defendants persisted in their cross-appeal, and record indicated that affirmance of judgment would be a miscarriage of justice, District Court of Appeal would regard plaintiff's abandonment of appeal as withdrawal of any objection she might have to consideration of evidence in light which would permit reversal of original judgment and a trial de novo. Code Civ.Proc. § 955.

◆

Schell, Delamer & Loring, Los Angeles, for defendants, respondents and cross-appellants Poteet and United Parcel Service.

William Barnett Spivak, Beverly Hills, Jacob Chaitkin and Douglas J. Stapel, Pasadena, for plaintiff, appellant and cross-respondent Upper.

SCOTT, Justice pro tem.

Defendants Poteet and United Parcel Service of Los Angeles, Inc., appeal from an adverse judgment following a verdict in a personal injury case. Defendant Suffern does not participate in this appeal. The named defendants are called cross-appellants for the following reason: After the verdict and judgment they made a motion, under section 629 of the Code of Civil Procedure, as amended 1951, in the alternative for a judgment notwithstanding the verdict, or for a new trial. The motion for judgment notwithstanding the verdict was denied and the motion for new trial was granted, on the ground of the insufficiency of the evidence. This order appears in the minutes of the court but it was not followed by a written order signed by the judge and filed with the clerk, as required by the provisions of section 657 of the Code of Civil Procedure. From this latter order granting new trial, plaintiff appealed. Thereupon, defendants appealed from the order denying motion for judgment notwithstanding the verdict and from the judgment. On motion of plaintiff this court made the following order, "Defendants' attempted appeal from the order denying a judgment *non obstante veredicto* is dismissed without prejudice to the defendants' appeal from the original judgment", 116 Cal.App.2d 5, 253 P.2d 486, 488. Later, plaintiff's appeal from the order granting motion for new trial was dismissed under Rule 17(a) of Rules on Appeal, because plaintiff had filed no brief. This leaves defendants' appeal from the judgment as the sole matter requiring consideration.

[1] Defendants now urge the insufficiency of the evidence to support the verdict and judgment. They assert that they would not be content with a new trial which would result from a reversal without direction, and they now ask that the trial court be directed to enter judgment in their favor which would be "a final determination of the rights involved". The words last quoted are taken by defendants from the opinion of this court above cited, 116 Cal.App.2d 5, 253 P.2d 486, 488 and, out of context, might be construed as supporting their contention that they are now entitled to a directed judgment in their favor, rather than a trial de novo. It is obvious, however, that the quoted words mean no more than that matters legally determined on this appeal become the law of the case and are controlling on the trial court hereafter.

The evidence shows that defendant driver was going east on Franklin Avenue in Los Angeles, and stopped for westbound traffic before making a left turn onto an intersecting street. Plaintiff was a guest in an automobile going east on the street, following behind defendants' truck. It stopped ten feet behind the truck when the latter had ceased moving preparatory to making the left turn. After allowing some westbound vehicles to pass him defendant driver proceeded to make his left turn. When he started his turn he saw defendant Suffern approaching him from a point some distance to the east. Defendant Suffern, westbound, after he approached the truck which was completing its left turn, swerved his automobile to his left to avoid hitting the truck and in doing so went over so far that it collided with the automobile in which the plaintiff was riding.

It is obvious that the trial court regarded the evidence presented at the previous trial as insufficient to support the verdict, although through inadvertence of counsel, the written order granting motion for new trial was not signed. Under the provisions of section 657 of the Code of Civil Procedure, because of the absence of such order, "on appeal from such order it will be conclusively presumed that the order was not based upon that ground". No other ground is stated in the minute order nor is any suggested by defendants on this appeal.

Plaintiff, by abandoning her appeal from the order for a new trial may be deemed to acquiesce in a new trial and to consent to having the evidence again considered by the court or by a jury under appropriate instructions.

[2, 3] We note that these same defendants who are now appealing from the judgment, at a previous time when their motion for judgment notwithstanding the verdict had been denied did not then avail themselves of their right which they then had to appeal from the judgment, but in lieu thereof, made their alternative motion for a new trial. When this motion was granted they were precluded from an appeal until plaintiff had filed her appeal which then permitted defendants to file their cross-appeal, Rule 3(a)—Rules on Appeal. After a careful consideration of the evidence and the inferences drawn therefrom, it is obvious that defendants, on this appeal, are not entitled to a reversal of the judgment with directions to the trial court to enter judgment in their favor. An appellate court will not preclude further proceedings below by directing entry of a final judgment unless it is clear from the record that the losing party on appeal will be unable to make an additional substantial showing in support of his case 4 Cal.Jur.2d 558; Pollitz v. Wickersham, 150 Cal. 238, 251, 88 P. 911.

As the court pointed out in Green v. Key System Transit Lines, 116 Cal.App.2d 512, 521, 253 P.2d 780, 786. "'Modern psychological experiments have shown that, due to the quickness with which an accident happens, those who see it, and those who participate in it, may not get clear impressions. If, after trial, an appellate court attempted to weigh every one of these impressions which may seem contradictory, by the rules of the exact sciences, few verdicts could stand.' (Citing cases.) * * * 'in cases of this nature, such arguments are unreliable because they fail to take into account the human element, what may have been done by the respective drivers, and because of the many uncertainties which necessarily exist in such matters as the respective weights of the cars, the respective speeds, the exact positions, the force and direction of the blows, and many other elements.'"

We are of the opinion that the defendants were more nearly correct in their position as to what was necessary and proper at the time when they sought a new trial. The trial court, as we have already noted, and, more recently, the plaintiff, have agreed that this retrial of the entire case on its merits would be in the interests of justice. Defendants' appeal from the judgment imposes upon themselves more strict and exacting standards for evaluating the evidence than was the situation when the trial court considered and ruled upon the motion for new trial.

[4–6] When a judgment is attacked as being unsupported by the evidence, the power of the appellate court in passing on this question begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the verdict rendered by the jury; and on appeal from a judgment for plaintiff in an action for damages for negligence, all conflicts in the evidence must be resolved in favor of the plaintiff and all legitimate and reasonable inferences indulged in to uphold the judgment, if possible; and when two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the jury. Crawford v. Southern Pac. Co., 3 Cal.2d 427, 45 P.2d 183; Arundel v. Turk, 16 Cal.App.2d 293, 60 P.2d 486; Martin v. Martin, 79 Cal.App.2d 409, 179 P.2d 655; Balasco v. Chick, 84 Cal.App. 2d 802, 192 P.2d 76.

If we analyzed the evidence according to this more strict and exacting standard, we might conclude that the judgment should be affirmed. In that event defendants would be denied the new trial they desire and which both the trial court and their adversary have agreed they should have. If, on the other hand, judgment is reversed, the case would merely be remanded to the trial court for a new trial.

Upon the abandonment of her appeal by plaintiff the reason for the cross-appeal by defendants ceased to exist. These defendants, by persisting in their appeal, could hope to gain no more than they were already entitled to under the order granting them a new trial. The possibility that they might recover their costs on appeal in addition to getting a reversal resulting in a new trial has apparently outweighed in their minds the risk they assume by insisting that the evidence be evaluated according to the exacting standard required by law under the cases cited above.

Under section 955 of the Code of Civil Procedure, "The dismissal of an appeal is in effect an affirmance of the judgment or order appealed from, unless the dismissal is expressly made without prejudice to another appeal."

[7] The record in its entirety indicates that an affirmance of the judgment by such a dismissal or otherwise, would be a miscarriage of justice. Another appeal on this same record would be unwise and futile. For these reasons the case could not be dismissed without disregarding essential rights of the parties.

We have concluded that substantial justice will result to all parties if we regard plaintiff's abandonment of her appeal by failing to file a brief, resulting in this court's dismissal of her appeal as a withdrawal of any objection she might have to a consideration of the evidence in a light which will permit a reversal of the judgment and its legal consequence, which will be a new trial.

Rule 26(a), Rules on Appeal, relating to costs, provides, "In any case in which the interests of justice require it, the reviewing court may make any award or apportionment of costs which it deems proper." The unusual circumstances set forth above have led us to the decision that the respective parties should bear their own costs.

We are aware that when a judgment is reversed without directions in the usual case a trial de novo results without necessity of ordering it. To avoid any possible confusion we are making our order in this case more specific.

Judgment reversed and cause remanded for a new trial. The respective parties will bear their own costs on appeal.

WHITE, P. J., and DORAN, J., concur.

119 Cal.App.2d 621

WILSON et al. v. BARRY et al.

Civ. 8230.
Sac. 6302.

District Court of Appeal, Third District, California.

Aug. 10, 1953.

Action against individual nonresident defendants for a judgment in personam, wherein corporate defendants were joined by reason of fact that action was derivative. From an order of the Superior Court, Plumas County, dismissing the action for failure to bring it to trial within two years, the plaintiffs appealed. The District Court of Appeal, Schottky, J., held that the time consumed by an appeal is not to be considered in applying the two-year discretionary provision for dismissal for want of prosecution, if the pendency of the appeal makes it impossible, for all practical purposes, for plaintiffs to proceed to trial while appeal is pending.

Order reversed.

1. Dismissal and Nonsuit 🔑60(2)

The intent of statute pertaining to dismissal of actions for want of prosecution is to fix a minimum period within which mere delay is not deemed to be sufficient cause for failure for dismissal, and an immediately ensuing interval of three years, during which the court, in its discretion, may adjudge such delay sufficient, and a maximum period of five years, on expiration of which such delay is sufficient as a matter of law and dismissal is made mandatory. Code Civ.Proc. § 583.

2. Dismissal and Nonsuit 🔑60(1)

Wide discretion rests in trial court in applying statutory provision authorizing court, in its discretion, and on motion of defendant after due notice to plaintiff, to dismiss any action for want of prosecution, whenever plaintiff has failed for two years after action is filed to bring such action to trial, but this discretion is one controlled by legal principles and is to be exercised in accordance with the spirit of law and with view to subserving, rather than defeating, the ends of justice. Code Civ.Proc. § 583.

3. Dismissal and Nonsuit 🔑60(3)

The time consumed by an appeal from an order is not to be considered in applying the discretionary statutory provision for dismissal of an action for want of prosecution for a period of two years, if it can be said that the pendency of such appeal made it impossible, or for all practical purposes impossible, for plaintiff to proceed to trial while the appeal was pending. Code Civ.Proc. § 583.

4. Courts 🔑21

Judgment 🔑206

Generally, a court may not acquire jurisdiction in personam over defendant in an action, by service of notice or other process outside the territory or state in which the forum exists, but service by publication confers only in rem jurisdiction over the defendant so served, and consequently only in rem relief can be given. Code Civ.Proc. § 412, 413, 583.

5. Dismissal and Nonsuit 🔑60(3)

Where action filed by plaintiffs against individuals and corporations was actually in personam against individual nonresident defendants, and motion for withdrawal of appearances of individual defendants was granted, jurisdiction in personam over such defendants could only be preserved by a reversal of order of withdrawal, and thus pendency of plaintiff's appeal from order made it impossible, for all practical purposes, to proceed to trial while appeal was pending, with result that period of pendency of appeal was not to be considered in applying two year discretionary period for dismissal for want of prosecution. Code Civ.Proc. §§ 412, 413, 583.

6. Dismissal and Nonsuit 🔑60(3)

Where plaintiff brought action by which they sought personal judgment against nonresident individual defendants, and corporate defendants, and eight months after filing of action a demurrer purporting to be on behalf of all defendants was filed, and four months thereafter a demurrer to amended complaint was filed, followed by motion by individual defendants for withdrawal of their appearances as unauthorized, even if time of pendency of appeal from order granting motion for withdrawal of appearances were to be included in computing two-year period for discretionary dismissal for want of prosecution, dismissal after a period of 37 months had elapsed between filing of action and motion for dismissal, was an abuse of discretion under the circumstances. Code Civ.Proc. § 583.

7. Courts 🔑26

In a legal sense, discretion is abused whenever, in the exercise of its discretion, the court exceeds the bounds of reason, all of the circumstances before it being considered.

8. Common Law 🔑9

Sound public policy requires that litigation be disposed of upon substantial rather than upon technical grounds. Code Civ.Proc. § 583.

Carroll Single and Charles L. Moore, Jr., San Francisco, for appellant.

Walter F. Pettit, San Francisco, for respondent.

SCHOTTKY, Justice.

This is an appeal from an order dismissing the action for failure to bring it to trial within the two year period as provided in section 583 of the Code of Civil Procedure.

A former appeal was before this court involving an appeal from an order granting defendants' motion to withdraw alleged unauthorized appearances made in their behalf. The order granting the withdrawal of appearances was reversed as to defendant Barry but affirmed as to all defendants except defendant Barry, it being held that Barry's actions constituted a general appearance and that the withdrawal of appearance should not have been allowed as to him. 102 Cal.App.2d 778, 228 P.2d 331.

The following is a chronology of the procedure in this case:

The complaint was filed on August 20, 1948, but no summons was issued nor was any attempt made to serve defendants;

Defendants demurred to the complaint on April 30, 1949, and also at that time made a motion for summary judgment with notice and supporting affidavit;

A first amended complaint was filed on August 18, 1949, and a demurrer was interposed thereto on August 29, 1949;

On October 5, 1949, a motion to withdraw unauthorized appearances was filed, with notice and supporting affidavits;

On December 8, 1949, the demurrer to the first amended complaint was overruled and defendants were given 20 days in which to answer;

On December 16, 1949, the motion to withdraw unauthorized appearances was granted by the trial court;

Notice of the above referred to prior appeal was filed by plaintiffs on February 14, 1950;

On March 12, 1951, the above referred to opinion of this court was filed;

On April 4, 1951, defendants filed a memorandum required to set cause for trial;

Remittitur was filed on May 14, 1951;

On July 12, 1951, the defendant Barry filed his answer to the amended complaint;

On July 19, 1951, defendants, through their attorney, Frank M. McAuliffe (who was their attorney throughout the litigation until after the filing of the present appeal), filed and served a Notice of Time and Place of Trial, to the effect that the trial was set for August 14, 1951;

On August 29, 1951, defendant filed and served notice that the trial was set for October 3, 1951;

On September 20, 1951, defendants filed a motion to dismiss, with notice and supporting affidavits;

On October 3, 1951, the case was called to be heard on its merits, at which time the trial court heard the motion to dismiss and granted same;

On December 3, 1951, notice of the present appeal was filed.

It appears that plaintiffs were granted several continuances in the action, both on and off the record. Apparently some of the continuances were granted due to the fact that there were several substitutions of counsel for plaintiffs. It appears that five different counsel of record have represented plaintiffs.

Appellants contend that the action of the trial court in granting the motion to dismiss the action was arbitrary and capricious and was an abuse of discretion.

[1] Section 583 of the Code of Civil Procedure provides in part as follows:

> "The court may in its discretion dismiss any action for want of prosecution on motion of the defendant and after due notice to the plaintiff, whenever plaintiff has failed for two years after action is filed to bring such action to trial, * * *."

The intent of said section 583 has been well stated in Hibernia Savings & Loan

Society v. Lauffer, 41 Cal.App.2d 725, at page 729, 107 P.2d 494, at page 496:

> "* * * The purpose of said section 583, as indicated in Romero v. Snyder, supra, at page 219 of 167 Cal. [216], at page 1003 of 138 P. [1002] was 'to fix: (1) A minimum period within which mere delay is not deemed to be sufficient cause; (2) an immediately ensuing interval of three years, during which the court, in its discretion, may adjudge it sufficient; and, (3) a maximum period of five years, upon the expiration of which, the delay is declared to be sufficient as a matter of law and the dismissal is made mandatory.'"

[2] The instant appeal involves the two year provision of the section and the authorities indicate that a wide discretion rests in the trial court in applying this provision.

In Jepsen v. Sherry, 99 Cal.App.2d 119, the court said at page 120, 220 P.2d 819, at page 822:

> "It is well settled that a court has an inherent and statutory power to dismiss an action for a failure to prosecute it with diligence; *and that its action should not be disturbed unless an abuse of discretion clearly appears.*" (Italics added.)

The court then went on to say on the same page:

> "However, the two years mentioned in these statutes is not an arbitrary limit to be followed in all cases, but was intended as a general guide in determining whether or not a 'want of prosecution' appears and, if so, whether this power should be used in view of the entire situation. *This discretion is one controlled by legal principles and is to be exercised in accordance with the spirit of the law and with a view to subserving, rather than defeating, the ends of substantial justice.* [Citation.] Each case must be decided on its own peculiar features and facts. [Citation.]" (Italics added.)

The record shows that the action was filed on August 20, 1948, and that the order of dismissal was filed on October 3, 1951. Thus it appears that less than 37½ months elapsed between the filing of the action and the order of dismissal. The appeal from the order granting defendants' motion to withdraw their appearance was filed on February 14, 1950, and the remittitur in that appeal was filed on May 14, 1951. If the 15 months consumed by said appeal were deducted from the total of 37½ months which elapsed between the time of the filing of the action and the order of dismissal, it would leave a period of less than 23 months.

While we know of no case dealing with the propriety of computing time consumed by an appeal in dismissing an action not brought to trial within two years after the filing of the action, there are cases dealing with the question in connection with the five year mandatory dismissal provisions of Code of Civil Procedure, section 583. The principles enunciated by those cases seem equally applicable to the instant case, considering it on its own peculiar facts.

In Christin v. Superior Court, 9 Cal.2d 526, 71 P.2d 205, 112 A.L.R. 1153, the complaint was filed on January 24, 1930. On July 17, 1930, the trial court granted a motion for change of venue from which plaintiff appealed on August 14, 1930. The order was reversed by the appellate court on March 22, 1934; the remittitur issuing on May 22, 1934. After various delays caused by demurrers and pending negotiations for settlement, the case was set for trial on August 12, 1936. On July 15, 1936, defendants moved for a dismissal on the grounds that the action had not been brought to trial within five years after filing. The court denied the motion and the case was reset for trial, whereupon defendants petitioned for a writ of prohibition. In answering whether or not the period of time consumed by the first appeal was to be considered the court, 9 Cal.2d at page 530, 71 P.2d at page 207, said:

> "We are nevertheless of the opinion that the motion was properly denied for another reason. Respondent contends that while the appeal from the order changing venue was pending in the

> District Court of Appeal, it was not possible for the plaintiff to bring the cause to trial; and that upon the successful termination of this appeal, plaintiff was restored to his position at the time the erroneous order was made, with the result that the statutory period provided by section 583 did not run during the interval of 3 years and 9 months. In our view this contention is sound, and the peculiar circumstances of this case must be deemed to give rise to one of the exceptions to the terms of section 583."

Further on, in speaking of analogous situations, the court said:

> "* * * Thus, where an appeal from a judgment is taken, the trial court has no jurisdiction to proceed in the cause during the pendency of the appeal, and consequently the time consumed on appeal is not considered as part of the statutory period. Kinard v. Jordan, 175 Cal. 13, 164 P. 894. And where contestants of a will were induced by fraud to consent to a dismissal of their contest, and later had the dismissal vacated, the court held that the time between the dismissal and the reinstatement of the action was to be excluded in computing the five-year period. Estate of Morrison, 125 Cal.App. 504, 14 P.2d 102. See, also, Allyne v. Superior Court, 200 Cal. 661, 254 P. 564."

In discussing the Estate of Morrison, the court said, 9 Cal.2d at page 533, 71 P.2d at page 208:

> "The theory of this decision seems to us to be equally applicable to a situation where, for all practical purposes, going to trial would be impossible, whether this was because of total lack of jurisdiction in the strict sense, or because proceeding to trial would be both impracticable and futile."

Finally the court said, 9 Cal.2d at page 533, 71 P.2d at page 209:

> "* * * If the actual time on appeal had consumed the whole of the five-year period, could plaintiff have been held barred from going to trial? This would be an amazing miscarriage of justice, penalizing conduct entirely reasonable, and inducing procedure detrimental to the interests of both court and litigants. And the same is true where not the whole period, but a substantial part of it is consumed on appeal. We are therefore led to the conclusion that under the circumstances of this case, the time consumed by the appeal from the order changing venue is not to be counted as part of the five-year period specified by section 583 of the Code of Civil Procedure."

In a later case, Westphal v. Westphal, 61 Cal.App.2d 544, at page 547, 143 P.2d 405, at page 407, in dealing with a problem like that in the Christin case, supra, the court said:

> "It is settled that the time during which it is impossible to bring a case to trial because of the pendency of an appeal should be excluded in determining whether a case has been brought to trial within five years of the filing of the complaint. Kinard v. Jordan, 175 Cal. 13, 164 P. 894; Christin v. Superior Court, 9 Cal.2d 526, 71 P.2d 205, 112 A.L.R. 1153. The basic dispute between the parties on this appeal is whether the pendency of the appeal of the other plaintiffs made it impossible (Kinard v. Jordan, supra) or 'for all practical purposes' impossible (Christin v. Superior Court, supra, 9 Cal.2d at page 533, 71 P.2d [205], 208, 112 A.L.R. 1153) for appellants herein to proceed to trial while that appeal was pending."

And in the Westphal case the contention was made by respondent that the dismissal by the trial court made upon a motion under the five year mandatory provision of Code of Civil Procedure, section 583, could be upheld as an exercise of the trial court's discretionary power to dismiss under the two year provision of Code of Civil Procedure, section 583. In answer to this the court said, 61 Cal.App.2d at page 551, 143 P.2d at page 409:

> "2. Since the amendment of Section 583, Code of Civil Procedure, to

> give discretionary power to the trial court to dismiss for want of prosecution 'whenever plaintiff has failed for two years after action is filed to bring such action to trial' instead of 'for two years after answer filed' as theretofore, the court has no power to dismiss for any delay of less than two years 'after action is filed,' since the effect of that amendment was to suspend the power of the court to dismiss for want of prosecution short of the two-year period after the filing of the action. Hibernia Savings & Loan Soc. v. Lauffer, 41 Cal.App.2d 725, 729, 107 P.2d 494; Romero v. Snyder, 167 Cal. 216, 219, 220, 138 P. 1002. Excluding the time during which the appeal of their co-plaintiffs was pending less than two years elapsed between the filing of the action and its dismissal."

The Westphal case appears to lay down the rule that the time consumed by an appeal is not to be considered in applying the two-year discretionary provision of section 583.

[3] However, under the language of the Christin and Westphal cases, before it can be said unequivocally that the time consumed by the former appeal is not to be considered in the instant case we must determine whether the pendency of said appeal made it "impossible" or "'for all practical purposes' impossible" for plaintiffs to proceed to trial while the appeal was pending.

The record shows that the complaint was against defendants Robert R. Barry, Wilford Carey, administrator, Fred Dunning, Coleman Burke, Plumas Land Company, Plumas Mining Company, Plumas Lumber Company, California Trust Company, and various Does. Barry, Burke and Dunning were apparently officers and directors of the three Plumas companies, and Carey was the administrator of a deceased director and officer. The complaint set up four causes of action against the various defendants, praying for: (1) Damages for the misconduct and mismanagement of the directors Barry, Carey, Dunning and Burke (apparently on the theory of a stockholders' derivative action); (2) Delivery of a promissory note and title to realty obtained from Plumas Land Company by defendants upon false representation, to the person legally entitled thereto, or damages therefor; (3) Accounting by the defendants Barry, Carey, Dunning and Burke of their management of corporate funds and property; (4) Appointment of a receiver; (5) Injunction against the individual defendants from disposing of corporate assets at a loss or sacrifice, etc. Therefore, it appears that the action was, in reality, against the defendants Barry, Carey, Dunning and Burke, the Plumas companies being joined only because the actions were of derivative nature. Too, the type of relief sought was in personam against the defendants, and not in rem, except in so far as the realty involved was concerned. Thus when the trial court granted the withdrawal of the appearances of the defendants Barry, Carey, Dunning, Burke, and California Trust Company, there were really no defendants against whom plaintiff could proceed. By the withdrawal of the appearances of the individual defendants, all jurisdiction over them was lost. 5 Cal.Jur.2d Appearance, sections 4, 12, 38. Respondents argue that after the granting of motion to withdraw appearances plaintiffs had two courses of action open by which they might save their case: (1) To contest the granting of the motion by an appeal; (2) To serve the withdrawn defendants by publication under Code of Civil Procedure, §§ 412 and 413. Plaintiffs chose the first course.

[4] We do not believe that plaintiffs could have obtained jurisdiction to secure the in personam relief and judgment prayed for by them by publication of summons as defendants Barry, Carey, Dunning and Burke were residents of New York. The authorities interpreting sections 412 and 413 of the Code of Civil Procedure are to the effect that service by publication confers only in rem and not in personam jurisdiction over defendants so served, and therefore only an in rem and not in personam judgment or relief could be given. Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565; Pinon v. Pollard, 69 Cal.App.2d 129, 158 P.2d 254. As was said by our Supreme

Court in Frey & Horgan Corporation v. Superior Court, 5 Cal.2d 401, at page 404, 55 P.2d 203, at page 204:

> "The general rule has long been established that a court may not acquire jurisdiction *in personam* over the defendant in an action, by service of notice or other process outside the territory or state in which the forum exists. It was so decided in the case of Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565, and there are innumerable decisions in accordance with that authority."

[5] We, therefore, conclude that it would have been "for all practical purposes impossible" for these plaintiffs to bring the case to trial during the pendency of the former appeal, since only by the reversal of the order granting defendants' motion to withdraw their appearance could plaintiffs obtain jurisdiction over them to obtain the relief sought. Therefore, it is clear that under the authority of the Westphal and Christin cases, supra, the 15 months consumed by the former appeal should not have been included in computing delay for the purpose of a dismissal under Code of Civil Procedure, section 583, and the case was actually ready for trial and set for trial less than 23 months after the filing of action. Under section 583 the court had no power to dismiss for want of prosecution short of the two-year period after the filing of the action, and the court erred in granting the motion for dismissal.

Even if the 15 months consumed in the former appeal could not be deducted from the total of 37½ months which elapsed between the filing of the action and the entry of the order granting the motion to dismiss, we believe that the granting of said motion would still amount to an abuse of discretion. For the discretion mentioned in section 583 of the Code of Civil Procedure "is one controlled by legal principles and is to be exercised in accordance with the spirit of the law and with a view to subserving, rather than defeating, the ends of substantial justice." Jepsen v. Sherry, supra [99 Cal.App.2d 119, 220 P.2d 822].

The record in the instant case discloses a most unusual situation. The complaint was filed on August 20, 1948, but no summons was issued and no service was made on defendants. On April 30, 1949, Attorney Frank M. McAuliffe filed a demurrer, signing same as attorney for all defendants. On the same date he filed a motion for summary judgment, signing same as attorney for all defendants. The demurrer was sustained and an amended complaint was filed on August 18, 1949, and on August 29, 1949, Attorney McAuliffe filed a demurrer thereto, signing same as attorney for defendants. Then on October 5, 1949, Attorney McAuliffe filed a notice of motion on behalf of all defendants to withdraw the appearance made on behalf of said defendants on the ground that said appearance was unauthorized by any of said defendants. This motion was granted by order made on December 16, 1949, which order was reversed on appeal as to defendant Barry. Thereafter on April 4, 1951, after the filing of the decision of this court in the former appeal, Attorney McAuliffe, as attorney for defendants Barry, Plumas Land Company, Plumas Mining Company and Plumas Lumber Company, filed a memorandum to set the case for trial. On July 12, 1951, the answer of the defendant Barry was filed. On July 19, 1951, and again on August 29, 1951, defendants filed and served a notice of time and place of trial, the last notice stating that the trial had been set for October 3, 1951. Then on September 20, 1951, defendants filed a notice of motion to dismiss the action, said notice stating that it would be made on October 3, 1951, the time set for the trial. Said notice of motion was mailed to the plaintiffs, at Taylorsville, California, but was not mailed to the new counsel for plaintiffs (although defendants' counsel had been in communication with him) and plaintiffs' counsel did not know of said motion until a few hours before the time set for the hearing thereof, as plaintiffs were away from home and did not receive their mail until they were on their way to the trial. Plaintiff R. Pierce Wilson and his counsel appeared in court on October 3, 1951, and were ready to proceed with the trial of the case, but the court ordered that the motion to dismiss be heard first, and after argument upon said motion granted same.

In the early case of Lybecker v. Murray, 58 Cal. 186, at page 189, the court said:

> "* * * Under no circumstances is the discretion of the Court to be exercised arbitrarily, but it is a discretion, governed by legal rules, to do justice according to law or to the analogies of the law, as near as may be. * * It must be exercised within the limitations above stated to promote substantial justice in the case."

In Berry v. Chaplin, 74 Cal.App.2d 669, at page 672, 169 P.2d 453, at page 456, the court said:

> "In a legal sense discretion is abused whenever in the exercise of its discretion the court exceeds the bounds of reason, all of the circumstances before it being considered. Makzoume v. Makzoume, 50 Cal.App.2d 229, 231, 123 P.2d 72. An abuse of discretion is never presumed but must be affirmatively established by the party complaining of the provisions of the order. [Cases cited.] The burden is on the party complaining of the order to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice an appellate court will not substitute its opinion and thereby divest the trial court of its discretionary power. [Cases cited.]"

And in Fine v. Fine, 76 Cal.App.2d 490, at page 495, 173 P.2d 355, at page 358, the court said:

> "In determining the question as to whether an abuse of discretion occurred in this case, we have in mind the language employed in Clavey v. Lord, 1891, 87 Cal. 413, [at page 419] 25, P. 493, [at page 495], where the court said: 'The only limitation that the law has placed upon the exercise of discretionary judicial power is that it must not be abused. While it may be difficult to define exactly what is meant by abuse of judicial discretion, and whatever it may imply as to the disposition and motives of the judge, it is fairly deducible from the cases that one of its essential attributes is that it must plainly appear to effect injustice.' See, also, Hale v. Hale, 1935, 6 Cal.App.2d 661, 663, 45 P.2d 246."

See, also, In re Estate of Selb, 93 Cal. App.2d 788, 210 P.2d 45.

[6-8] We are convinced that taking into consideration the facts and circumstances shown by the record in the instant case there was an abuse of discretion in granting the motion to dismiss the action. As was said in Berry v. Chaplin, supra: "In a legal sense, discretion is abused whenever in the exercise of its discretion the court exceeds the bounds of reason, all of the circumstances before it being considered." Here plaintiffs had commenced an action in which, among other things, they sought a personal judgment against defendants who were nonresidents of California. Service by publication would avail them nothing so far as obtaining a judgment in personam is concerned. Eight months after the filing of the action a demurrer purporting to be on behalf of all defendants was filed by a member of the bar. Four months thereafter a demurrer to the amended complaint was filed, and then followed the proceedings hereinbefore enumerated. Following the filing of the opinion of this court in the former appeal, and even before the remittitur had come down, respondents filed a memorandum to set the cause for trial, and thereafter had the case set for trial and notice of time and place of trial given. While the purpose of the two year provisions in Code of Civil Procedure, § 583, undoubtedly was to prevent unreasonable delay in the prosecution of actions, we do not believe that it was ever the intention of the Legislature to provide that it would be a proper exercise of judicial discretion to grant a motion for dismissal of the action under the circumstances shown by the record here. As a matter of sound public policy litigation should be disposed of upon substantial rather than upon technical grounds. We do not believe that, under the authorities hereinbefore cited, the term "judicial discretion" is

broad enough to sustain such a determination, and we, therefore, conclude that the granting of the motion to dismiss would be an abuse of discretion even though we are not correct in our conclusion that the 15 months consumed by the former appeal should be deducted from the total of 37½ months which elapsed between the filing of the action and the granting of the motion. We are unable to understand how the granting of respondents' motion to dismiss, a motion filed less than one month after respondents themselves had filed and served notice of time and place of trial, and on the very day that the case was on the calendar for trial, can be held to be a proper exercise of judicial discretion. For as stated in Jepsen v. Sherry, supra, the discretion to be exercised in such a case is "one controlled by legal principles and is to be exercised in accordance with the spirit of the law and with a view to subserving, rather than defeating, the ends of substantial justice."

No other points raised in the briefs require discussion.

The order of dismissal is reversed.

VAN DYKE, P. J., and PEEK, J., concur.

---

119 Cal.App.2d 481

In re OSTRANDER'S ESTATE.

LAMBRECHS et ux. v. OSTRANDER.

Civ. 4568.

District Court of Appeal, Fourth District, California.

Aug. 3, 1953.

Will contest involving questions of undue influence and lack of mental capacity to execute will. The Superior Court, San Diego County, Joe L. Shell, J., entered judgment for contestant, and proponents appealed. The District Court of Appeal, Fourth District, Barnard, P. J., held, inter alia, that the evidence supported jury's finding that the will had resulted from the undue influence of proponents.

Affirmed.

1. Wills ⚷155(1)

In order to show that will resulted from undue influence, it must be shown that its provisions were unnatural, that its dispositions were at variance with intentions of decedent expressed both before and after execution of will, that relations existing between chief beneficiaries and decedent afforded beneficiaries opportunity to control testamentary act, that decedent's mental and physical condition was such as to permit subversion of his freedom of will, and that chief beneficiaries were active in procuring instrument to be executed.

2. Wills ⚷166(1)

Evidence in will contest sustained jury's finding that will had resulted from undue influence of proponents.

3. Wills ⚷165(4)

In proceeding on objections by testator's daughter, who was his sole heir, to probate of will which named third parties as chief beneficiaries, on ground of undue influence, court did not err in refusing to allow proponents to testify as to what testator had said about his daughter in a conversation between a fourth party and testator seven or eight years prior to execution of will.

4. Wills ⚷330(3)

In will contest involving questions of undue influence and lack of mental capacity, instruction as to evidentiary effect of unjust or unnatural will as it related to mental capacity of testator was proper.

James B. Abbey, Charles E. Karpinski, David H. Thompson, San Diego, for appellants.

Herney & Herney, Marie M. Herney, San Diego, for respondent.

BARNARD, Presiding Justice.

This is an appeal from a judgment denying probate to a will. Arthur Ostrander, aged 78, died September 5, 1951, leaving as his sole heir at law an unmarried daughter, Louise, who was 43 years of age. His estate consisted of $6,954 in a savings account, an old automobile and a "ranch" worth some $2,000. On June 25, 1951, he executed a will, leaving $100 to his daughter and everything else to Mr. and Mrs. Lambrechs. He had made a prior will leaving everything to his daughter. Mr. Lambrechs was the brother of the testator's deceased wife. The new will was filed for probate and the daughter filed this contest. A jury specifically found that Mr. Ostrander was not of sound mind when he executed the will, and that he executed it by reason of the undue influence of the proponents. A motion for a new trial was denied and the Lambrechs have appealed from the judgment.

The testator's wife, who had operated a fur store, died in 1943. After her death he sold the store, investing most of the proceeds in government bonds in the joint names of himself and his daughter. From 1925 to 1943, the daughter had done the housework to enable her mother to operate the store. She continued to keep house for her father until 1946, when he sold his home and moved to the "ranch" some 30 miles from San Diego. The daughter then moved into a small apartment and supported herself by doing ironing and caring for children. From 1946 to 1951, she went to the "ranch" on weekends and holidays, where she cooked, cleaned, washed and did other work for her father.

Early in March, 1951, the decedent locked himself in his house on the "ranch" for four or five days. A deputy sheriff who was called found him in bed fully clothed and with four loaded guns. He was incoherent in speech, did not recognize his friends, and said he was going to use the guns on anyone that came around and bothered him. The deputy sheriff advised the daughter to file a psychopathic complaint against him. Instead of doing so, she took him to her apartment where he remained until March 8. He was then taken to a hospital where he remained a week, and then to a sanitarium licensed to care for senile mental patients, where he remained a month. The daughter then arranged to have him cared for in the home of his nephew, Clyde Ostrander, where he stayed from April 15 to June 19. He then went to the home of an old friend and stayed until June 23, when he went to the home of the Lambrechs and stayed there until he died. His daughter had visited him regularly while he was in the hospital, the sanitarium, and at his nephew's. While at the nephew's, he wanted to make a will leaving his property to the nephew, and he wanted to make a will leaving everything to this friend during the three days he was there.

On June 9 and June 19, the testator drew all his funds from two bank accounts, a total of about $1,800. He also took all his bonds from his safety deposit box. These bonds were all in the joint names of himself and his daughter, except one which had been issued to the testator and his wife. The last one of the bonds had been purchased in March, 1951. Shortly after the testator arrived at the Lambrechs' home on June 23, he showed Mrs. Lambrechs some money "in rolls" and these bonds. She told him he should not carry them around with him. On the morning of June 25, she helped him make a list of these bonds. Mrs. Lambrechs testified that on that morning the testator asked her to locate a Mrs. Aust, who had been a friend of his wife, and that she then called Mrs. Aust and made an appointment to meet her that afternoon. Mrs. Aust was a secretary in the office of an attorney who had represented Mr. and Mrs. Lambrechs for some ten years.

In the afternoon of June 25, Mrs. Lambrechs took the testator down town as he said he wanted to buy a hat. She took him to the San Diego Trust and Savings Bank, although the testator had for years done his banking business at two other banks, in one of which he still had a safety deposit box. She took him to an officer of the bank and the testator produced his roll of cash and the bonds. The bonds were cashed and the banker suggested that all the money be deposited in a savings account, which was done. During the conversation the banker suggested that the testator ought to make a will.

Mrs. Lambrechs then took the testator to the office of her attorney in the same building, where the will in question was prepared and executed. A woman who had worked for the Lambrechs for many years without compensation, as a "labor of love", was present at the bank and at the lawyer's office, and she and Mrs. Lambrechs remained in the room with the testator while the will was being executed, and during all of the conversation in connection therewith. The attorney had never met the testator before and did not charge him for his services. Mrs. Lambrechs took part in the interview and the testator frequently asked her for information concerning his past life. After the will was executed it was given to the testator who turned it over to Mrs. Lambrechs shortly thereafter, and she retained possession of it until he died. On the night he died she told the daughter that she knew nothing about the terms of the will.

[1, 2] The appellants first contend that the evidence is not sufficient to support the finding of undue influence under the test which is set forth in Re Estate of Lingenfelter, 38 Cal.2d 571, 241 P.2d 990, 999, as follows:

> "'(1) The provisions of the will were unnatural. * * * (2) The dispositions of the will were at variance with the intentions of the decedent, expressed both before and after its execution. (3) The relations existing between the chief beneficiaries and the decedent afforded to the former an opportunity to control the testamentary act. (4) The decedent's mental and physical condition was such as to permit a subversion of his freedom of will. And (5) the chief beneficiaries under the will were active in procuring the instrument to be executed.'"

It is conceded that the evidence is sufficient to support the first and second of these requirements. In support of the contention that the appellants were not in a position to control the testamentary act of the testator it is argued that no confidential relationship existed; that the testator came to their home of his own accord only two days before the will was executed; and that three disinterested persons were present when the will was prepared and executed. It is argued that the only evidence which tends to support the requirement that the proponents were active in procuring the execution of the will is the fact that the draftsman of the will had for some years acted as attorney for them, and the fact that one of the proponents was present in the room when the will was executed; and that these facts are overcome by the fact that it was the banker who suggested to the testator that he ought to make a will. It is further argued that there was no evidence that the decedent's mental and physical condition was such as to permit a subversion of his freedom of will, since there was no substantial evidence to support the jury's finding that the testator did not have testamentary capacity.

The evidence was sufficient to show an existing relationship between these parties which afforded an opportunity to the appellants to control the testamentary act, especially in view of the testator's mental condition as shown by the record. They had known the decedent since 1904 and had visited him frequently prior to Mrs. Ostrander's death, and Mr. Lambrechs was his brother-in-law. Mrs. Lambrechs testified that from 1946 until the spring of 1951, the testator came to their house very often; that he consulted her with reference to all his business matters, and she advised him with respect thereto; that he always came to her for advice; that while he was staying in his nephew's home he asked her to find a place for him; and that when he came to their home on June 23 she told him he could stay there as long as he wanted to do so. He showed her the money and bonds the first day and then followed her advice as to what he should do with them, although he had apparently not trusted the banks in which they had previously been kept. He had moved twice within four days, and had twice before wanted to make a will in favor of the person with whom he was staying although he had been in the last person's home only three days. Whether or not the evidence was legally sufficient to show lack of testamentary capacity on the day the will was executed, there was ample evidence that he had been of unsound mind in a medical sense for many months, and some evidence that he was suffering from a delusion regarding his daughter. The evidence in this connection also had a bearing upon the existing relationship and the opportunity to control the testamentary act.

With respect to the matter of activity on the part of the proponents in securing this will, there is evidence that Mrs. Lambrechs advised the testator concerning his money and bonds on June 23, and again on the morning of June 25. She testified that on that morning the testator asked her if she could locate a Mrs. Aust who, he said, used to be a friend of his wife; and that she called Mrs. Aust and made an appointment to meet her in the lawyer's office that afternoon. She knew that Mrs. Aust worked for her attorney but did not tell the testator of this fact. She testified that he had said nothing about making a will or wanting to see a lawyer before they left her home. Having taken him down town, ostensibly to buy a hat, she took him to the bank where she had done business for years. The banker had never seen the testator before, and did not know that he had a daughter. The banker testified that nothing was said in his presence about the immediate making of a will.

After the bank account was opened, Mrs. Lambrechs took the testator up to the lawyer's office. The attorney who prepared the will testified that before they came to his office Mrs. Lambrechs had called him on the phone and said that there was a Mr. Ostrander there who wanted to come in to see him about making a will; that he could not remember whether or not the phone call had been on that same day; that when they came in he believed Mrs. Lambrechs opened the conversation and told him that Mr. Ostrander wanted to make a will; that Mr. Ostrander then said he wanted a will that nobody could break; and that he called in another lawyer and a secretary from his office, and questioned the testator in their presence in order to have them as witnesses to the testator's mental condition if anybody tried to break the will. The lawyer who was thus called in testified that he was there about 20 minutes and that the lawyer who drew the will was there only part of the time; that Mrs. Aust told the testator that she had been a friend of his wife's for a good many years; that the conversation was chiefly between Mrs. Aust and the testator; that during the conversation the attorney who drew the will asked the testator "to explain to me the reason for making the will as he did"; and that the only explanation then made by the testator was that he intended to exclude his daughter because of her conduct in a real property transaction which had taken place shortly prior to that time. There is no evidence that the testator had been involved in any real estate transaction since 1946. There is substantial evidence supporting the implied finding with respect to the matter of activity. In re Estate of Abert, 91 Cal.App.2d 50, 204 P.2d 347; In re Estate of Hampton, 39 Cal.App.2d 488, 103 P.2d 611; In re Estate of Teel, 25 Cal.2d 520, 154 P.2d 384; In re Estate of Bucher, 48 Cal.App.2d 465, 120 P.2d 44.

The appellants next contend that the evidence was not sufficient to establish mental incompetency on the day the will was executed, or to prove any specific insane delusion which affected the making of the will. While it is unnecessary to decide this question, In re Estate of Teel, 25 Cal.2d 520, 154 P.2d 384, the evidence, although conflicting, has an important bearing on the matter of undue influence. The proponents produced eight witnesses who saw the testator on that day, whose testimony was favorable to them on the issue of competency. In addition to the proponents, their attorney and his secretary, these witnesses were the banker who saw the testator for some ten minutes, an intimate friend of the proponents who met the testator casually while they were making the deposit in the bank, the woman who had long worked for the Lambrechs without compensation, and the attorney who was called in for the purpose of observing the testator's mental capacity.

Seven witnesses, who had been close friends and associates of the testator for many years, testified to many facts and incidents which led them to believe that he was of unsound mind. Among these, in the early part of 1951, the decedent imagined that he had planted vegetables which were being stolen from him; he threatened to shoot the thieves and carried a pistol in his car; he made false accusations; he was very forgetful, and would ask the same question over again within two minutes; he would try to pay for purchases two or three times in the same transaction; he did not recognize old friends and when told who they were would again ask who they were within two minutes; he did not recognize his surroundings or his daughter, and while at his daughter's home thought he was on the "ranch"; while staying in his daughter's home he told one witness he wanted to see Louise as he had not seen her for a long time; he believed that someone was stealing everything he had and wanted to kill someone; and he falsely accused his daughter of passing his window and refusing to come in and see him. One witness, who had known and seen the testator frequently for over 50 years and who saw him at least 12 times in the spring of 1951, testified that the testator would come in and buy gasoline and want to pay for it twice, and would ask the witness "Do I know you?"

The wife of his nephew, where the testator stayed from April 15 to June 19, testified that during that period he was confused and had no power of recollection; that he could not identify her as the wife of his nephew and repeatedly failed to recognize her son whom he had known since birth; that he was "will conscious", and once fabricated a story that he had seen his lawyer and made a will giving everything to them; that he did not know the extent and character of his property, and did not know where his safety deposit box was located; that on one occasion she went with him to two banks where he insisted he had rented a safety deposit box although the bank records showed none, and although he had a box in another bank; that he lost his money and forgot where he put things, and then insisted that nothing had been lost; that at times he did not remember that he ever lived on the "ranch"; that he imagined he owned the witness' home and furniture and wanted to sell it; that he would fly into violent rages and threaten to choke his daughter, and in five minutes had forgotten the episode; that he wandered away from home and did not know where he was; and that his daughter came to see him frequently but after her visits he would immediately forget that she had been there. A doctor, who had cared for him after the deputy sheriff found him barricaded in his home, testified that the testator suffered from a permanent and progressive mental disease, both senile dementia and arteriosclerosis; and that he was of unsound mind on March 16, 1951, and on the day the will was drawn. This doctor had for four years been the attending physician for six sanitariums, taking care of mental patients.

While there is a conflict in the evidence with respect to the mental capacity of the testator on the day in question, and while there is evidence he and his daughter had quarreled at times during the years, the evidence as a whole indicates that he was suffering from a delusion with respect to his daughter which affected the making of the will. The evidence as to his mental condition further discloses a situation which would make the best possible opportunity for the use of undue influence, and strongly supports the jury's finding in that regard.

[3] It is next contended that the court erred in sustaining objections to questions asked of certain witnesses. The questions called for conclusions on the part of witnesses, who did not qualify as intimate acquaintances. Neither error nor prejudice appears. It is further contended that the court erred in refusing to allow the proponent husband to testify as to what the testator has said about his daughter in a conversation between a third party and the testator seven or eight years prior to the execution of the will. No error appears in this connection. In re Estate of Higley, 64 Cal.App. 664, 222 P. 626; In re Estate of Sproston, 4 Cal.2d 717, 52 P.2d 924.

[4] The appellants also attack certain instructions. It is first argued that one instruction, in effect, told the jury that an unjust or unnatural will was in itself evidence of the mental capacity of the decedent, and that this comes within the disapproval expressed in Re Estate of Nolan, 25 Cal.App. 2d 738, 78 P.2d 456. This contention is not supported by the record. It is also argued that the court erred in giving instructions relating to the effect of a confidential relationship between persons procuring the execution of a will and the testator. It is not argued that these instructions were not cor-

rect statements of the law, but it is contended that no evidence establishing such confidential relationship was here produced. The evidence was sufficient to justify the giving of the instructions.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

119 Cal.App.2d 465

LOS ANGELES TRANSIT LINES et al. v. SUPERIOR COURT OF STATE, IN AND FOR LOS ANGELES COUNTY.

Civ. 19602.

District Court of Appeal, Second District, Division 1, California.

July 31, 1953.

Application for writ of prohibition seeking to prevent ordered inspection of certain documents. The District Court of Appeal, Doran, J., held that the application would be considered as a petition for a writ of mandate, and held that since persons seeking discovery had not shown that the instruments sought were in existence, and had not shown that they were material, relevant, and competent, and admissible, discovery was not warranted.

Writ of mandate directing vacation of discovery order granted.

1. Discovery 🔑89

In absence of showing by plaintiff as to existence, competency, relevancy, materiality, and admissibility of statements of witnesses relating to accident giving rise to personal injury action, and papers, notes, and memoranda disclosing oral statements made by witnesses to such accident, inspection of such documents would not be ordered. Code Civ.Proc. §§ 1000, 1985.

2. Discovery 🔑97(4)

Searches and Seizures 🔑7(1)

A party or witness has a constitutional right to be free from unreasonable searches and seizures, and it is therefore incumbent upon one seeking discovery to show clearly that he has a right thereto and that constitutional guaranties will not be infringed, and to that end, the affidavit in support of demand for inspection must identify the desired books, papers and documents, and must clearly show that they contain competent and admissible evidence which is material to the issues to be tried. Code Civ.Proc. §§ 1000, 1985.

3. Discovery 🔑86(1)

The right given by statute to discover books, papers and documents relating to merits of pending action does not entitle party to enter into mere fishing examination of all books, papers and documents of his adversary. Code Civ.Proc. §§ 1000, 1985.

4. Mandamus 🔑1

Prohibition 🔑5(3)

Writ of prohibition could not properly issue to prevent ordered inspection of certain documents, but, in view of fact that parties would not be prejudiced and ends of justice would be served by considering the application for writ of prohibition to be, in effect, a petition for writ of mandate, the application would be so considered.

Trippet, Newcomer, Yoakum & Thomas, Henry R. Thomas, Henry F. Walker, Los Angeles, for petitioners.

Harold W. Kennedy, County Counsel, Wm. E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondent.

DORAN, Justice.

This application which has been denominated a "petition for a writ of prohibition" relates to an order "pursuant to C.C.P. section 1000" which provides that the court may make such an order on notice, as further provided in section 1010. Said notice must be in writing and "state when, and the grounds upon which it will be made".

The action was for damages for personal injuries by Jack Gill and Bertha Gill v. Los Angeles Transit Lines and G. K. Moore.

The notice of motion provided "that plaintiff will move the court * * * for an order * * * permitting plaintiffs to inspect and copy documents or papers in your possession or under your control, containing evidence relating to the merits of the above entitled action or the defense therein.

"The documents and papers which plaintiffs will seek to have the Court order produced are as follows:

"1. Any statement made by defendant G. K. Moore to defendant Los Angeles Transit Lines concerning the manner in which the accident in the above entitled cause occurred; or any statement which an agent, servant or employee of Los Angeles Transit Lines made to Los Angeles Transit Lines concerning the manner in which the accident in the above entitled cause occurred, and all papers, notes and memoranda which disclose oral statements made by an agent, servant or employee of Los Angeles Transit Lines to Los Angeles Transit Lines regarding such accident.

"2. All statements of witnesses which contain evidence or matters relating to the above entitled action, or the accident giving rise thereto, and all papers, notes and memoranda which disclose oral statements made by witnesses to such accident."

The court denied the motion as to paragraph "1" above quoted but granted it as to paragraph "2". The order is as follows:

> "It Is Hereby Ordered and Decreed that on Tuesday, March 10, at 10:00 A.M., defendants ~~produce at the office of Stanley Fleishman~~, ~~6331 Hollywood Boulevard~~, ~~Hollywood~~, ~~California~~, the ~~following documents and papers~~, ~~and~~ permit the inspection, ~~thereof and the~~ copying ~~and~~ *or* photographing ~~thereof~~ *of the following documents* by or on behalf of the plaintiffs:
>
> "All statements of witnesses which contain evidence or matters relating to the above entitled action or the accident giving rise thereto; and all papers, notes and memoranda which disclose oral statements made by witnesses to such accident."

The record reveals that the petitioners herein are the defendants in said action and the Transit Casualty Co. the insurer of defendant Los Angeles Transit Lines.

The petition herein recites that, "said petitioner insurance carrier agreed to provide defense for the assured or assureds and was given the right to make investigation of accidents and asserted accidents, the purpose being to enable it to prepare defense to possible claims or suits or to claims and suits when and if made all in accordance with its contract obligations. Said insurance also provides and provided that the assured or assureds shall cooperate with petitioner insurance carrier in giving statements, securing witnesses, and fully and faithfully cooperating with petitioner insurance carrier."

It is contended by petitioners that "respondent court has acted beyond and in excess of its jurisdiction." In this connection it is urged that "Inspection cannot be ordered of any document unless it be first shown by the applicant therefor that such document exists, is admissible in evidence and is competent, relevant and material to the issues involved."; that "No showing was made by applicants on their motion for inspection that the documents ordered to be produced would be admissible in evidence or that any of them would be relevant, material or competent to any issue in the cause." and, that "the documents ordered for inspection are privileged matter."

[1, 2] Respondents showing in support of the effort to obtain the order in question was insufficient. As was pointed out by the court in McClatchy Newspapers v. Superior Court, 26 Cal.2d 386, 159 P.2d 944, 950, "The right to have an inspection of papers and documents in the hands of a party to the action or a third person is governed by different rules from those applying to depositions. A party or witness has a constitutional right to be free from unreasonable searches and seizures, and it is therefore incumbent upon the one seeking an inspection to show clearly that he has a right thereto and that the constitutional guaranties will not be infringed. Hence, the affidavit in support of the demand for inspection must identify the desired books, papers and documents and it must clearly show that they contain competent and admissible evidence which is material to the issues to be tried. The affiant cannot rely merely upon the legal conclusion, stated in general terms, that the desired documentary evidence is relevant and material. * * * Although it would be unjust to permit plaintiff to recover for an alleged libel by suppressing or withholding evidence which is material or vital to the action, defendant must first show the materiality of the desired evidence and cannot obtain permission to search through all of plaintiff's papers and records merely in the hope or expectation that the investigation will disclose favorable information."

[3] And, as quoted in Ex Parte Clarke, 126 Cal. 235 at page 242, 58 P. 546, at page 548, 46 L.R.A. 835, "The right given by statute to discover books, papers, and documents relating to the merits of a pending action does not entitle a party to enter into a mere fishing examination of all the books, papers, and documents of his adversary. An inquisitorial examination was not contemplated by the framers of the statute". See also Kullman Salz & Co. v. Superior Court of Solana County, 15 Cal.App. 276, 114 P. 589; Funkenstein v. Superior Court, 23 Cal.App. 663, 139 P. 101. Many other authorities could be cited in support of petitioners contentions.

In view of the foregoing it is unnecessary to consider other contentions raised in the petition.

In the many cases which have reviewed and considered orders made pursuant to section 1000, Code of Civil Procedure and subpoenas duces tecum issued under section 1985, Code of Civil Procedure, are found the same basic principle underlying proceedings under both sections. In the case of McClatchy Newsp. v. Superior Court, supra, it will be noted that the court after discussing proceedings under section 1000, Code of Civil Procedure, states that the principles discussed apply with equal force to an attempt by subpoena duces tecum to inspect papers and documents in the hands of the opposing party.

[4] Because of this similarity it is important to note whether the ruling in Lockheed Aircraft Corp. v. Superior Court, 28 Cal.2d 481, 171 P.2d 21, 166 A.L.R. 701, would be applicable. The court said, 28 Cal.2d at page 487, 171 P.2d at page 25 that a writ of prohibition "cannot be used to prevent the enforcement of a subpoena duces tecum on the ground the affidavit is defective" citing C. S. Smith Metropolitan Market Co. v. Superior Court, 16 Cal.2d 226, 105 P.2d 587. Therefore, while a writ of prohibition could not properly issue in this case it would in no way prejudice the rights of any party in interest and would serve the ends of justice to consider the application to be, in effect, a petition for a writ of mandate, ordering the court below to vacate and set aside the minute order of March 4, 1953, and the written order of March 6, 1953, quoted above, which embodied the said minute order.

It is ordered that a peremptory writ of mandate issue directing respondent Superior Court to vacate and set aside its minute order of March 4, 1953, and its written order of March 6, 1953, referred to in the foregoing opinion.

WHITE, P. J., and DRAPEAU, J., concur.

119 Cal.App.2d 614

STALLINGS v. FOSTER et al.

Civ. 8203.

District Court of Appeal, Third District, California.

Aug. 10, 1953.

As Modified on Denial of Rehearing Sept. 4, 1953.

Action for damages which resulted when plaintiff was arrested, confined, tried, and acquitted, on criminal charge made by defendants. The Superior Court, Nevada County, entered judgment from which defendants appealed. The District Court of Appeal, Schottky, J., held that cause of action which did not allege that the arrest or detention was unlawful, or that the arrest was made without valid warrant or legal process, did not state a cause of action for unlawful imprisonment, and findings in accordance with such allegations could not support judgment for damages for false imprisonment.

Reversed and remanded with directions.

1. False Imprisonment ⚿2, 4
Malicious Prosecution ⚿55

The elements of malice and lack of probable cause are not necessary to a proper cause of action for false arrest, but such elements must be alleged and proved in an action for malicious prosecution.

2. Malicious Prosecution ⚿16

Generally, when one maliciously, and without reasonable or probable cause, institutes or prosecutes, in a court having jurisdiction of the matter, a judicial proceeding against another, the proceeding, when terminated in favor of the defendant, furnishes the basis for an action for malicious prosecution.

3. False Imprisonment ⚿3

The distinction between malicious prosecution and false imprisonment is that in the former the detention is malicious but under the due forms of law, whereas in the latter, the detention is without color of legal authority.

4. False Imprisonment ⚿20(1)

Allegations that a defendant, at the order of a second defendant, swore to a criminal complaint charging plaintiff with petty theft, that plaintiff was arrested and confined in jail, and that plaintiff was acquitted on trial of such charge, and suffered damages thereby, without an allegation that the arrest or detention was unlawful, or that arrest was made without valid warrant or legal process, did not state a cause of action for false imprisonment.

5. Appeal and Error ⚿1176(5)

Where plaintiff who had been arrested, tried, and acquitted on criminal charge filed by defendants, brought action for damages and alleged two causes of action, and first cause of action did not allege the requisite elements of false imprisonment, but requisite elements were contained in second cause, and trial court erroneously awarded damages under first cause for false imprisonment, but denied damages under second cause, judgment would be reversed and case remanded to permit trial court to harmonize findings and enter new judgment in accordance therewith.

◆

Frank G. Finnegan, Sacramento, for appellants.

Albert L. Johnson, Nevada City, for respondent.

SCHOTTKY, Justice.

Plaintiff filed an action for damages against defendants. The amended complaint was in two causes of action.

The first cause of action alleged, in substance, that defendant Cardinal Grocery Stores, a corporation, operated a grocery store in Nevada City and that defendant Foster was the manager and defendant Aaron was the assistant manager of the store; that on January 7, 1950, defendant Aaron, at the behest of defendant Foster, swore to criminal complaint charging the plaintiff with the crime of petty theft in that he had unlawfully taken a bottle of whisky from said store; that plaintiff was arrested and taken into custody upon said charge and held in jail overnight for about twenty hours until released on bail; that plaintiff was brought to trial upon said charge but was acquitted because he proved he bought the liquor elsewhere; that plaintiff's health and reputation were damaged and that he was compelled to expend $200 to defend himself against said charge; that defendants acted maliciously.

The second cause of action alleged, in substance, that while plaintiff was walking along the street on January 7, 1950, defendants seized him, accused him of theft, called an officer, causing his arrest; that plaintiff was forcibly taken by the officer against his will and charged by defendants with larceny, whereupon he was imprisoned and detained in jail for more than twenty hours until released on bail; that the charge of larceny was false and that plaintiff did not commit any crime against the property of defendants and was innocent of any charge made against him which made him subject to arrest or imprisonment; that in the making of said charge and causing said imprisonment, defendants acted with deliberate and premeditated malice; that plaintiff has been damaged in the sum of $10,200.00 actual damages, and is also entitled to punitive or exemplary damages.

Defendants filed an answer denying the material allegations of the amended complaint and set up a separate defense in which they alleged that defendant Foster saw plaintiff pilfer a bottle of Old Stagg whisky from the open counter in said store on which it was displayed and put the said bottle in his shirt; that the said defendant Dolan V. Foster informed defendant Harold W. Aaron that he had seen plaintiff pilfer said whisky, and said Harold W. Aaron intercepted said plaintiff after he had proceeded about 25 or 30 feet on the sidewalk after he had left said store with said bottle of whisky; that plaintiff made no objection to accompanying defendant Harold W. Aaron back to said store; that at said time and place plaintiff said: "I don't know why I did it; this is the first time I ever did anything like this," and offered some money to pay for the said whisky to said Harold W. Aaron and also offered the money to Dolan V. Foster and other persons standing near. That thereupon plaintiff was turned over to a police officer who had been summoned in the meantime; that until plaintiff was turned over to the police officer as aforesaid, no other force than herein set out was used.

The action was tried by the judge sitting without a jury, and sharply conflicting testimony was given by numerous witnesses. The plaintiff and two witnesses testified that plaintiff had purchased the questioned bottle of Old Stagg in a liquor store near the defendant store. Also, that plaintiff received a sales slip therefor (which is in evidence), and that the bottle was not wrapped, rather that plaintiff had placed it inside his jacket. Then plaintiff, by his testimony, proceeded from the liquor store across the street to the defendant store, where he purchased some groceries, but no liquor, he all this time carrying the unwrapped bottle inside his jacket, which bottle slipped from it from time to time; that after making the grocery purchases plaintiff left the store, only to be stopped by defendant Aaron and taken by him back to the store where plaintiff was relieved of his bottle and an officer summoned.

Mrs. Underwood, a witness for defendants, testified that she saw plaintiff standing in front of the Old Stagg liquor display in defendant store, staggering and weaving around, and that she also saw a bottle of Old Stagg in his hand, which he placed inside his jacket or shirt; that she related this to defendant Aaron, then assistant manager of defendant store.

Defendant Foster, manager of defendant store, testified that he was in a little cubbyhole in the store watching plaintiff through a one-way mirror, and that he saw plaintiff take a bottle of Old Stagg from the display shelf and put it under his coat. Defendant Foster also testified that no bottles had been sold from the display, and that one was missing after plaintiff left the store. After talking with defendant Aaron about what he saw, and Aaron telling him what Mrs. Underwood had related, defendant Foster summoned an officer, while defendant Aaron apprehended plaintiff and returned him him to the store. Defendant Aaron and witness Hilpert testified that upon returning the plaintiff to the store, the bottle was taken from inside plaintiff's coat, and that plaintiff offered to pay for it then, stating something to the effect that "that was the first time he had ever done anything like that." Plaintiff denied making such a statement.

According to the testimony of defendant Foster the police officer asked him what he was going to do and Foster replied that he was going to have plaintiff arrested, and turned him over to the police officer who took plaintiff to the police station. Plaintiff was locked up and remained in jail until 11:00 o'clock the next morning at which time defendant Aaron swore to a complaint charging plaintiff with petty theft, and plaintiff, who was already in custody, was then released on $50 bail. Two jury trials were had on the charge of petty theft, the first resulting in a disagreement and the second in an acquittal.

The court found that all of the allegations of the first cause of action except paragraph VI, which alleged that defendants acted maliciously, were true and that all of the allegations of the second cause of action were untrue. The court found further that "the arrest, imprisonment and prosecution of plaintiff as alleged in the complaint on file herein has caused plaintiff great physical inconvenience and discomfort, loss of time, mental suffering, humiliation of mind, shame, public ridicule, invidious publicity, and public disgrace to his loss and damage in the sum of Five Hundred ($500.00) Dollars." The court also found "that all of the allegations of defendants' answer that are inconsistent with these findings are untrue."

Judgment was entered awarding plaintiff damages in the sum of $500, and that "the plaintiff be denied any exemplary or punitive damages from the defendants in this action, or any damages for malicious prosecution, alleged in his second cause of action." Defendants have appealed from said judgment.

For reversal of the judgment appellants make the following contentions: 1. It was error to give judgment for malicious prosecution without finding lack of probable cause; 2. A judgment for malicious prosecution cannot stand unless malice is alleged and proved; 3. The first cause of action was one for malicious prosecution, and the second cause of action one for false arrest, and that the findings were against the second cause of action.

Respondent in reply contends that: 1. The judgment was based upon the first cause of action which was for false arrest, and against the second cause of action which was for malicious prosecution; 2. Therefore, appellants' first two contentions have no application; 3. The judgment and findings must be affirmed since there is substantial evidence to support them.

[1, 2] It is at once apparent that the parties are not in agreement either as to the effect of the allegations of the complaint or as to the nature of the judgment, because appellants insist that the judgment was for malicious prosecution and respondent asserts that it was for false arrest. It is therefore necessary to analyze the allegations of the amended complaint, because if the first cause of action was one for false arrest, as contended by respondent, appellants' contentions would have no application, the elements of malice and lack of probable cause not being necessary to a proper cause of action for false arrest. On the other hand, if the first cause of action is one for malicious prosecution, then there would be merit in appellant's contentions because the elements of malice and lack of probable cause must be alleged and proved in an action for malicious prosecution. The elements of a cause of action for malicious prosecution are set forth in 16 Cal.Jur., Malicious Prosecution, section 2:

> "The rule is general that when one maliciously, and without reasonable or probable cause, institutes or prosecutes, in a court having jurisdiction of the matter, a judicial proceeding against another, the proceeding, when terminated in favor of the defendant, furnishes the basis for an action for malicious prosecution."

[3] It being clear that respondent in his first cause of action did not allege a good cause of action for malicious prosecution, we shall next consider whether he pleaded and proved a cause of action for false arrest in the first cause of action. False imprisonment is defined by the Penal Code, § 236, as "the unlawful violation of the personal liberty of another." The definition is the same in both criminal and civil cases. Dillon v. Haskell, 78 Cal.App.2d 814, 178 P.2d 462. See, also, 12 Cal.Jur., False Imprisonment, section 2. Prosser, section 12, defines false imprisonment as "the confinement of the plaintiff within boundaries fixed by the defendant, without legal justification, by an act or the breach of a duty intended to result in such confinement." The distinction between malicious prosecution and false imprisonment is an important one, and is stated to be that "in malicious prosecution the detention is malicious but under the due forms of law, whereas in false imprisonment the detention is without color of legal authority." 35 C.J.S., False Imprisonment, § 4.

The first cause of action alleged that defendant Aaron at the order of his superior, defendant Foster, swore to a criminal complaint charging plaintiff with petty theft of a bottle of liquor from defendant store, and that plaintiff was arrested and taken into custody upon said charge and held in jail overnight for a period of approximately 24 hours, until released on bail, and that plaintiff at the trial upon said charge was acquitted, he having proved that he purchased the liquor in another store, and then finally alleged damages.

[4] We conclude that the first cause of action did not state facts constituting a cause of action for false arrest, for while the swearing out of the complaint, the arrest and detention and the damages flowing therefrom are set out, it is not alleged that the arrest or detention was unlawful, nor is it alleged that the arrest was made without valid warrant or legal process, and as stated in Dillon v. Haskell, supra, 78 Cal.App.2d at page 816, 178 P.2d at page 463, "A complaint for unlawful imprisonment which fails to allege facts under which the arrest would be unlawful is insufficient."

[5] The second cause of action, hereinbefore summarized, does allege facts sufficient to constitute a cause of action for false arrest, or false imprisonment, and the record would support findings in accordance with the allegations of the second cause of action. But the court specifically found that the allegations of the second cause of action were untrue and also found that the allegations of the first cause of action were true except as to the allegation as to malice which was found to be untrue. There are, therefore, no findings to justify a judgment either for false arrest or malicious prosecution, and it is stated in the judgment itself that plaintiff should be denied any damages for malicious prosecution (which the judgment erroneously states to have been alleged in the second cause of action).

It is evident that in the preparation of findings and judgment the pleadings were not carefully analyzed and the two alleged causes of action were confused. It may well be that the court intended to award respondent a judgment of $500 for false arrest, but the findings as signed and filed will not support such judgment. Under such circumstances we must reverse the judgment, but feel that we should remand the cause with directions to the trial court to harmonize the findings and enter a new judgment in accordance therewith. As stated in 4 Cal.Jur.2d, Appeal and Error, section 670:

> "Likewise, it is appropriate to reverse and remand a judgment based on inconsistent findings, with directions to harmonize the findings and enter a new judgment in accordance therewith."

The case was thoroughly tried and it is unnecessary to take further evidence.

The judgment is reversed with directions to the trial court to harmonize the findings and to enter judgment in accordance therewith. Each party to bear his own costs on appeal.

VAN DYKE, P. J., and PEEK, J., concur.

---

119 Cal.App.2d 497

SANDERS et al. v. MacFARLANE'S CANDIES.

Civ. 15455.

District Court of Appeal, First District, Division 2, California.

Aug. 4, 1953.

As Amended on Denial of Rehearing Sept. 3, 1953.

Hearing Denied Oct. 1, 1953.

Action by husband and wife for personal injuries sustained by wife as a result of a fall on floor in defendant's store. The Superior Court, Santa Clara County, entered judgment of nonsuit and plaintiffs appealed. The District Court of Appeal, Nourse, P. J., held that there was sufficient evidence to show that the floor had been waxed in manner not safe for defendant's invitees and that plaintiff fell because of the unsafe condition.

Judgment reversed.

1. Trial 🔑142

If inferences which can reasonably and fairly be deduced from the evidence can sustain allegations of plaintiff it is error to grant nonsuit.

2. Trial ⚷142

Whether a particular inference can be drawn from certain evidence is a question of law, but whether the inference shall be drawn, in any given case, is a question of fact for the jury.

3. Evidence ⚷54

An inference cannot be based on mere possibilities but must be based on probabilities, and in civil cases the rule of decision is a rule of probability only.

4. Evidence ⚷587

Where plaintiff relies on circumstantial evidence to sustain his cause of action, he does not have to exclude possibility of every other reasonable inference possibly derivable from facts proved.

5. Negligence ⚷121(2)

Where plaintiff fell in defendant's store, no inference of negligence arose upon proof of fall.

6. Negligence ⚷136(22, 25)

In action by dancing teacher accustomed to polished floors, for injuries sustained in fall on defendant's floor on Monday, whether defendant's janitor who ordinarily took care of floor on week-ends and was supplied by defendant with wax and mop, waxed floor during week-end preceding accident and left excess wax where plaintiff fell, and whether plaintiff slipped because of the surplus wax were questions for jury.

7. Negligence ⚷44

Storekeepers have a duty to use ordinary care to keep floors of their premises safe for business invitees and if storekeeper has floor waxed or polished it must be done in such a manner that it remains safe for invitees.

8. Negligence ⚷48

When an unsafe condition in premises causes injury to business invitee, and has been created by owner of property or by employee within scope of his employment, knowledge of dangerous condition is imputed to owner and invitee need not prove owner's notice or knowledge of it.

Bohnett, Hill, Cottrell & Bohnett, San Jose, for appellants.

Campbell, Hayes, & Custer, San Jose, W. R. Dunn, Burlingame, for respondents.

NOURSE, Presiding Justice.

Plaintiffs, husband and wife, brought action for serious personal injuries suffered by the wife as the result of a fall in defendant's store in San Jose. Plaintiff in singular will hereafter refer to the wife. The cause was tried before a jury. Plaintiffs appeal from judgment of nonsuit entered at the close of their case. The only question presented is whether their evidence was sufficient to go to the jury.

Plaintiff's evidence supporting the action was in substance as follows:

Before the accident plaintiff was a dancing teacher, teaching ballet, tap, acrobatic dancing, et cetera. In the afternoon of May 16, 1949, she entered the store with her mother. She observed the floor. It was polished. "* * * the floor looked very shiny and pretty, and I remarked that the—the floor looked very lovely. Looks almost oily, I said, it was so shiny." The floor was of a material similar to linoleum or asphalt tile. She asked a salesgirl for a certain kind of candy, of which she did not know the name but which she described. When the girl went to the rear of the store to get it, plaintiff followed her at the outside of the counter, walking along the middle of a wide aisleway to see whether the girl was getting the particular kind of candy plaintiff wanted. The floor appeared clean and she had no difficulty in walking on it. As a dancing teacher and dancer, she was accustomed to polished floors. When she had walked approximately half the depth of the store, where the salesgirl was getting the candy from behind the counter plaintiff turned and took a couple of steps toward the counter to see what kind of candy the girl was getting. When plaintiff was very close to the counter, right in front of it, both her feet at once went out from under her, "both feet at once just zipped" and she landed on the floor on her left hip, facing the counter. (She was later found to have fractured the neck of her left femur in the fall.) She was momentarily dazed but turned around pushing with her hands on the floor until she sat with her back leaning against the counter. She sat there a few minutes trying to regain her composure. When she was sitting there she put her hands down on each side of her to hold herself and as she did so her "hands sort of stuck to the floor" right next to the counter. It was apparently very waxy, sticky, and she could feel it on her fingers. A saleslady came from behind the counter and took her name and address and asked whether she was hurt. While the saleslady was with her she heard a thump; she looked and saw to the front of the store a girl on the floor. The saleslady also looked up and said, "My goodness. There goes another one." Plaintiff did not remember details of the girl's fall; she herself was still in a daze on the floor. When she sat there she did not see any foreign objects on the floor. She had not turned her ankle when she fell. She was wearing very stable sport shoes.

The manager of defendant's San Jose store testified under section 2055, Code of Civil Procedure, that she did not know whether prior to the accident floor wax had been applied to the floor of the store. The janitor came in at night and took care of that. She did not know what was done with the floor. The janitor came once a week on the week-end. She believed he used to come in Sunday nights. Supplies for the janitor were kept in back of the store. Among them was liquid wax in gallon bottles and a mop. There was liquid wax in the storeroom at the closing of the store on Saturday evening preceding the accident (which happened on a Monday). She did not check on Monday to see whether any wax had been used. The janitor, who at the time of the accident worked for defendant, left for the East with his family more than a year before the trial. (He was not heard as a witness.)

Appellant contends that from the above evidence a jury was entitled to draw the inferences that defendant's janitor waxed the floor of the store during the week-end preceding the accident and left excess wax near the base of the counter and that plaintiff slipped because of that surplus wax; therefore the case should have gone to the jury. Respondent contends that the evidence did not permit any inference that it was the janitor who put any wax or a surplus of wax on the floor, or that he did so negligently, or that defendant had or should have had knowledge of the presence of the wax.

[1–4] The position of appellant must be sustained. The parties agree and the rule is too well settled to require citation of authority that if inferences which can reasonably and fairly be deduced from the evidence can sustain the allegations of plaintiff it is error to grant a nonsuit. "Whether a particular inference can be drawn from certain evidence is a question of law, but whether the inference shall be drawn, in any given case, is a question of fact for the jury." Blank v. Coffin, 20 Cal.2d 457, 461, 126 P.2d 868, 870. An inference cannot be based on mere possibilities; it has been held that it must be based on probabilities. 32 C.J.S., Evidence, § 1044, pages 1132, 1133; Gardner v. Seymour, 27 Wash. 2d 802, 180 P.2d 564, 569; Kentwood Lumber Co. v. Illinois Cent. R. Co., 5 Cir., 65 F.2d 663, 665. This accords with the general principle, enunciated more than once by this court that in civil cases the rule of decision is a rule of probability only. Spolter v. Four-Wheel Brake Service Co., 99 Cal.App.2d 690, 693, 222 P.2d 307; Wirz v. Wirz, 96 Cal.App.2d 171, 175, 214 P.2d 839, 15 A.L.R.2d 1129. "It is not necessary, in order to establish a theory by circumstantial evidence, that the facts be such and so related to each other that such theory is the *only* conclusion that can fairly or reasonably be drawn therefrom * * *." Katenkamp v. Union Realty Co., 36 Cal.App.2d 602, 617, 98 P.2d 239, 246. The plaintiff relying on circumstantial evidence does not have to exclude the possibility of every other reasonable inference possibly derivable from the facts proved. Vaccarezza v. Sanguinetti, 71 Cal.App.2d 687, 692, 163 P.2d 470; Spolter v. Four-Wheel Brake Service Co., supra, 99 Cal.App.2d at page 694, 222 P.2d 307.

[5, 6] It is true, as urged by respondent, that no inference of negligence arises upon proof of only a fall on defendant's floor. Vaughn v. Montgomery Ward &

Co., 95 Cal.App.2d 553, 556, 213 P.2d 417. However here there is moreover evidence that the victim was a dancing teacher accustomed to polished floors and wearing very stable sport shoes; that she had no difficulty walking over the floor of the store which was conspicuously shiny and polished, but that when she stood very close to the counter her feet suddenly slipped from under her; that near to the counter the floor was so sticky and waxy that she could feel the wax on her hands and that they to some extent stuck to the floor; that she did not see any foreign object on which she could have slipped and that the fall was not caused by her turning an ankle. From these facts a jury could conclude that it was probable that plaintiff's fall was caused by slipping on excess wax near the base of the counter. Moreover from the conspicuously shiny and polished look of the floor, together with the facts that the accident happened on a Monday whereas the janitor of defendant used to take care of the floor on the week-end, probably on Sunday evening, and that the janitor was supplied by defendant with liquid wax and a mop, the jury could conclude that it was probable that defendant's janitor had left the surplus wax on which plaintiff slipped when he polished the floor during the preceding week-end. The possibility suggested by respondent, that the floor might have been waxed by an independent contractor making a special profession of such work finds no support whatever in the evidence and under the rules previously stated need not be excluded by plaintiff's evidence to make a prima facie case.

[7, 8] Storekeepers are under duty to use ordinary care to keep the floors of their premises reasonably safe for the business invitees who must pass over them. Tuttle v. Crawford, 8 Cal.2d 126, 130, 63 P. 2d 1128. If a storekeeper has a floor waxed or polished it must be done in such a manner that it remains reasonably safe for his invitees. Nicola v. Pacific Gas & Electric Co., 50 Cal.App.2d 612, 615, 123 P.2d 529; Lorenz v. Santa Monica, etc., School Dist., 51 Cal.App.2d 393, 399, 124 P.2d 846. When an unsafe condition which causes injury to an invitee has been created by the owner of the property himself or by an employee within the scope of his employment, the invitee need not prove the owner's notice or knowledge of the dangerous condition; the knowledge is imputed to the owner. Hatfield v. Levy Brothers, 18 Cal.2d 798, 806, 17 P.2d 841. In Sharpless v. Pantages, 178 Cal. 122, 172 P. 384, the evidence showed that plaintiff slipped because of the loose condition of a strip of carpet on which she stepped. A motion for nonsuit was denied. The Supreme Court said, 178 Cal. at page 124, 172 P. at page 385: "It being the duty of the defendant to use ordinary care to maintain the carpet upon the steps in such condition that it would be safe for persons to pass thereon in an ordinary manner, the fact that the plaintiff's foot slipped as she stepped upon the carpet is some evidence tending to show that defendant had failed to do so and it is sufficient to sustain the decision upon the motion for a nonsuit." We hold that here also there is sufficient evidence tending to show that the floor had been waxed in a manner not reasonably safe for defendant's invitees, that plaintiff fell because of said unsafe condition and that defendant was responsible for it.

Respondent relies mainly on McKellar v. Pendergast, 68 Cal.App.2d 485, 156 P.2d 950 and Owen v. Beauchamp, 66 Cal.App. 2d 750, 152 P.2d 756, for the contention that the evidence was insufficient as a matter of law. The McKellar case is not in point. The plaintiff slipped on some spots of oily substance on the lobby floor of an apartment house; she contended they were garbage drippings, negligently dropped by the janitor, but there was no evidence identifying the substance as garbage drippings; the District Court held that any other person could have left the drops of unknown oily substance as well as the janitor. The Owen case is nearer to the one before us. There the plaintiff slipped in a dentist's office on some dental wax of the same kind as used by the defendant dentist. The District Court affirmed a judgment on a directed verdict for defendant saying that the wax could have been imported by another invitee or by an employee of respondent one minute before plaintiff fell, without the knowledge of defendant. It may be doubted whether the fact that the material on which plaintiff slipped was identified as dental wax as used by defendant did not reasonably and fairly permit an inference of probability that the wax was dropped by defendant or by an employee within the scope of his employment. (There was a dissent in the District Court and two justices voted for hearing in the Supreme Court). However even if the decision were correct, each case of this kind must be judged on its own facts, Ahern v. S. H. Kress & Co., 97 Cal.App.2d 691, 698, 218 P.2d 108, and the probabilities as to dental wax dropped in a dental office need not be the same as those with respect to excess floor wax found applied to part of the floor of a store. As said before, the evidence in this case can be held to show the probability that the wax on which plaintiff slipped was left by a janitor for whose acts defendant is responsible.

Judgment reversed.

DOOLING, J., concurs.

* * *

119 Cal.App.2d 574

In re TAYLOR'S ESTATE.

BLACK v. TAYLOR.

Civ. 19630.

District Court of Appeal, Second District, Division 3, California.

Aug. 7, 1953.

Rehearing Denied Sept. 1, 1953.

Hearing Denied Oct. 1, 1953.

Proceeding by alleged legatee to have letter entirely written, dated, and signed by deceased admitted to probate wherein aunt of deceased filed opposition. The Superior Court, Los Angeles County, Newcomb Condee, J., admitted instrument to probate and aunt appealed. The District Court of Appeal, Vallée, J., held that words "in case *Davie Jones* gets me out in the South Pacific ocean" in will of testator who was about to embark on a hazardous voyage during wartime were intended as explanation as to why he made his will at that time and did not set up a condition precedent to operation of the will.

Affirmed.

1. Wills 🔑72

One of requisites of valid will is that it must appear that the writing was executed with testamentary intent.

2. Wills 🔑72

No particular words are necessary to show a testamentary intent but it must appear that maker intended by instrument to dispose of property after his death.

3. Wills 🔑93

When words, which may be construed as testamentary, are used in an informal document, such as a letter, and it is not entirely clear that the writer intends thereby to dispose of his property at his death, extrinsic evidence may be considered in determining such intent.

4. Wills 🔑72

Letter which was entirely written, dated and signed by individual who was about to embark on a hazardous, dangerous voyage during wartime and who was contemplating death and which made a complete disposition of his bonds, cash in the bank, and back pay, apparently his entire estate, leaving it to a friend, was testamentary in character.

5. Wills 🔑93

In proceedings by legatee to probate letter entirely written, dated and signed by alleged testator, evidence established that letter admitted to probate was the paper to which testator had referred as his will in his conversations with legatee.

6. Wills 🔑80

Test for determining whether will is conditional is whether testator intended by language used to make happening of possibility referred to a condition precedent to operation of will, in which case the instrument is not entitled to probate if condition is not fulfilled, or whether testator stated possibility of happening merely as motive or reason which led to making of instrument. Probate Code, §§ 24, 142.

7. Wills ⚿80

In order to require denial of admission of writing to probate on ground that death of testator did not occur in circumstances contemplated by him, writing must contain language which fairly indicates a purpose to limit its operation.

8. Wills ⚿80

Language of will should be held to be mere inducement to testator's making will and not condition precedent to operation of will, if that construction is fairly permissible.

9. Wills ⚿80

A condition precedent to operation of will will not be implied from indefinite language.

10. Wills ⚿80

Particularly in case of those in military or naval service, who are liable to sudden peril and whose informal wills receive high favor at hands of court, language expressive of special apprehension as inducement to making of will is not readily construed into a positive condition.

11. Wills ⚿448

Fact that testator left a will implies he did not intend to die intestate.

12. Wills ⚿93

All surrounding circumstances, including preservation of document after apparent condition has failed and instructions to take care of it, should be considered in determining whether testator regarded contingency as relating to motive inducing making of will rather than as condition to its becoming operative.

13. Wills ⚿93

Delivery of will by testator to someone for preservation is some evidence that testator intended will to be unconditional.

14. Wills ⚿93

Parol evidence, including declarations of testator, are admissible to show that his intention was to make an absolute, and not a conditional, will.

15. Wills ⚿80

A subsequent desire that a will, once conditional, should become absolute, is ineffective without re-execution or republication of the will.

16. Wills ⚿80

Words "in case *Davie Jones* gets me out in the South Pacific ocean" in will of testator who was about to embark on hazardous voyage during wartime were intended as explanation as to why he made his will at that time and did not constitute a condition precedent to operation of will in view of extrinsic evidence that testator delivered will to someone else for preservation, that testator preserved will until his death eight years later, and that testator made declarations, after his return, about will to legatee.

G. G. Baumen, Los Angeles, for appellant.

Bordon & Bordon, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal from a judgment admitting an instrument to probate as the will of the decedent after a contest tried by the court without a jury.

The decedent, Clark E. Taylor, died March 10, 1952. The instrument is entirely in his handwriting, dated and signed by him. The contest was on the grounds the instrument is not testamentary in character, and if it is that it is conditional. It is in the form of a letter and reads:

> "Heumenie Calif.
> [Hueneme]
> "Acorn Unit 33.
> "1-3-44—
>
> "Dear. A. K. Lindsay
>
> "Sorry I did not get to see you during Xmas But we were ordered back here to S.F. & then we sail from here for the above address on the 8th how long we will be down there your guess is as good as mine
>
> "Anyway what I wanted most of all to see you about was getting a new bank book remember I told you about me loosing mine also ~~about~~ in case *Da-*

vie Jones gets me out in the South Pacific ocean in other words lost at Sea I would very much like to turn my Bonds & cash in the bank also the pay I will have coming in the navy over to

Betty Black
1935 W. 23rd St.
Los Angeles Calif.
Phone ParKway 3703.

"Her Mother & Father are

Mr & Mrs Ted Luschen
Same address.

"Thanking you very much for all your past favors & this one if it should have to happen

"Sincerely,

"Clark E. Taylor

"*over*

"My Bank account is

C. E. Taylor.
5929 So Main St.
L. A. Calif."

On the trial of the contest, the evidence consisted of the instrument and the testimony of Betty Black received without objection. Betty testified: she was not related to the decedent; she had known him 24 years; she took Mr. Taylor to Port Hueneme in the latter part of 1943 at a time when he was gettting ready to go overseas; "[a]t the time of his departure he said in the event anything would happen to him, he was sending a paper, which I took to be the will, to Mr. Lindsay, and in case anything happened to him, that I should contact Mr. Lindsay"; the instrument was in Mr. Lindsay's possession, not in hers, from the time it was mailed by Mr. Taylor to Mr. Lindsay; she did not see Mr. Lindsay between January 3, 1944, and the date of Mr. Taylor's death; in the latter part of 1945 or 1946 Mr. Taylor was out of the military service; after he got out of the service he lived with her parents, her husband and herself, in Compton; the five of them lived together in the same house; he lived there about seven months; on one occasion, during that time, at dinner Mr. Taylor mentioned "Mr. Lindsay had this paper that he had mailed to him, and was still holding it"; "when he finally found an apartment of his own, he again mentioned in case we didn't see each other again, or if anything should happen to him, that I should contact Mr. Lindsay"; in 1948 she moved to Inglewood; Mr. Taylor was living there at that time; from 1948 into 1950 he had dinner with them several times a week; on the day of his death he called on her to deliver a birthday gift and died at her home; some time after 1948 he referred to the instrument as his will; he had had a "bad accident on his way to Las Vegas, and he was leaving again for Las Vegas, and at that time he mentioned again, 'Well, if I should turn over again and something happens, be sure you get in touch with Mr. Lindsay about this paper, this will.' "; after Mr. Taylor's death Mr. Lindsay got in touch with her and told her about this instrument.

After the death of Taylor, Lindsay filed the instrument with the county clerk. Betty Black petitioned for its admission to probate. Lottie Taylor, an aunt, filed the contest. She appeals from the judgment admitting the instrument to probate as the will of the decedent.

Appellant makes the same contentions here as she made below: (1) The instrument is not testamentary in character; (2) If it is testamentary in character, it is conditional.

[1] One of the requisites of a valid will is that it must appear the writing was executed with testamentary intent.[1] There is no definite, fixed rule by which testamentary intent may be gauged. Cases may be cited in which papers offered for probate were established as wills in which the testamentary intent was less apparent than is the intent shown by Taylor's letter; no useful purpose would be served by citing or analyzing them as each case must stand on its own peculiar facts.

[2, 3] No particular words are necessary to show a testamentary intent. It must appear only that the maker intended

---

[1] In re Estate of Button, 209 Cal. 325, 331, 287 P. 964; In re Estate of Spitzer, 196 Cal. 301, 306, 237 P. 739.

by the instrument to dispose of property after his death. When words which may be construed as testamentary are used in an informal document such as a letter, and it is not entirely clear that the writer intends thereby to dispose of his property at his death, extrinsic evidence may be considered in determining such intent.[2] Language similar to that used by Taylor has been held to be dispositive where the character of the document and the surrounding circumstances have indicated a testamentary intent.[3]

[4] We think it plain on the face of the letter, that it is testamentary in character. Taylor was about to embark on a hazardous, dangerous voyage during the war. He was contemplating death. His thought was upon the disposition he was about to make of his property. The letter makes a complete disposition of his bonds, cash in the bank and back pay,—apparently his entire estate. Considering Taylor's friendship for Betty Black, the circumstances surrounding his act, and his declarations after the war, it seems clear he intended that in the event of his death the letter would direct the distribution of the property specified therein to Betty Black. The facts seem to exclude any other inference. The words "I would very much like to turn my Bonds * * * over to Betty Black" may be construed as words of gift, as direct and certain as if Taylor had written, "I bequeath to Betty Black my Bonds. * * *" They practically have the same significance to a layman as specific words of gift.

[5] It is argued that there was no evidence to identify the letter admitted to probate as the paper to which Taylor referred in his conversations with Betty Black. Shortly before he wrote the letter, he told Betty he was sending a paper to Lindsay, a will, and that if anything happened to him she should contact Lindsay. After he left the service he told her Lindsay was still holding the paper; and later, after he had had a "bad accident," that if "something happens" to be sure and get in touch with Lindsay about "this paper, this will." After Taylor died, Lindsay got in touch with Betty, told her about this "instrument," and filed it with the county clerk. It may be inferred from this evidence that the letter admitted to probate is the letter to which Taylor referred in his conversations with Betty.

Appellant contends that if it be held that the letter is testamentary in character, its effectiveness was conditioned on Taylor's not returning from a sea voyage; and he, having returned, the condition was not fulfilled and the disposition did not take effect.

Probate Code, section 24, reads: "A will, the validity of which is made conditional by its own terms, shall be granted or denied probate, or denied effect after probate, in conformity with the condition." A condition precedent in a will is one which is required to be fulfilled before a particular disposition takes effect.[4]

[6] The test for determining whether a will is conditional is generally stated in this fashion: Did the testator intend, by the language used, to make the happening of the possibility referred to a condition precedent to the operation of the will, in which case the instrument is not entitled to probate if the condition is not fulfilled; or did he state the possibility of the happening merely as the motive or reason which led to the making of the instrument and which was carelessly stated in language suggestive of a condition, in which case the will becomes operative on the testator's death even if the event, the possibility of which appears to have induced the will, has not taken place?[5] One may,

---

[2] In re Estate of Golder, 31 Cal.2d 848, 850, 193 P.2d 465; Estate of Beffa, 54 Cal.App. 186, 188, 201 P. 616.

[3] In re Estate of Cook, 173 Cal. 465, 467, 160 P. 553. See also Barber v. Barber, 368 Ill. 215, 13 N.E.2d 257, 260–261.

[4] Prob.Code, § 142.

[5] Damon v. Damon, 90 Mass. 192, 8 Allen 192; Skipwith v. Cabell's Ex'or, 19 Grat. 758, 60 Va. 758, 782; Barber v. Barber, 368 Ill. 215, 13 N.E.2d 257, 261; McMerriman v. Schiel, 108 Ohio St. 334, 140 N. E. 600, 602; In re Forquer's Estate, 216 Pa. 331, 66 A. 92, 93, 8 Ann.Cas. 1146; Ferguson v. Ferguson, 121 Tex. 119, 45

by way of narrative, state a contingency he has in mind as the inducement for making his will, or he may, on the contrary, state it as the condition on which the will is to become operative.

[7–15] In order to require a denial of admission to probate on the ground that death did not occur in circumstances contemplated by the decedent, the writing must contain language which clearly indicates a purpose to limit its operation.[6] Courts will not regard a will as conditional when it reasonably can be held that the testator was merely expressing his inducement to make it, however inaccurate his use of language might be if strictly construed.[7] The language should be held to be mere inducement if that construction is fairly permissible.[8] A condition will not be implied from indefinite language.[9] Particularly in the case of those in the military or naval service, who are liable to sudden peril, and whose informal wills receive high favor at the hands of the courts, language expressive of special apprehension as inducement to a will is not readily construed into a positive condition.[10] A statement in a will which merely indicates the necessity of a will does not render it conditional.[11] The fact that the testator left a will implies he did not intend to die intestate.[12] All the surrounding circumstances, including the preservation of the document after the apparent condition has failed, and instructions to take care of it, should be considered in determining whether the testator regarded the contingency as relating to the motive inducing the making of the will rather than as a condition to its becoming operative.[13] Delivery of the will by the testator to someone for preservation is some evidence he intended the will to be unconditional.[14] Parol evidence, including declarations of the testator, is admissible to show that his intention was to make an absolute and not a conditional will.[15] In Estate of Vines, (1910) Prob. Div. 147, the court admitted evidence of declarations of the testator, made down to within a short time before he died, to the effect that the will in question was all right and that his wife would take all he had to leave. The fact that no will has subsequently been executed is itself favorable to the absolute character of the disputed

---

S.W.2d 1096, 1098, 79 A.L.R. 1163; In re Tinsley's Will, 187 Iowa 23, 174 N.W. 4, 7, 11 A.L.R. 826; 57 Am.Jur. 455, § 673; Annotation 11 A.L.R. 846; 79 A.L.R. 1168; 3 Mo.L.Rev. 83.

[6] See cases collected 11 A.L.R. 846; 79 A.L.R. 1168.

[7] Eaton v. Brown, 193 U.S. 411, 24 S.Ct. 487, 48 L.Ed. 730, 732; Likefield v. Likefield, 82 Ky. 589, 56 Am.Rep. 908; Watkins v. Watkins' Adm'r, 269 Ky. 246, 106 S.W.2d 975, 976–977; Barber v. Barber, 368 Ill. 215, 13 N.E.2d 257, 261; 57 Am. Jur. 454, § 672; 8 Ann.Cas.1150; 79 A.L.R. 1168.

[8] Ferguson v. Ferguson, 121 Tex. 119, 45 S.W.2d 1096, 1097–1098, 79 A.L.R. 1163; American Trust & Safe Deposit Co. v. Eckhardt, 331 Ill. 261, 162 N.E. 843, 845; Annotation 11 A.L.R. 846; 54 A.L.R. 933; 35 Mich.L.Rev. 1049, 1060.

[9] Cartwright v. Cartwright, 158 Ark. 278, 250 S.W. 11, 14.

[10] In the Goods of Spratt, 1897, Prob.Div. 28.

[11] Ferguson v. Ferguson, 121 Tex. 119, 45 S.W.2d 1096, 1098, 79 A.L.R. 1163.

[12] Ferguson v. Ferguson, 121 Tex. 119, 45 S.W.2d 1096, 1097, 79 A.L.R. 1163.

[13] In the Goods of Mayd, 6 Prob.Div. 17; Cody v. Conly, 27 Grat., Va., 313, 320; In re Davis' Estate, 275 Pa. 126, 131, 118 A. 645; In re Dowling's Estate, 16 Pa.Dist. & Co.R. 381, 385; French v. French, 14 W.Va. 458, 486–500; National Bank of Commerce v. Wehrle, 124 W.Va. 268, 20 S.E.2d 112, 115; Likefield v. Likefield, 82 Ky. 589, 56 Am.Rep. 908, 912; Watkins v. Watkins' Adm'r, 269 Ky. 246, 106 S.W.2d 975, 977; McMerriman v. Schiel, 108 Ohio St. 334, 140 N.E. 600, 601; Barber v. Barber, 368 Ill. 215, 13 N.E.2d 257, 261; Succession of Gurganus, 206 La. 1012, 20 So.2d 296, 299, 35 Mich.L.Rev. 1049, 1061.

[14] Likefield v. Likefield, 82 Ky. 589, 56 Am.Rep. 908.

[15] Barber v. Barber, 368 Ill. 215, 13 N.E. 2d 257, 261; Dowling's Estate, 16 Pa. Dist. & Co.R. 381, 385; Massie v. Griffin, 2 Metc. 364, 59 Ky. 364, 368; Likefield v. Likefield, 82 Ky. 589, 56 Am.Rep. 908; McMerriman v. Schiel, 108 Ohio St. 334, 140 N.E. 600; 68 C.J. 631, § 256; 35 Mich.L.Rev. 1049, 1060.

instrument.[16] Of course, a subsequent desire that a will once conditional should become absolute is ineffective without re-execution or republication of the will.[17]

The cases on the question of whether wills are conditional are numerous, and vary in results with the phraseology of each instrument.[18] The language in Strauss v. Schmidt, 3 Phil. 209, 161 Eng. Rep. 1304, was similar to Taylor's. The testator said "in case I should die on my travels." He returned home. The will was held unconditional, it being shown that he recognized the paper as his will shortly before his death. The wording of the will in Maxwell v. Maxwell, 3 Metc. 101, 60 Ky. 101, also was "in case I should die on my travels." The will was held unconditional.[19]

[16] Rarely is it to be supposed that a testator means that the will he leaves unrevoked at his death was only meant to operate if he died at some particular time. The meaning of what Taylor said is, "knowing the uncertainty of human life, and being about to enter on something particularly dangerous, I make this will." We thing the language of the instrument, when considered in the light of the surrounding circumstances together with Taylor's declarations after his return, is fairly susceptible of the construction that he was merely narrating an approaching event as an inducement for making the will. A fair inference is that his reference to "in case *Davie Jones* gets me out in the South Pacific ocean" was intended as an explanation why he made his will at that time, to be effective whenever he might die; unless, of course, he revoked it. Instead of revoking it, he had it preserved until his death eight years later. Taylor did not expressly limit the operation of the will to

---

16. 1 Schouler, Wills, Executors & Adm'rs. 6th ed. 490, § 414.

17. In re Tinsley's Will, 187 Iowa 23, 174 N.W. 4, 7, 11 A.L.R. 826; Annotation 8 Ann.Cas. 1150, 1152.

18. Illustrations of language held not to make the will conditional are: "On leaving this station for Thargomindah and Melbourne, in case of my death on the way." In the Goods of Mayd, 6 Prob. Div. 17; "In case of any fatal accident happening to me, being about to travel by railway." In the Goods of Dobson, L.R. 1 P. & D. 88; "If any thing should happen me while in India." Estate of Vines (1910) Prob.Div. 147; "If I do buy it [if I am killed]." Estate of Pawle, 34 Times Law Rep. 437; " 'I am writeing my Will if any thing Hapins to me Before I come Home' ". In re Moore's Estate, 332 Pa. 257, 2 A.2d 761, 762; " 'If enything happens to us on this trip that we shouldn't return' ". National Bank of Commerce v. Wehrle, 124 W.Va. 268, 20 S.E.2d 112, 115–116; "Should a misfortune befall me on my journeys and I thereby lose my life." In re Langer's Estate, 156 Misc. 440, 281 N.Y.S. 866, 868; "In case of accident I sign this my will." Bateman v. Pennington, 3 Moore P.C. 223, 13 Reprint 95; " 'I leave this as a memoranda of my wishes should anything happen to me during my intended trip' ". In re Redhead's Estate, 83 Miss. 141, 35 So. 761; "I am going away; I may never return. I leave my property to Gaines and Dan; dispose of it as you think fit." Cody v. Conly, 27 Grat. 313, 68 Va. 313, 314; "I am going on a Journey and may, not ever return. And if I do not, this is my last request." Eaton v. Brown, 193 U.S. 411, 412, 24 S.Ct. 487, 48 L.Ed. 730; "Whereas I am going to go on a journey to Mexico, and should I die, * * * my wife * * * is entitled to collect and draw all my outstanding monies." Re Rempel Estate, 32 Man. 126, 68 Dom.L. R. 677, 678; "If anything happens that the operation is not successful I want you to have everything." Re Swords, (1929) 3 Dom.L.R. 564, 566; "To whom it may consern that I. Michael P. Dowling is to go on opperation for a groth in the head if anything serious shoud happen to me I leave all I own to." In re Dowling's Estate, 16 Pa.Dist. & Co. R. 381; "Let all men know hereby, if I get drowned this morning, March 7, 1872, that I bequeath all my property, personal and real, to my beloved wife." French v. French, 14 W.Va. 458, 462: "I request that in the event of my death while serving in this horrid climate, or any accident happening to me." Matter of Thorne, 4 Swab. & Tr. 36, 164 Reprint 1428. See also annotation 11 A.L.R. 853.

19. See also In re Tylden, 18 Jur. 136; In the Goods of Dobson, L.R. 1 P. & D. 88.

a certain time; nor does it appear that it was to take effect only in the event he died in the South Pacific. Manifestly, he did not intend to die intestate, as appears from the extrinsic evidence which confirms the unconditional character of the testamentary disposition and clearly indicates that passing of title to his property was contingent on the happening of but one event —death.

We hold that the instrument is testamentary in character—a will; and that it was absolute and not conditional.

Affirmed.

SHINN, P. J., and WOOD, J., concur.

CALIFORNIA REPORTER

260 PACIFIC REPORTER
SECOND SERIES

CALIFORNIA REPORTER

260 PACIFIC REPORTER
SECOND SERIES

---

41 Cal.2d 371

PEOPLE v. RUPP.

Cr. 5416.

Supreme Court of California, in Bank.
Aug. 14, 1953.

Defendant was convicted of murder in the first degree and from the judgment entered by the Superior Court, Orange County, Kenneth E. Morrison, J., on the jury's verdict, the defendant appealed. The Supreme Court, Edmonds, J., held, inter alia, that conviction can not be had on defendant's extra-judicial admissions or confessions without proof aliunde of corpus delicti; but held that full proof of body of crime, sufficient to convince jury of its conclusive character, was not necessary before admissions could be received, a prima facie showing being all that was required.

Affirmed.

1. Criminal Law 🔑406(1), 409, 517(4), 535(2)

Conviction can not be had on defendant's extrajudicial admissions or confessions without proof aliunde of corpus delicti; but full proof of body of crime, sufficient to convince jury of its conclusive character, is not necessary before admissions may be received, a prima facie showing being all that is required.

2. Homicide 🔑282½

When a defendant is convicted of murder in the first degree, the jury determines his punishment as well as his guilt. Pen.Code, § 189.

3. Homicide 🔑179

Evidence concerning mental condition of defendant in homicide prosecution, when offered solely to persuade jury to reduce degree of crime, is not admissible, but evidence bearing upon specific mental state necessary to conviction of crime should be received.

4. Homicide 🔑18(4)

When killing is shown to have been committed in perpetration of or attempt to perpetrate rape, a finding of premeditation and deliberation is not necessary. Pen. Code, § 189.

5. Homicide 🔑179

In prosecution for homicide allegedly committed during attempt to perpetrate rape, wherein psychiatrists' reports indicated that defendant, although under influence of compelling sexual urge, had been in sufficient state of awareness to contemplate acts necessary to satisfy his passion, evidence concerning defendant's mental condition was properly rejected. Pen. Code, § 189.

6. Homicide 🔑289

Where evidence pointed indisputably to homicide in attempt to perpetrate rape, it was proper for court to advise that defendant was either innocent of charge of murder or was guilty of murder in first degree. Pen.Code, § 189.

7. Indictment and Information 🔑190

An "assault" with intent to commit a crime necessarily embraces an "attempt" to commit said crime, but an "attempt" does not necessarily include an "assault". Pen. Code, §§ 189, 220.

8. Criminal Law 🔑624

Generally, it is within discretion of trial court whether issue of sanity should be tried before same jury as heard former stage of proceeding. Pen.Code, § 1026.

9. Criminal Law 🔑1166(1), 1166½(12)

Where jurors were fully and correctly instructed that they were sole and exclusive judges of effect and value of evidence and of credibility of witnesses, and evidence was overwhelmingly to effect that defendant was sane, no prejudicial error resulted from fact that issue of insanity was tried before same jury which heard evidence concerning commission of crime and fact that trial judge stated at close of former proceeding that he felt that jury's verdict of first-degree murder was a good one.

◆

N. D. Meyer, Public Defender, Santa Ana, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., James L. Davis, Dist. Atty. (Orange) and James P. Devine, Asst. Dist. Atty., Santa Ana, for respondent.

EDMONDS, Justice.

A jury found William Rupp guilty of murder in the first degree, without recommendation, and concluded that he was sane at the time the crime was committed. His motion for a new trial was denied and the statutory appeal, Penal Code, section 1239 (b), is from the judgment which imposes the death penalty.

Most of the evidence concerning the commission of the crime is without conflict. For about six months prior to August 8, 1952, the date Ruby Ann Payne was killed, Rupp was employed by William Dyer as an assistant bee keeper and general helper. On the morning of the homicide, Rupp was working in the yard near the Dyer home. Shortly after noon, Dyer and his wife went away, leaving their three young children in the care of Ruby Ann, a fifteen-year-old girl who lived nearby.

Kenneth Dyer, aged eight, testified that shortly after the parents had gone, Rupp knocked at the rear door of the house and asked him if his father was home. When told that Dyer was away, Rupp departed. A few minutes later, he returned and explained to Kenneth that he had a check for the boy's father. Kenneth suggested that Rupp give the check to the baby sitter, but Rupp refused. Instead, he entered the house, placed the paper upon a desk in the living room, and left.

A short time later, Kenneth heard someone open the rear door. In the hall outside the playroom in which Ruby Ann and the children were watching a television program, Kenneth encountered Rupp holding a .22 caliber rifle. They discussed the gun for a few moments. The boy then left and returned with a bullet, which he gave to Rupp.

At the request of Rupp, the boy brought a hammer to him. Rupp then sent him upon another errand, this time to a warehouse located some distance from the house, to obtain a five gallon can.

As he was returning from the warehouse, Kenneth heard the sound of a shot. Hurrying to the house he discovered Rupp with Ruby Ann in the hall outside the bedroom door. The girl was lying upon the floor. Rupp was upon one knee beside her, "pulling at her jeans". When Kenneth asked what had happened, Rupp jumped up but said nothing. After the boy repeated his question, Rupp stood silently for a moment and then ran out the rear door. A few seconds later, Kenneth saw Rupp's automobile being driven away.

A neighbor called a physician who arrived about one-half hour later. The girl's clothing was disarranged and there had been a great amount of bleeding. He estimated that death had occurred several minutes before his arrival.

According to the autopsy surgeon's report, the girl was shot twice. One bullet entered the back, passed through the lungs and emerged from the chest. A second bullet penetrated the right side of the face and lodged in the neck. In addition, a wound which could have been caused by a blow from a hammer was found on the top of the head. Death resulted from asphyxiation, caused by blood entering the trachea and bronchea, combined with shock and loss of blood. An examination of the genital system revealed a bruise or abrasion on the hymen, resulting from the insertion of some object into the vagina. No traces of seminal fluid were found about the body, although stains of that substance appeared upon Rupp's underclothing.

One bullet was removed from the body and another was found nearby. Searchers discovered Rupp's automobile in a lemon grove about five or six miles from the

Dyer ranch. In the car they found a .22 caliber rifle and several hundred rounds of ammunition. A ballistics test indicated that the lethal bullets came from that gun.

Rupp was arrested late in the evening of the fourth day after the killing. He was taken to the city jail and interrogated by police officers. He readily admitted killing the girl and gave a detailed confession to both arresting officers, each of whom testified as to its contents. The next morning, he again confessed. This confession was recorded by a stenographer and a transcription of it read to the jury. A third confession, made two days later, also was read to the jury. In addition, police officials, present when the confessions were given, testified as to their substance. All of this evidence was admitted over the objection of counsel for Rupp.

Substantially, the same facts are stated in each confession. Rupp told the officers he had seen Ruby Ann a few times prior to the day of the homicide but never had occasion to speak to her. While he was working, in the yard, he saw the girl go into the house. Referring to the time immediately after the Dyers had left, he said "That is when I got * * * the impulse to go in the house and try to rape her. I got it to go right now. I have had the impulse for a long time to do this thing." "To this girl?" he was asked. "No", he replied, "just anyone in particular; just whenever a chance come up, but then it just seemed like a chance there, and I jumped real fast to it without stopping to plan or think anything out."

Rupp stated that he then got his gun from his car, removed his shoes, and went into the house. Asked why he took the gun with him, he replied "I was going to take it in to try to scare her." The questioning then continued as follows:

"Q. So she would submit to you? A. Yes.

"Q. And let you have sexual relations with her there at that time? * * * A. Yes, and I changed my mind to do it; I didn't.

"Q. What did you decide to do then? A. Knock her out.

"Q. And what did you do then? A. I got the boy to get me a hammer."

So that the boy would leave, the statement continued, Rupp sent him to the warehouse for an empty can. The other children also left, and he was alone with the girl, who was sitting on a sofa watching the television program. In reply to a question, he told the officers he then hit the girl on the top of the head with the hammer.

Further interrogation brought out these details:

"Q. What did you say to her first? A. Nothing.

"Q. You didn't say a thing? A. I didn't say a thing.

"Q. Your purpose at that time was to knock her unconscious? A. Yes.

"Q. So you could use her, and you knew she wasn't going to submit to you unless you got her unconscious? A. Yes.
* * *

"Q. Then after you hit her with the hammer what did you do? A. Well, I didn't knock her out, and she ran, and as she ran down the hall to stop her I shot, and she kept on running, so I shot a second time and then she fell."

Rupp stated that thereupon, he "ripped her clothes off." He denied that thereafter he attempted to rape her; instead, "just then I left; I decided to get up and get out of there." However, he admitted fondling the body and inserting his finger into the genital organs. He further stated that the reason that he tore the blouse and Levis partly from the girl's body was to see her naked form. He admitted that if the girl had submitted to him he would not have used force.

After he left the Dyer ranch, Rupp drove to the entrance of a canyon about five or six miles away. There he stopped at a grocery store and purchased some crackers and soda pop. He remained in the canyon for three days, sleeping in his automobile. Questioned concerning his reason for remaining in the vicinity, he answered that he believed his car would be recognized. On the fourth day, he abandoned his car and hid in a lemon grove. That evening, he walked into a nearby town to get something to eat and to give himself up.

Rupp does not challenge the sufficiency of this evidence to support the judgment of conviction. He contends that the trial court erred in rulings upon the admission of evidence and instructions to the jury. Also, he argues, it was error to try the issue of insanity before the same jury which heard the evidence concerning the commission of the crime. Finally, he claims prejudice from remarks of the trial judge.

[1] It is contended that testimony concerning Rupp's admissions or confessions, insofar as they related to an attempt to commit rape, should not have been received because the corpus delicti of that crime had not been established. In this connection, it is argued that the corpus delicti must have been proven "to a moral certainty and beyond a reasonable doubt".

However, as stated in People v. Cullen, 37 Cal.2d 614, 234 P.2d 1: "It is the settled rule * * * that the corpus delicti must be established independently of admissions of the defendant. Conviction cannot be had on his extra-judicial admissions or confessions without proof *aliunde* of the corpus delicti; but full proof of the body of the crime, sufficient to convince the jury of its conclusive character, is not necessary before the admissions may be received. A prima facie showing * * * is all that is required. The defendant's extra-judicial statements are then admissible, the order of proof being discretionary, and together with the prima facie showing must satisfy the jury beyond a reasonable doubt." 37 Cal.2d at pages 624–625, 234 P.2d at page 7.

In the present case, apart from Rupp's admission, there was evidence of the use of force against the girl, a disarrangement of the clothing and a disturbance of the genital organs. Also, the record includes ample testimony placing Rupp at the scene of the crime. From these facts an attempt to commit rape could be inferred.

No evidence was offered by Rupp which would tend to disprove the commission of the acts stated by him in his confessions. Instead, by data in regard to his personal medical history, he sought to establish the existence of a mental condition which would excuse his acts or justify conviction of a lesser crime than murder in the first degree. Objections to such evidence were sustained.

Several formal offers of proof were made, all of which were substantially similar. They included evidence purporting to show that Rupp had suffered from various illnesses and disorders which might have damaged the tissues of the brain. Abnormal conditions occurring at the time of his birth caused him to be born a "blue baby", a condition indicating oxygen starvation. During his first year, he suffered from Otis Media, mastoiditis, pneumonia, influenza, and anemia. Subsequently, he became afflicted with intestinal tuberculosis, leukemia and rickets. When he was three years old, he underwent seven operations for mastoids, with a possible infection or damage to the brain. Between the ages of three and six, he suffered from spastic convulsions at intervals of about two months, at which times he would become unconscious for periods of 10 or 12 hours with fevers of about 106 degrees.

This history included a series of abnormal sexual practices which began shortly after he was nine years old and continued until the time of the present action. In 1948, at the age of 14, Rupp committed an assault upon a woman. He entered her bedroom while she was asleep, struck her on the head with a hammer, and then fled. Rupp was apprehended and committed to a State mental hospital for observation. There he was diagnosed as "not psychotic but (having) a prepsychotic personality. Diagnosis Schizoid Personality Without Psychosis (Fetishism)." He was released on probation to the custody of his parents and placed under the care of a psychiatrist.

About eight months later, Rupp was involved in an automobile accident in which he struck two girls. Recounting the incident to an examining psychiatrist, Rupp stated that he drove his automobile onto them intentionally in order to have sexual relations with them, but he became frightened and abandoned his purpose. Officially, the occurrence was reported to have been an accident, and no criminal prosecution followed.

Two encephalographic studies of Rupp were made, one in February, 1949, and another two months after Ruby Ann was killed. They indicated damage to the parts of the brain affecting the thinking, volitional and emotional faculties. A characteristic of this type of injury is to cause "impulsive, irrational behavior", subjecting a person so afflicted to high sensitivity to stimuli, fainting or epileptic seizures. According to the opinion of the medical experts, Rupp's brain was in this condition at the time of the killing.

This evidence, Rupp argues, should have been admitted for these purposes: (1) to aid the jury in assessing the penalty; (2) to assist it in fixing the degree of the murder; (3) as direct evidence of, and as a foundation for opinion testimony concerning Rupp's mental capacity to premeditate, deliberate, form malice or intent; and (4) to show unconsciousness.

[2] Upon the issue of the extent of punishment, the rejection of this evidence was proper. As stated in People v. Barclay, 40 Cal.2d 146, 252 P.2d 321, "[w]hen a defendant is convicted of murder in the first degree, the jury determines his punishment as well as his guilt. [Citations.] Since the issues of punishment and guilt are determined at the same time, there is danger that evidence or instructions offered on the former issue may influence the verdict on the latter issue. Accordingly, to avoid prejudice to either the People or the accused by injection of collateral issues into the case, evidence of the good or bad habits and background of the accused is generally held inadmissible [citations], and the consideration of the jury is limited to the facts and circumstances attending the commission of the offense itself." 40 Cal.2d 157–158, 252 P.2d 327.

[3] Evidence concerning the defendant's mental condition, when offered solely to persuade the jury to reduce the degree of a crime, is not admissible. People v. French, 12 Cal.2d 720, 737, 87 P.2d 1014. However, evidence bearing upon a specific mental state necessary to the conviction of a crime should be received. People v. Wells, 33 Cal.2d 330, 350–351, 202 P.2d 53. In this connection, Rupp argues that the offered testimony was relevant to show a lack of premeditation, deliberation, malice, and intent necessary to convict him of murder in the first degree. He also contends that it was relevant to a showing that he was unconscious at the time he committed the acts.

[4] All of the evidence received tended to show a killing in the perpetration of or attempt to perpetrate rape, which, if established, is murder in the first degree. Pen. Code, sec. 189; People v. Lindley, 26 Cal.2d 780, 791, 161 P.2d 227. Where a killing is shown to have been committed under such circumstance, a finding of premeditation and deliberation is unnecessary. People v. Valentine, 28 Cal.2d 121, 131–132, 169 P.2d 1; People v. Bernard, 28 Cal.2d 207, 211–212, 169 P.2d 636. "[M]alice is shown by the nature of the attempted crime, and the law fixes upon the offender the intent which makes any killing in the perpetration of or attempt to perpetrate the [felony] * * * murder of the first degree." People v. Coefield, 37 Cal.2d 865, 868, 236 P.2d 570, 572; People v. Witt, 170 Cal. 104, 107, 148 P. 928; People v. Milton, 145 Cal. 169, 170–172, 78 P. 549. The controlling inquiry is whether Rupp had the mental state essential to the commission of rape or attempted rape.

In People v. Parker, 74 Cal.App. 540, 241 P. 401, it was said: "The crime of attempt to commit rape upon a girl under the age of consent is compounded of two elements, viz., the intent to have sexual intercourse with her, and a direct act done towards its consummation but falling short of the execution of the ultimate design. The overt act need not be the last proximate act to the consummation of the contemplated rape." 74 Cal.App. at page 546, 241 P. at page 403.

Although the offer of proof was stated by counsel for Rupp to be for the purpose of showing his inability to deliberate, premeditate, form malice or intent, there was no indication that a person suffering from the type of brain deterioration shown would be unable to form an intent to commit rape. The offer included the reports of several psychiatrists appointed by the court, each of whom stated that Rupp committed the acts because of his intent to have sexual intercourse with the girl.[1] Each of the psychiatrists testified that Rupp had the ability to intend to commit an act of sexual intercourse with her.

[5] Nor did the offer tend to show that Rupp was unconscious at the time he committed the acts. Although counsel for Rupp offered the evidence for that purpose, he did not indicate that any witness would testify that the damaged condition of Rupp's brain would cause him to act in a state of unconsciousness. On the contrary, the reports of the psychiatrists indicated that Rupp, although under the influence of a compelling sexual urge, was in a sufficient state of awareness to contemplate the acts necessary to satisfy his passion. Under these circumstances, the trial judge correctly ruled that such evidence was not material.

[6] No instruction defining manslaughter or murder in the second degree was given. Instead, the jurors were told: "Although there are two degrees of murder, the evidence in this case is such that either the defendant is innocent of the charge of murder or he is guilty of murder in the first degree, for murder which is committed in the perpetration or attempt to perpetrate rape, * * * is murder of the first degree, whether the killing was intentional, or unintentional or accidental." On the facts of the present case, this instruction was proper; for, where the evidence points indisputably to a homicide in the perpetration or attempt to perpetrate one of the felonies enumerated in section 189 of the Penal Code, it is proper for the court to advise the jury that the defendant is either guilty or innocent of murder in the first degree. People v. Sanford, 33 Cal. 2d 590, 595, 203 P.2d 534; People v. Lindley, supra, 26 Cal.2d 780, 791, 161 P.2d 227; People v. Perkins, 8 Cal.2d 502, 516, 66 P. 2d 631; People v. Johnson, 219 Cal. 72, 76–77, 25 P.2d 408.

[7] Rupp contends that the evidence demonstrates conclusively that the killing

---

[1] Dr. Musfelt, relating his opinion as to the mental state of Rupp at the time of the killing, reported: "There in the television room was 15 year old Ruby Ann Payne, his employer's baby sitter. An urge to have sexual intercourse with her was experienced. Patient left house and returned to work in the yard of ranch home. * * * The urge to have intercourse with the baby sitter became stronger. He was aware that he was too shy and bashful to secure realization of his sexual desire for intercourse with her other than by the use of force. Thus he went to his car and secured his 22 caliber rifle. He then went back into his employer's home and walked into the television room. * * * The patient then sent the boy from the room with another excuse, walked up to the side of the girl, and hit her on head with hammer. Patient states it was with the idea of 'knocking her out' with no conscious thought of killing her."

According to the report of Dr. Marcus, "[Ruby Ann] acting as a baby sitter was watching the television. [Rupp] went out to the car and went to town to get a sack of material and on his return about noon entered the house with a rifle. As she watched the television, he asked one of the three small children of the family to get him a hammer. He struck the girl in the head intending to have intercourse with her and not to kill her."

Dr. Day's report states: "While working outside the bee keeper's home [Rupp] kept thinking about the girl inside which made him become progressively more excited sexually and then he entered the home after he removed a .22 caliber rifle from his car. He states he carried this rifle around with him for target practice. He intended using the rifle merely to scare her into having sexual relations with him. He planned his manner of approaching the girl but an eight year old boy in the home changed his mind. He felt it was better then to use a hammer so he asked the little boy to get a hammer for him deciding to use the hammer to render the girl unconscious and then have sexual relations with her. The young girl sat watching television and he decided to strike her on the head with the hammer. He went up behind her and struck her and then she stood up and ran at which time he took his gun and shot at her in order to stop her from fleeing from him so that he could have sexual relations with her. He did not intend to kill her but rather intended to shoot her in an arm or leg to stop her from running."

did not occur in the attempt to commit one of the felonies enumerated in section 189 of the Penal Code. Instead, the argument continues, it shows a killing arising out of an assault with intent to commit rape, Pen. Code, sec. 220, which is not one of the enumerated felonies. But an assault with intent to commit rape is merely an aggravated form of an attempted rape, the latter differing from the former only in that an assault need not be shown. People v. Welsh, 7 Cal.2d 209, 213, 60 P.2d 124. "An 'assault' with intent to commit a crime necessarily embraces an 'attempt' to commit said crime, but said 'attempt' does not necessarily include an 'assault.'" People v. Akens, 25 Cal.App. 373, 374, 143 P. 795, 796.

The evidence in the record reasonably shows the commission of no crime other than a killing in an attempt to perpetrate rape. Rupp's confession, the circumstances surrounding the crime, and even his own offers of proof disclose an attack upon the girl in an effort to satisfy his sexual desires. It was proper to give the instruction.

Another contention is that the trial court erroneously refused certain requested instructions. However, each of these was framed on the theory of either manslaughter or murder in the second degree for which there was no basis in the evidence.

Rupp's objection to trying the issue of insanity before the same jury which heard the evidence concerning the commission of the crime was overruled. Contending that this ruling was error, Rupp argues that the jury might have been influenced by information received during the four days intervening between the two stages of the proceeding, and by remarks made by the trial judge at the close of the former proceeding, in which he said: "I want to say to you that I feel that your verdict is a good verdict." The ruling was made particularly prejudicial, the argument continues, by the denial of a motion to question the jury on *voir dire*.

[8] Generally, it is within the discretion of the trial court whether the issue of sanity should be tried before the same jury as in the former stage of the proceeding. Pen.Code, sec. 1026; People v. French, supra, 12 Cal.2d 720, 765, 87 P.2d 1014. In People v. Daugherty, 40 Cal.2d 876, 256 P.2d 911, the trial court commented: "You have discharged that duty conscientiously and, *in my opinion, as the evidence in the case warranted.*" This court said: "It is doubtful that the error, if any, in the court's comment was prejudicial in view of the adequacy of the evidence, his strong admonitions to them, and the casual nature of the remark buried as it was in the common laudatory statement regarding the performance by the jury of its duty and the fact that it was made before the sanity hearing began. When we consider those circumstances together with the power of the court to comment on the credibility of testimony provided he tells the jury it is exclusive judge of all questions of fact and credibility of the witnesses, Cal.Const., art. VI, § 19, we find no prejudicial error." 40 Cal.2d 892, 256 P.2d at page 920. It has been held that the right to comment upon the evidence permits a trial judge, in proper cases, to express an opinion even as to the guilt of the defendant. People v. Ottey, 5 Cal.2d 714, 728, 56 P.2d 193. And "[t]he fact that the trial judge's remarks were made before the trial on the insanity issue rather than during its progress, gives rise to no distinction as the trial on the substantive charges and the insanity issue constitute but a single trial." People v. Busby, 40 Cal.App.2d 193, 202, 104 P.2d 531, 536. Nor is it necessary either to reexamine the jurors on their *voir dire* or to readminister the oath to them. People v. Davis, 94 Cal.App. 192, 197, 270 P. 715; People v. Foster, 3 Cal.App.2d 35, 39, 39 P.2d 271; People v. Woods, 19 Cal.App.2d 556, 558, 65 P.2d 940.

[9] The jurors were fully and correctly instructed that they were the sole and exclusive judges of the effect and value of evidence and of the credibility of witnesses. The evidence is overwhelmingly to the effect that Rupp was sane. Accordingly, no prejudicial error is indicated.

Objection is made to the introduction in evidence of several photographs alleged to be of an inflammatory nature. However, those most likely to prejudice the jury, the photographs of the girl's body taken at the scene of the crime, were admitted over objection only that a proper foundation had not been laid. The others were received after counsel for Rupp either expressly stated that there was "no objection" or where the objections to them were withdrawn.

The judgment and the order denying a new trial are affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, and SPENCE, JJ., concur.

SCHAUER, J., concurs in the judgment.

---

41 Cal.2d 252

PEOPLE v. HAEUSSLER.

Cr. 5391.

Supreme Court of California, in Bank.
July 7, 1953.

Rehearing Denied July 28, 1953.

Defendant was convicted of manslaughter in driving of vehicle and of driving automobile while under influence of intoxicating liquor. The Superior Court, Ventura County, Walter J. Fourt, J., entered judgment, and defendant appealed. The Supreme Court, Edmonds, J., held that where sample of defendant's blood was taken for purpose of typing for transfusion, while defendant was unconscious after automobile accident, and portion of blood taken was tested for alcohol, and evidence thereby obtained was used in obtaining conviction, manner of obtaining such evidence was not so brutal or shocking to conscience as to constitute violation of due process.

Judgment affirmed.

Carter and Schauer, JJ., dissented.

Prior opinion, App., 248 P.2d 434.

1. Criminal Law 🔑393(1)

The privilege against self-incrimination is a privilege against testimonial compulsion. Const. art. 1, § 13.

2. Criminal Law 🔑393(1)

Evidence consisting of a test of blood taken from an accused is not a communication from the accused, and is not obtained by testamentary compulsion, but is real evidence of ultimate fact in issue, the defendant's physical condition. Const. art. 1, § 13.

3. Constitutional Law 🔑266

Where sample of accused's blood was taken for purpose of typing for transfusion, while accused was unconscious after automobile accident, and a portion of blood taken was tested for alcohol, and evidence thereby obtained was used in obtaining conviction for manslaughter and driving while intoxicated, the manner of obtaining such evidence was not so brutal or so shocking to the conscience as to constitute violation of due process. Vehicle Code, § 501; Pen. Code, § 192, subd. 3; U.S.C.A.Const. Amend. 14.

4. Criminal Law 🔑475

In prosecution for manslaughter and driving while intoxicated, testimony of highway patrolman, who had many years of experience in investigating traffic accidents and reporting their causes, that in his opinion, based upon marks and debris on highway, point of impact between accused's automobile and that of decedent, which collided when meeting on two lane highway, was in decedent's lane of traffic, was testimony upon a matter subject to expert testimony, and was admissible. Vehicle Code, § 501; Pen.Code, § 192, subd. 3.

5. Criminal Law 🔑464, 1153(2)

Generally, it is for trial court to determine competency and qualification of a witness to state an opinion, and upon appeal its ruling will not be disturbed in absence of manifest abuse of discretion.

6. Criminal Law 🔑475

In prosecution for manslaughter and driving while intoxicated, trial court did not abuse its discretion in permitting a speedometer mechanic, qualified as an expert, to testify, in response to evidence offered by accused tending to prove that, after accident, speedometer on automobile with which accused collided, was broken and its needle fixed at a point indicating speed of 78 miles per hour, that a severe impact might cause needle to become fixed at any point, regardless of speed at which automobile had been traveling. Vehicle Code, § 501; Pen.Code, § 192, subd. 3.

7. Automobiles ⚿358

To warrant conviction for driving automobile while "under influence of intoxicating liquor", a finding that intoxicating liquor had so far affected the nervous system, brain or muscles of accused as to impair to an appreciable degree the ability to operate vehicle in a manner like that of an ordinarily prudent and cautious person in full possession of his faculties using reasonable care and under like conditions, would be sufficient. Vehicle Code, § 501.

See publication Words and Phrases, for other judicial constructions and definitions of "Under Influence of Intoxicating Liquor".

8. Automobiles ⚿332

Persons may be "under influence of intoxicating liquor", within meaning of driving while intoxicated statute, without having been affected to extent commonly associated with intoxication or drunkenness. Vehicle Code, § 501.

9. Criminal Law ⚿822(6)

In prosecution for driving while intoxicated, instruction that accused was under influence of intoxicating liquor if, having consumed alcoholic liquor in any amount whatsoever, she was so affected that she acted differently from an ordinarily prudent person under similar circumstances, when prefaced with words relating to driving of vehicle and preceded by instruction stating that her ability to operate vehicle must have been impaired, could not have confused jury. Vehicle Code, § 501.

10. Criminal Law ⚿829(3)

In prosecution for manslaughter and driving while intoxicated arising out of collision between accused's automobile and that of decedent when meeting on two lane highway, where jurors were told that to convict they must find misconduct by accused to have been cause of death, and that occurrence of accident did not warrant inference of negligence, there was no legal requirement that court expressly negative liability in event that accident was unavoidable or caused solely by negligence of other driver. Vehicle Code, § 501; Pen.Code, § 192, subd. 3.

11. Criminal Law ⚿655(1)

In prosecution for manslaughter and driving while intoxicated, record failed to sustain charge of bias on part of trial judge. Vehicle Code, § 501; Pen.Code, § 192, subd. 3.

◆

Cornwall & Westwick, Santa Barbara, for appellant.

Edmund G. Brown, Atty. Gen., Frank Richards, Dep. Atty. Gen., and Roy A. Gustafson, Dist. Atty., and Donald L. Benton, Dep. Dist. Atty., Ventura, for respondent.

EDMONDS, Justice.

Marion Joan Haeussler was tried before a jury upon charges of manslaughter in the driving of a vehicle, Pen.Code, § 192, subd. 3, and of committing an unlawful act while driving a vehicle under the influence of intoxicating liquor. Vehicle Code, § 501. Following her conviction on both counts, the imposition of sentence was suspended and she was admitted to probation. By section 1237 of the Penal Code, an order granting probation is a "final judgment of conviction" for the purpose of appeal.

At about 1:00 a. m., a Buick convertible automobile operated by Mrs. Haeussler collided with a Mercury sedan driven by Vernon Lovelace in which Edward Amsel and Wayne Goff were riding. Amsel was killed and Lovelace and Goff were injured. Mrs. Haeussler also sustained injuries.

The accident occurred on a level highway about 20 feet wide with two lanes. Driving west, Lovelace observed the lights of the Buick as it came around a curve, apparently in the wrong lane. The car continued its course, the lights remaining undimmed. In an attempt to avoid a collision, he applied his brakes and swerved sharply to his left. Mrs. Haeussler's car struck the right side of the Mercury.

An officer of the California Highway Patrol, who arrived at the scene of the accident a few minutes later, inspected the automobiles and took measurements of the skid marks on the pavement. At the trial and over objection, he gave his opinion of the point of impact as being in the westbound lane, about 21 inches from the center line. He also testified that there was an odor of alcohol on Mrs. Haeussler's breath.

The injured persons were taken to an emergency hospital. There, while Mrs. Haeussler was unconscious, an attendant withdrew from her arm five cubic centimeters of blood. Four of these were used to type her blood for a transfusion. The remainder was given to a laboratory technician for analysis.

Objections to the technician's testimony concerning his findings were overruled. He stated that the alcohol content of the blood was about .180 per cent. A medical expert testified that intoxication may occur when the amount of alcohol in the blood is between .050 and .150 per cent, but all individuals whose blood contains alcohol in an amount greater than the latter figure are unable to drive safely. According to his estimate, the alcohol content of Mrs. Haeussler's blood at the time of the accident was about .215 per cent.

As grounds for a reversal of the judgment, Mrs. Haeussler claims that the admission of testimony concerning the results of the blood test taken without her consent deprived her of due process of law. Other contentions are that the trial court erred in permitting a mechanic to state his opinion in regard to the speedometer reading of one of the cars and in admitting the highway patrolman's opinion testimony concerning the point of impact. She also argues that the court erred in its rulings upon instructions to the jury. Finally, she asserts, the trial was conducted in a manner which favored the prosecution.

Mrs. Haeussler bases her claim of a denial of due process upon Rochin v. People of California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183. In the Rochin case, the record showed that police officers, in search of narcotics, invaded the defendant's room without a warrant. Seeing Rochin put two capsules into his mouth, the officers "jumped upon" him and attempted to remove the objects. Unsuccessful, they took him, handcuffed, to a hospital where, by means of a tube, an emetic was injected into his stomach, causing him to vomit the capsules. Upon analysis, they were found to contain morphine.

In a trial upon the charge of unlawfully possessing narcotics, Health and Safety Code, § 11500, the capsules were the chief evidence against Rochin. The United States Supreme Court reversed the judgment of conviction, saying: "we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation." 342 U.S. at page 172, 72 S.Ct. at page 209, 96 L.Ed. 183.

Counsel for Mrs. Haeussler reads the Rochin decision as holding that any taking of evidence, by force, from the person of a defendant without his consent violates due process. In the present case, it is said, such force consisted of puncturing her skin with a needle to withdraw blood. But even if the decision does not condemn all forcible taking of real evidence, the argument continues, it precludes the use of any which is obtained by a forcible entry into the defendant's body.

The court in the Rochin case approved prior decisions which declare that due process, as that term is used in the Fourteenth Amendment, does not embody all of the rights enumerated in the first eight amendments, but only those immunities which are "so rooted in the traditions and conscience of our people as to be ranked as fundamental" or are "implicit in the concept of ordered liberty". 342 U.S. at page 169, 72 S.Ct. at page 208.

[1] That the privilege against self-incrimination is not one of the immunities

implicit in due process was decided in Twining v. State of New Jersey, 211 U.S. 78, 29 S.Ct. 14, 53 L.Ed. 97, and reaffirmed in Adamson v. People of State of California, 332 U.S. 46, 67 S.Ct. 1672, 91 L. Ed. 1903. However, the privilege is guaranteed by the Constitution of this State, which declares that "[n]o person shall * * * be compelled in any criminal case, to be a witness against himself". Cal. Const. Art. I, sec. 13. Reviewing the scope and purpose of that provision, this court said in People v. Trujillo, 32 Cal.2d 105, 194 P.2d 681, "Wigmore, in an exhaustive and scholarly discussion of the history and policy behind the provision of the Federal Constitution, which is substantially the same as the California mandate, concludes that the object of the protection 'is the employment of legal process to *extract from the person's own lips* an admission of his guilt, which will thus take the place of other evidence * * *.

"'In other words, it is not merely any and every compulsion that is the kernel of the privilege, in history and in the constitutional definitions, but *testimonial compulsion.*'" 32 Cal.2d at page 112, 194 P.2d at page 685.

This statement of the rule is consistent with that of the United States Supreme Court, Holt v. United States, 218 U.S. 245, 31 S.Ct. 2, 54 L.Ed. 1021; United States v. White, 322 U.S. 694, 64 S.Ct. 1248, 88 L.Ed. 1542, and the courts of other jurisdictions which, in analogous factual situations, have concluded there was no violation of the privilege. State v. Green, 121 S.C. 230, 114 S.E. 317 [placing defendant's foot in footprint found at scene of crime]; State v. McLaughlin, 138 La. 958, 70 So. 925 [scrapings taken from beneath accused's fingernails]; Biggs v. State, 201 Ind. 200, 167 N.E. 129, 64 A.L.R. 1085 [removing defendant's shoes to match footprints]; State v. Aspara, 113 La. 940, 37 So. 883 [removing defendant's clothing for comparisons and tests]; Ash v. State, 139 Tex.Cr.R. 420, 141 S.W.2d 341 [giving accused an enema to recover swallowed jewelry]; United States v. Kelly, 2 Cir., 55 F.2d 67, 83 A.L.R. 122 [taking fingerprints of accused]; see annotation 164 A.L.R. 967; Inbau, Self Incrimination [1950].

[2] Evidence is not obtained by testamentary compulsion where it consists of a test of blood taken from an accused. It is not a communication from the accused but real evidence of the ultimate fact in issue—the defendant's physical condition. State v. Cram, 176 Or. 577, 160 P.2d 283, 289, 164 A.L.R. 952; State v. Sturtevant, 96 N.H. 99, 70 A.2d 909, 911–912; State v. Ayres, 70 Idaho 18, 211 P.2d 142, 144; State v. Alexander, 7 N.J. 585, 83 A.2d 441, 445; Block v. People, 125 Colo. 36, 240 P.2d 512, 515–516, certiorari denied 343 U.S. 978, 72 S.Ct. 1076, 96 L.Ed. 1370.

Similarly, real evidence obtained from a defendant's stomach by use of an emetic is not violative of the privilege against self-incrimination. Despite contrary suggestions, the majority of the court in the Rochin case did not rest its reversal of the conviction upon that ground. (See the concurring opinions of Justices Black and Douglas, 342 U.S. 165, 174, 177, 72 S.Ct. 205, 96 L.Ed. 183.) Nor did the court overrule or limit earlier cases which define the scope of the privilege or exclude that privilege from the operation of the due process clause of the Fourteenth Amendment. Accordingly, no changes in the rules stated and applied in those cases may be presumed.

More pertinent to the present inquiry is the prohibition against unlawful searches and seizures stated in the Fourth Amendment to the federal Constitution and in the California Constitution. Article I, section 19. In Wolf v. People of State of Colorado, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782, the applicability of the due process clause of the Fourteenth Amendment to that prohibition was considered. Freedom from unlawful intrusion was held to be basic to a free society and, being implicit in the concept of ordered liberty, enforceable against the states through the due process clause.

In prosecutions in the federal courts, an accused may, upon timely motion, obtain an order suppressing evidence obtained from him unlawfully. But the court in the Wolf case expressly stated that this method of enforcement is not obligatory upon the states. Recognizing that the primary effect of such a remedy is to protect the person incriminated by such evidence, in opposition to the interests of society in the detection and punishment of criminal acts, the court said: "We cannot * * * regard it as a departure from basic standards to remand such persons, together with those who emerge scatheless from a search, to the remedies of private action and such protection as the internal discipline of the police, under the eyes of an alert public opinion, may afford. Granting that in practice the exclusion of evidence may be an effective way of deterring unreasonable searches, it is not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective." 338 U.S. at page 31, 69 S.Ct. at page 1362, 93 L.Ed. 1782.

Without deviation, this court has held that competent evidence, although improperly obtained, is admissible in a criminal prosecution against the person from whom the evidence is taken. People v. Kelley, 22 Cal.2d 169, 172, 137 P.2d 1; People v. Gonzales, 20 Cal.2d 165, 169, 124 P.2d 44; People v. Mayen, 188 Cal. 237, 205 P. 435, 24 A.L.R. 1383.

Elements of unlawfulness in the acquisition of evidence were present in the Rochin case, the initial entry and search being without the authority of a warrant. However, the basis for the decision is not that the evidence was acquired illegally. Reversal of the judgment upon that ground would have been contrary to the Wolf case, and it is not to be supposed that the Supreme Court would make such a startling change in constitutional doctrine without mention of that decision.

The essence of the Rochin decision is in the court's reference to Brown v. State of Mississippi, 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682, and other coerced confession cases. In the Brown case, a conviction based upon a confession obtained by torture was reversed because such a practice amounted to a wrong "so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void". 297 U.S. at page 286, 56 S.Ct. at page 465. So, in the Rochin case, the court said: "Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency. So here, to sanction the brutal conduct which naturally enough was condemned by the court whose judgment is before us, would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society." 342 U.S. at pages 173–174, 72 S.Ct. at page 210, 96 L.Ed. 183. In brief, the Rochin case holds that brutal or shocking force exerted to acquire evidence renders void a conviction based wholly or in part upon the use of such evidence.

Contrary to Mrs. Haeussler's contention, the Rochin opinion does not rest upon the premise that the taking of evidence from the person of a defendant or by entry into his body is the decisive factor. Instead, the entire course of conduct was examined and found to be brutal and shocking. The court disclaimed any intent to fix rigidly the confines of due process by asserting that they must remain "indefinite and vague". That blood tests and similar techniques may stand against constitutional objection is suggested by the statement: "We therefore put to one side cases which have arisen in the State courts through use of modern methods and devices for discovering wrongdoers and bringing them to book. It does not fairly represent these decisions to suggest that they legalize force so brutal and so offensive to human dignity in securing evidence from a suspect as is revealed by this record." 342 U.S. at page 174, 72 S.Ct. at page 210.

[3] The taking of a blood test, when accomplished in a medically approved manner, does not smack of brutality. In recent years, millions of young men have been subjected to such tests as an incident to

induction into military service. In this state, a blood test is required of each person making application for a marriage license, Civil Code, sec. 79.01, and physicians engaged in prenatal care of a pregnant woman, or attending such woman at the time of delivery, must obtain a sample of her blood for purposes of a test for venereal disease. Health & S. Code, sec. 21402. Moreover, in the present case, Mrs. Haeussler was unconscious at the time the blood was withdrawn, and the removal of four of the five cubic centimeters was necessary to provide medical treatment. The only unauthorized action of the medical attendant was to remove one additional cubic centimeter of blood after the hypodermic needle already had been inserted. Certainly, this conduct cannot be characterized as shocking to the conscience, and it does not support Mrs. Haeussler's claim of a violation of due process of law.

Another point relied upon is that the testimony of the highway patrolman relative to the point of impact was not upon a matter subject to expert testimony and should not have been received. But, as was said in Zelayeta v. Pacific Greyhound Lines, 104 Cal.App.2d 716, 232 P.2d 572; "It is quite obvious that the conclusion, based upon the facts of a particular case, as to just where a collision between two vehicles occurred, may be so obvious that any reasonable person, trained or not, can draw that inference from the facts. It is equally clear that cases may occur where the opinions of trained experts in the field on this subject will be of great assistance to the members of the jury in arriving at their conclusions. In such cases a traffic officer who has spent years investigating accidents in which he has been required to render official reports not only as to the facts of the accidents but also as to his opinion as to their causes, including his opinion, where necessary, as to the point of impact, is an expert. Necessarily, in this field, much must be left to the common sense and discretion of the trial court." 104 Cal.App.2d at page 727, 232 P.2d at page 579.

[4] In the present case, the officer's qualifications as a witness included many years of experience in investigating traffic accidents and reporting their causes to his superiors. He based his opinion upon an inspection of skid and gouge marks on the pavement and the location of oil, broken glass, parts of the vehicles and other debris. The trial court was justified in concluding that a determination, from these indicia, as to the point of impact might properly be made by an expert.

It is also argued that the trial court committed prejudicial error in permitting the prosecution's witness, a mechanic, to give opinion testimony relative to a broken speedometer on the Lovelace car. This testimony was in response to evidence offered by Mrs. Haeussler tending to prove that, after the accident, the speedometer was broken and its needle fixed at a point indicating a speed of 78 miles per hour. The mechanic testified that a severe impact might cause the needle to become fixed at any point, regardless of the speed at which the car had been traveling.

[5, 6] This witness was qualified as an expert by evidence that he had been a speedometer mechanic for several years. No attempt was made by counsel for Mrs. Haeussler to cross examine him concerning his qualifications nor was any request made to take the witness on *voir dire.* Generally, it is for the trial court to determine the competency and qualification of a witness to state an opinion, and upon appeal its ruling will not be disturbed in the absence of a manifest showing of abuse of discretion. Huffman v. Lindquist, 37 Cal.2d 465, 476, 234 P.2d 34. None was shown here.

[7] Objection is made to the definition of "under the influence of intoxicating liquor" given in instructions to the jury. They were told that it was unnecessary to find that Mrs. Haeussler was "drunk" or "intoxicated"; it would be sufficient if it were found that intoxicating liquor had "so far affected the nervous system, brain or muscles as to impair to an appreciable degree the ability to operate the vehicle in a manner like that of an ordinarily prudent and cautious person in the full possession of his faculties, using reasonable care and under like conditions". The degree to

which a person must be influenced by alcohol to warrant a conviction under section 501 of the Vehicle Code is correctly stated in the instruction. People v. Dingle, 56 Cal.App. 445, 449, 205 P. 705, 708.

Several cases are relied upon by Mrs. Haeussler for the proposition that "under the influence of intoxicating liquor" is synonymous with "intoxicated". People v. Dingle, supra; Taylor v. Joyce, 4 Cal.App. 2d 612, 41 P.2d 967; People v. Lewis, 4 Cal.App.Supp.2d 775, 37 P.2d 752. She argues that it was error to instruct otherwise.

In the Dingle case, an instruction defining a violation of section 17 of the Motor Vehicle Act, Stats.1919, p. 214, was challenged because of the asserted failure to define "intoxication". Rejecting that contention, the court said: "The statute does not say that no person shall operate or drive a motor vehicle on the public highway while 'intoxicated,' but that no person shall operate or drive such a vehicle on the public highway while 'under the influence of intoxicating liquor.' The instruction, therefore, very properly does not undertake to define 'intoxication,' but does state what acts and what condition will justify a finding that the accused is 'under the influence of intoxicating liquor,' within the meaning of the statute." 56 Cal.App. at page 452, 205 P. at page 708.

As a dictum, the court went on to say: "It is probably true, however, that the phrase 'under the influence of intoxicating liquor' is, substantially and to all practical intents and purposes, synonymous with such words as 'intoxication' and 'drunkenness.' But even so, the instruction gives a good definition of 'intoxication.' In St. Louis, etc., Ry. Co. v. Waters, 105 Ark. 619, 152 S.W. 137, the Arkansas Supreme Court defined 'intoxication,' or 'drunkenness,' substantially in accord with the definition given in this instruction. In that case the court said: 'A man may be said to be drunk whenever he is under the influence of intoxicating liquors to the extent that they affect his acts or conduct, so that persons coming in contact with him could readily see and know that the intoxicating liquors were affecting him in that respect.'" 56 Cal.App. at page 452, 205 P. at page 708.

[8] This dictum was the basis for holdings in the Taylor and Lewis cases. Insofar as these decisions hold that a person who is intoxicated also is under the influence of intoxicating liquor they are correct. Cf. Tracy v. Brecht, 3 Cal.App.2d 105, 114, 39 P.2d 498. It is generally recognized, however, that persons may be "under the influence of intoxicating liquor" within the meaning of statutes similar to section 501 of the Vehicle Code without having been affected to the extent commonly associated with "intoxication" or "drunkenness". See annotation 142 A.L.R. 555, 561; consistent with this view are People v. Ekstromer, 71 Cal.App. 239, 235 P. 69; People v. McKee, 80 Cal.App. 200, 251 P. 675; In re Ryan, 61 Cal.App.2d 310, 142 P.2d 769. To the extent that they indicate a contrary holding, Taylor v. Joyce, supra, and People v. Lewis, supra, are disapproved.

[9] In another instruction, the jury were charged that Mrs. Haeussler was "under the influence of intoxicating liquor" if, having consumed alcoholic liquor "in any amount whatsoever", she was so affected that she acted "differently from an ordinarily prudent person under similar circumstances". She reads this instruction as permitting the jury to find a violation of the statute as a result of her inability to perform acts other than the safe driving of an automobile. However, the instruction was prefaced with words relating to the driving of a vehicle and preceded by an instruction stating that her ability to operate a vehicle must have been impaired. Read in context, the instruction could not have confused the jury.

[10] Nor is there merit to the contention that the court committed prejudicial error in failing to instruct the jury that Mrs. Haeussler should be acquitted if the accident were unavoidable or if it were found that the accident was caused solely by the negligence of Lovelace. The jurors were told that, to convict Mrs. Haeussler, they must find misconduct by her to have been the cause of death; also, the occur-

rence of an accident did not warrant an inference of negligence. There was no legal requirement that the court expressly negative liability in the event that either of these contingencies occurred. People v. Rodgers, 94 Cal.App.2d 166, 168, 210 P.2d 71.

[11] The record fails to sustain the charge of bias on the part of the trial judge. The alleged misconduct consists of isolated instances among a great number of procedural rulings, many of which were adverse to the prosecution. No favoritism to either party is shown.

No other assignments of error require discussion.

The judgment is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

I cannot agree that the admission of testimony concerning the results of the blood test taken without defendant's consent was not a denial of due process. Defendant was unconscious when the blood sample was taken by the insertion of a hypodermic needle. This necessitated the use of force, however slight, and was an invasion of the privacy of her body. It may be admitted that the force used here was not so brutal or shocking as that used in People v. Rochin, 101 Cal.App.2d 140, 143, 225 P.2d 1, 913; Rochin v. People of California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183, but it still remains that force was used on the body of a person unable to protect herself, or even to remonstrate against the use of such force.

The illustrations used by the majority to demonstrate that the taking of blood tests, in a medically approved manner, do not "smack" of brutality, are not persuasive. First, it is suggested that millions of young men have been subjected to such tests as an incident to induction into military service, that blood tests are required of those applying for a marriage license, of pregnant women during prenatal care, or prior to their delivery. Not one of these groups was accused of a crime—not one of them was composed of unconscious persons. All of them had a choice—that of compliance or refusal. Defendant here had no such choice. A sample of blood was taken from her while in an unconscious state and the results of that test were given in evidence against her. In my opinion, this violates her personal guarantee, not only of due process of law, as guaranteed by both constitutions, but of the privilege against self-incrimination found in the California Constitution.

Any evidence obtained illegally, and it was certainly as illegally obtained here as if obtained by reason of the search of a person or a home without a search warrant, is in my opinion inadmissible in evidence. I have long been in favor of legislation designed to make such evidence inadmissible in all the courts of this state so that personal privacy may be protected as it was intended to be protected by the Fourth Amendment to the Constitution of the United States and section 19 of article I of the Constitution of California.

In my opinion, the forcible taking of blood for the purpose of making a blood test to use in evidence against that person "shocks the conscience. * * * is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation." Rochin v. People of California, supra, 342 U.S. at page 172, 72 S.Ct. 205, 209, 96 L.Ed. 183. To take blood from an unconscious person for the purpose of saving that person's life is justified only on the ground of the humanitarian purpose involved; to take it for the purpose of making out a criminal case against that person is something else again. As Mr. Justice Jackson said, United States v. Di Re, 332 U.S. 581, 68 S.Ct. 222, 229, 92 L.Ed. 210, our forefathers, "after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment." I agree with this concept and believe that it delineates the line of demarcation between the American way of life and what we are told may be expected under a totalitarian regime.

Because I believe in the dignity and security of the individual and agree with the framers of the Bill of Rights that "The right of the people to be secure in their *persons,* houses, papers, and effects, against unreasonable searches and seizures," should "not be violated," (emphasis added) I cannot sanction the conduct of the prosecution officers in this case, and would, therefore, reverse the judgment.

SCHAUER, J., concurs.

41 Cal.2d 384

PEOPLE v. CARNINE.

Cr. 5423.

Supreme Court of California, in Bank.
Aug. 14, 1953.

Prosecution for first degree murder allegedly committed in perpetration of robbery or burglary. The Superior Court, Sonoma County, entered judgment of conviction, and defendant appealed. The Supreme Court, Traynor, J., held that the court erred in refusing defendant's requested instruction exonerating him from first degree murder if jury found that he had not formed intent to rob victim until after the homicide.

Reversed.

1. Homicide 🔑270, 282

In first degree murder prosecution, evidence presented questions for jury as to whether defendant committed homicide in perpetration of robbery or burglary, and as to whether defendant was legally sane at time of crime. Pen.Code, § 189.

2. Homicide 🔑289

In first degree murder prosecution, wherein defendant contended that he had not intended to kill victim and had not decided to take victim's money, clothes, and automobile, until after attack had been terminated, it was error to refuse instruction to effect that if jury found that defendant had not formed intent to rob victim until after the homicide, the victim was not killed in perpetration of or attempt to perpetrate crime of robbery. Pen.Code, § 189; Const. art. 6, § 4½.

3. Criminal Law 🔑823(5)

Error of court in murder prosecution in refusing requested instruction exonerating defendant from first degree murder if jury found that he had not formed intent to rob victim until after homicide was not cured by general instruction relating to murder. Pen.Code, §§ 189, 211, 459; Const. art. 6, § 4½.

4. Homicide 🔑253(1)

The burden was on prosecution in homicide case to prove defendant guilty of murder of first degree beyond reasonable doubt, and defendant was entitled to be found guilty of no more than murder of second degree if his testimony, viewed in light of other evidence, was sufficient to create reasonable doubt as to his guilt of murder of first degree. Pen.Code, §§ 189, 211, 459; Const. art. 6, § 4½.

Paul Golis and Maurice Fredericks, Santa Rosa, under appointment by the Supreme Court, for appellant.

Edmund G. Brown, Atty. Gen., Doris H. Maier, Deputy Atty. Gen., Joseph Maddux, Dist. Atty., Sonoma, and William G. Luckhardt, Deputy Dist. Atty., Santa Rosa, for respondent.

TRAYNOR, Justice.

This appeal is from a judgment imposing the death penalty following defendant's conviction of first degree murder.

The following facts are undisputed: On September 9, 1952, defendant came to Santa Rosa from his mother's and stepfather's home a short distance out of town. He arrived before noon and spent most of the afternoon in the Lido Bar drinking beer and talking to the bartender and other patrons. About 5 p. m. he left the bar and went to Mr. Rosenbaum's near-by clothing store. He observed a salesman with a sample case talking to Mr. Rosenbaum and did not enter. He walked round the block, returned to the Lido Bar, and about 15 minutes later returned to Mr. Rosenbaum's store. Mr. Rosenbaum was then alone, reading a newspaper. Defendant entered the store, and after conversing with Mr. Rosenbaum, struck him twice on the side of the face and head. Mr. Rosenbaum fell to the floor, and defendant dragged him into a washroom toward the rear of the building. Defendant took money from his wallet, packed a suitcase with clothing from the store, and took it with him when he left the scene in Mr. Rosenbaum's car. He waited on one or two customers before he left the premises. Two days later Mr. Rosenbaum's body was discovered in the washroom. There was a leather thong tied round his neck and several small puncture wounds in the upper part of his body. Death was caused by shock and hemorrhage owing to laceration of the face and scalp and congestion and edema of the lungs owing to strangulation. After leaving the store, defendant drove to his parents' home and then to a ranch where he had been employed. Later he returned to Santa Rosa, where he left Mr. Rosenbaum's car. On the evening of the 11th, the same day Mr. Rosenbaum's body was found, he took a bus to San Francisco where he was apprehended.

Defendant pleaded not guilty and not guilty by reason of insanity. He testified that he went to the store to buy work clothes. Mr. Rosenbaum was a friend of his and had lent him $25, which defendant had not repaid. After he had bought the clothes he had an argument with Mr. Rosenbaum about the loan. He struck Mr. Rosenbaum twice but did not intend to kill him. He did not remember dragging him into the washroom or tying the thong round his neck or stabbing him. It was not until after he had left Mr. Rosenbaum in the washroom and had started to leave the store that he decided to return and take the money, clothing, and the car.

Although there is no dispute that defendant had been drinking before he attacked Mr. Rosenbaum, witnesses who saw him both shortly before and after the crime testified that he was not intoxicated. He remembered and described most of the events that occurred at the time. In a statement made to the district attorney and the police the day after his arrest, he said that he had bought the work clothes from Mr. Rosenbaum earlier in the day and not at the time of the attack. In that statement he made no reference to a quarrel about a loan.

On the trial of the issue of not guilty by reason of insanity, four psychiatrists testified, one for the prosecution and three who had been appointed by the court. They were all of the opinion that defendant was legally sane at the time of the commission of the crime. Testifying in his own behalf, defendant described some of his background and past experiences. He stated that he knew it was wrong to kill except when in military service or in self defense. None of the psychiatrists were of the opinion that anything in defendant's testimony indicated legal insanity. No witness testified that defendant was legally insane.

[1] The foregoing evidence is sufficient to support a finding that defendant committed the homicide in the perpetration of robbery or burglary, that he was legally sane at the time of the crime, and that he is therefore guilty of murder of the first degree. Penal Code, § 189. Defendant contends, however, that the trial court committed prejudicial error by refusing to instruct the jury on his theory of the case. He offered the following instruction, which the trial court refused to give on the ground that it was not the law.

"If you find that Defendant Arthur Carnine had not formed an intention to rob Isroil Rosenbaum until after he struck Isroil Rosenbaum, dragged his body into the washroom, and left his body lying on the floor of the washroom; then you are instructed that Isroil Rosenbaum was not killed by Arthur Carnine in the perpetration of or an attempt to perpetrate, the crime of robbery."

[2] According to defendant's testimony he never intended to kill Mr. Rosenbaum and did not decide to take the property until after the attack had terminated. As stated in People v. Kerr, 37 Cal.2d 11, 13–14, 229 P.2d 777, 778, where the same de-

fense was advanced in a similar factual situation, "It is true that if defendant's thoughts followed the course described by him the killing would not be first degree murder in the perpetration of robbery. [Citations.]" Accordingly, the instruction should have been given.

[3] It may not reasonably be contended that the error was cured by the following general instructions with respect to murder that were given by the court.

"Murder which is committed in the perpetration or attempt to perpetrate the crime of robbery, is declared by law to be murder of the first degree, and if you should find, beyond a reasonable doubt and to a moral certainty, that the defendant, Arthur C. Carnine, killed Isroil Rosenbaum in the perpetration or attempt to perpetrate the crime of robbery, as those terms are defined herein, you will have no choice but to designate the offense as murder in the first degree.

"Murder which is committed in the perpetration or attempt to perpetrate the crime of burglary, is declared by law to be murder of the first degree, and if you should find, beyond a reasonable doubt and to a moral certainty, that the defendant, Arthur C. Carnine, killed Isroil Rosenbaum in the perpetration or attempt to perpetrate the crime of burglary, as those terms are defined herein, you will have no choice but to designate the offense as murder in the first degree.

"Robbery is defined by Section 211 of the Penal Code as follows: 'Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.'

"In so far as this case is concerned, the crime of burglary is defined by section 459 of the Penal Code as follows: 'Every person who enters any * * * store * * or other building with intent to commit grand or petit larceny or any felony, is guilty of burglary.'

"The word 'perpetration' as used in these instructions, is defined as the doing or performance or commission of an act consciously or with a guilty intent, to commit the offense or offenses charged as a wicked deed.

"If you find that the defendant Arthur Carnine had not formed an intention to burglarize Isroil Rosenbaum's store until after he struck Isroil Rosenbaum, dragged his body into the washroom and left his body lying on the floor of the washroom —if he did such acts, then you are instructed that Isroil Rosenbaum was not killed by Arthur Carnine in the perpetration of, or an attempt to perpetrate, the crime of burglary."

There is nothing in the foregoing instructions that sets forth defendant's defense to the charge of murder committed in the perpetration of robbery. It is not improbable that the jury concluded that a lethal assault followed by a stealing of the victim's property constituted murder in the perpetration of a robbery even though the intent to steal was not conceived until the assault had terminated. The instructions not only left the door open to such a conclusion, but by specifically pointing out that in the case of murder committed in the perpetration of burglary the criminal intent must have been formed before defendant entered the store, they suggested that the time at which defendant formed the intent to steal the property was irrelevant in the case of murder committed in the perpetration of robbery.

Since defendant admitted that he had attacked Mr. Rosenbaum and thereafter had stolen his property, his only available defense, aside from insanity, to the charge of murder of the first degree was that set forth in the refused instruction. Although the jury was not required to accept defendant's testimony that he never intended to kill Mr. Rosenbaum and that he did not decide to steal his property until after the assault was completed, People v. Kerr, supra, 37 Cal.2d 11, 14, 229 P.2d 777, he was entitled to have them properly instructed on the defense raised thereby. People v. Carmen, 36 Cal.2d 768, 772–774, 228 P.2d 281, and cases cited.

This court cannot weigh the evidence to determine whether defendant's testimony was true or false. That question was for the jury. Under the instructions given it is impossible to conclude from the verdict that the jury disbelieved him and accordingly found against his only available defense. As stated in Daniels v. City and County of San Francisco, 40 Cal.2d 614, 623, 255 P.2d 785, 791. "It is the duty of the court to instruct on every theory of the case finding support in the evidence. [Citations.] The ordinary rules on appeal sustaining a general verdict which the evidence on one of several issues upholds [citations] has no application here where plaintiffs' theory of recovery was not even presented to the jury as an issue affecting their right of recovery. [Citations.]"

Even if we were at liberty to weigh the evidence to determine what credence the jury might have given defendant's testimony had its relevance been pointed out to them, we could not say that the evidence preponderated against the truth of his version of his mental processes. Defendant is twenty-one years of age. His formal education ended with the sixth grade, although he had some further education during the period of approximately two years he spent in the army after enlisting at the age of 16. After leaving the army he wandered about the country working for brief periods as various jobs. Several months before the crime he came to Santa Rosa to live with his mother and stepfather. He soon left Santa Rosa, however, and did not return until shortly before the crime. The day before the crime he secured employment as a milker at a ranch. The following morning he borrowed $10 from his stepfather to buy work clothes and walked into town. He visited various bars and poolhalls looking for friends and bought a half pint of whiskey and drank it. About 2:30 in the afternoon he went to the Lido Bar where he stayed until he left to go to Mr. Rosenbaum's store. While at the bar he drank from four to eight beers and one whiskey. He testified that Mr. Rosenbaum was a friend of his and that the reason he did not enter the store when he first went there was that he saw that Mr. Rosenbaum was busy and he did not wish to disturb him. He returned to the Lido Bar, had another beer, and then returned to Mr. Rosenbaum's store. After he had attacked Mr. Rosenbaum and left him lying in the washroom he waited on two customers. He made no effort to hurry them out of the store, but urged one of them to buy something else after he was unable to find what the customer originally wanted. In addition to the money he found in Mr. Rosenbaum's wallet, he took a suitcase and a box or boxes packed with clothing of assorted sizes. He then took Mr. Rosenbaum's car and drove to the ranch where he was employed. On the way he drove into a ditch and got other employees of the ranch to pull the car out. He unloaded the clothing and later drove back to town where he left the car. Later in the evening he took a taxi to various bars and then back to the ranch. During the evening he drank so much that the foreman was unable to awaken him for the morning milking, and he was fired. Later in the day he borrowed five dollars from his stepfather and went to the Russian river with his cousin where they canoed and drank whiskey. The following evening he decided to leave town and took a bus to San Francisco. He took some of the clothing he had stolen with him and left the rest at his mother's and stepfather's cabin. The testimony of various witnesses suggests that defendant had a rather easygoing, happy-go-lucky disposition. He owned a gun, but he did not use it in the commission of the crime.

The foregoing evidence is not inconsistent with defendant's testimony that his attack on Mr. Rosenbaum was the result of a sudden quarrel and that the taking of the property was an afterthought. It is inconsistent with the theory of a planned robbery or burglary. Defendant did not enter a store where he was unknown or where he could expect to find any large amount of money. He made no appreciable effort to conceal his crime. Not only did he expose himself to witnesses at the scene, but he drove his victim's car to the ranch where he worked and enlisted the aid of people who knew him to pull the car out of the ditch. Had he killed Mr. Rosenbaum to prevent his identification as a robber it is unlikely that immediately thereafter he would leave a trail so easily followed. The evidence presents a picture of a crime committed by a person whose behavior was generally erratic and who at the time was at least partially under the influence of alcohol. The crime had few, if any, of the indicia of careful planning. Under these circumstances it was a close question whether defendant first decided to rob Mr. Rosenbaum and then killed him in the perpetration of that robbery or first attacked him without premeditation and only thereafter decided to steal his property.

It may not be inferred from the fact that the jury brought in a verdict of murder of the first rather than of the second degree that it decided this question against defendant. The instructions on second degree murder carefully pointed out that murder could not be of the second degree if it was committed in the perpetration of a robbery or burglary. Thus these instructions referred the jury to those defining murder committed in the perpetration of a robbery or burglary, and as pointed out above, none of the latter instructions explained to the jury defendant's only defense to the charge of murder committed in the perpetration of a robbery.

[4] In determining whether the error was prejudicial, it bears emphasis that the burden was on the prosecution to prove defendant guilty of murder of the first degree beyond a reasonable doubt. It was not incumbent upon defendant to convince the jury that his version of what occurred was true. He was entitled to be found guilty of no more than murder of the second degree if his testimony viewed in the light of the other evidence was sufficient to create a reasonable doubt as to his guilt of murder of the first degree. Under these circumstances we cannot say that a different verdict would have been improbable had the requested instruction been given. Accordingly, the error constituted a miscarriage of justice within the meaning of Article VI, section 4½ of the Constitution. People v. Newson, 37 Cal.2d 34, 45, 230 P.2d 618; People v. Hamilton, 33 Cal.2d 45, 51, 198 P.2d 873.

The judgment is reversed.

GIBSON, C. J., and SHENK, CARTER, SCHAUER and SPENCE, JJ., concur.

EDMONDS, J., concurs in the judgment.

41 Cal.2d 279

PEOPLE v. LOGAN.

Cr. 5384.

Supreme Court of California, in Bank.
July 14, 1953.

Defendant was convicted in the Superior Court, Los Angeles County, Ellsworth Meyer, J., of assault with a deadly weapon and robbery of the first degree, and he appealed. The Supreme Court, Schauer, J., held that there was but a single crime committed when defendant stealthily crept up behind his victim, and struck her over head with baseball bat, and took her purse and fled, and conviction for assault with a deadly weapon would be reversed as the less serious offense, and judgment of conviction of robbery would be affirmed.

Judgment of conviction of assault with deadly weapon reversed; judgment of conviction of robbery affirmed.

Prior opinion, 247 P.2d 918.

1. Criminal Law ⚷438, 1169(1)

In prosecution for robbery and assault with a deadly weapon, wherein it appeared that defendant had struck his victim over the head with a baseball bat, and that he had been apprehended shortly thereafter and taken to the scene of the crime where a photograph was taken which disclosed the defendant and his victim, and that another photograph was taken at police station, showing defendant, the baseball bat, and his victim's purse, admission of photographs in evidence was error, but was not prejudicial to defendant in view of abundance of other evidence connecting him with the crime.

2. Criminal Law ⚷438

Photographs should not be offered or admitted in evidence in the criminal trial for any purpose other than that of helping the jury.

3. Witnesses ⚿274(2)

In prosecution for robbery and assault with a deadly weapon, wherein a police officer had testified as to prior convictions of defendant, and defendant introduced character witnesses, cross-examination of such character witnesses by prosecuting attorney by asking them whether they had heard of certain arrests and convictions of defendant was proper.

4. Witnesses ⚿274(2)

In absence of a showing of bad faith, it is always within scope of legitimate cross-examination to ask a character witness for defendant whether he has heard the defendant being accused of conduct inconsistent with the character attributed to him by the witness.

5. Criminal Law ⚿814(3)

In prosecution for robbery and assault with a deadly weapon, evidence relative to prior convictions of defendant was sufficient to warrant refusal to give instruction that there was no evidence in record that defendant had ever been convicted of any crime.

6. Criminal Law ⚿1170(2)

In prosecution for robbery and assault with a deadly weapon, wherein it was contended that defendant had stealthily crept up behind his victim and struck her over head with baseball bat, and victim testified that immediately before she was struck she heard only light foot-steps, and officer related statement by defendant to effect that defendant had turned his automobile around and approached victim, refusal to permit questions by defendant's counsel, for purpose of bringing out that defendant's automobile was noisy, and that crime could not have occurred in manner contended by state, was not prejudicial error, when defendant was permitted to give other testimony, to same effect, upon which he could base the same argument.

7. Criminal Law ⚿531(3)

In prosecution for robbery and assault with a deadly weapon, wherein defendant contended that transcribed confession made by him was involuntary, evidence supported trial judge's determination of initial question of admissibility of confession, and submission to jury of question of voluntariness under instruction that it was for them to determine whether confession was voluntary, and that they must disregard it if they found it was involuntary.

8. Criminal Law ⚿736(2)

In prosecution for robbery and assault with a deadly weapon, wherein a purported transcribed confession of defendant was introduced in evidence, and defendant denied and officer testified that transcript was correct, question whether transcribed confession was correct and complete was for jury.

9. Criminal Law ⚿1209

Crime committed when defendant allegedly stealthily crept up behind his victim, and struck her over head with baseball bat, and took her purse and fled, was but a single crime, and conviction of defendant for both the crime of assault with a deadly weapon and the crime of robbery of the first degree and imposing of separate sentences therefor, was error as double punishment for single crime. Pen.Code, §§ 211a, 213, 245.

◆

William B. Esterman, Hollywood, and Richard L. Rykoff, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Dan Kaufmann, Deputy Atty. Gen., for respondent.

SCHAUER, Justice.

Defendant appeals from a judgment pursuant to the verdict of a jury which found him guilty of (count one) assault with a deadly weapon and (count two) robbery of the first degree, and from an order denying his motion for new trial. We have concluded that various matters, hereinafter described, of which defendant complains did not constitute prejudicial error, but that the judgment must be reversed as to the first count because a single, indivisible act (the use of a baseball bat as a club) constituted count one assault *with a deadly weapon* and count two robbery *of the first degree* because committed by one "armed with a dangerous or deadly weapon". Pen.Code, § 211a.

The People's evidence discloses the following events: Early on the morning of May 12, 1951, Mrs. Adalyn Hickson was walking toward her home. She had left the store where she was employed as a cashier at 12:30 a. m. As she neared her home, she testified, "I heard light footsteps right behind me, just a few footsteps, I didn't have a chance to turn around," and "I came to in the hospital." She had suffered skull fractures, concussion, and cuts and bruises on her face and head. This incident occurred between 1:30 and 2:00 a. m., according to Mrs. Hickson's testimony.

At 1:40 a. m. Police Officers Judd and Bunda, on routine patrol duty in a radio car, observed a Ford car with lights off being driven away from the vicinity where Mrs. Hickson was later found. The lights of the Ford came on and it was driven through a boulevard stop without a halt. The officers displayed the red light of the police car as a signal to defendant, the driver of the Ford, to stop. Instead he accelerated and drove away, made a right turn and then a second right turn, the latter into a private driveway, and crashed through a metal gate. He then got out of the car, threw an object into the next yard, and ran toward the rear of the yard in which he was. The officers had pursued defendant, first in the police car and then on foot. At Officer Judd's command defendant halted at the rear of the yard into which he had driven. Officer Judd "asked the defendant what was the matter with him and what he threw over the fence. * * * The defendant stated that he was drunk and that he had not thrown anything over the fence." In the adjoining yard Officer Judd found Mrs. Hickson's purse. Defendant then said that "he had found the purse in a parked vehicle." In defendant's Ford was a baseball bat which, it was later learned, had a spot of human blood on it. Defendant had been drinking but did not appear to be intoxicated.

The officers took defendant to a police station where they and Detective Barclay interviewed him. Defendant first repeated that he had found the purse in an automobile. Barclay said, "Don't lie, I know better, where did you get the purse?". Defendant then said that he had taken it from a woman, that he had struck her with his fist and she had fallen down, that she had not screamed and that he did not know whether she got up after he struck her. Defendant further said he did not know the name of the street where the attack took place but that he believed he could direct the officers to the vicinity. The officers took defendant to the address shown in Mrs. Hickson's purse and found that she was not there. They then drove slowly along the street where defendant said the attack had occurred, defendant "stated that a bush looked familiar," and Officer Judd got out of the car and found Mrs. Hickson, unconscious, lying on the lawn. She was discovered at about 3:30 a. m. At this time defendant said, "She isn't dead is she? She's dead? Why don't you shoot me?"

The police summoned an ambulance, other officers, and photographers. While he was still at the scene of the crime defendant said he had hit the woman with a stick, then admitted that he had hit her with the baseball bat which was in his car and that he did not know why he had done so.

At about 4:00 a. m. defendant was taken back to the police station. Under questioning by the police he made a confession which was reported and transcribed by a stenographer. At about 5:30 a. m. defendant signed each of the five pages of the statement. Defendant was then taken to a cell where he slept. The next morning at about 10:30 another officer assigned to investigate the case questioned defendant and defendant again confessed and described the assault.

The substance of defendant's confessions is as follows: He was on his way to pick up his wife, who had been to a party, when he saw a woman walking along the sidewalk. He did not observe whether she had a purse. Defendant stopped his car, got out, and hit the back of her head with the baseball bat. The bat was part of the athletic equipment which defendant used in his work as a playground director. Defendant seized the woman's purse, fled, and was apprehended in the manner described by Officers Judd and Bunda.

At the trial defendant testified that he had not followed anyone or struck anyone with anything or taken a purse on the night of May 11 or early morning of May 12, 1951. He categorically and repeatedly denied having made any of the various oral admissions and confessions to which the officers had testified. He testified that the incriminating portions of the transcribed statement which he made in the police station had not been made by him in answer to questions but had been formulated by the interrogating officers after discussion between them in his presence, and that he signed the typed statement without having read it because "I was so dead for sleep at the time I wanted more than anything in the world just to be allowed to lie down and go to sleep and then again I was afraid if I didn't sign it I would be beaten like I was beaten before when I was a kid, by the police." (The circumstances under which the typed statement was prepared will be hereinafter described in connection with the discussion of its admissibility in evidence.)

Photographic Evidence

[1] Over defendant's objection the trial court admitted in evidence two photographs, taken at the scene of the crime shortly after its discovery, which show defendant, police officers, and the bleeding victim, and a photograph, taken at the police station after defendant had been returned there, which shows defendant, the baseball bat, and Mrs. Hickson's purse. Officer Judd testified that the photographs accurately show the circumstances there depicted. They do not purport to represent re-enactments of the crime.

Defendant argues that the photographs serve no proper evidentiary purpose and connect him with the crime in such a striking manner that the jury may well have been unduly impressed by them. The effect of the photographs was made worse, defendant says, by the following argument of the prosecuting attorney to the jury: "The woman was in a horrible condition, as you will see from these pictures, and I have no idea what might have happened to the woman, he might have been tried on a much more serious charge if nobody had found her until morning. In any event, you have this exhibit, showing the condition of this woman at the time she was found there. She is in a very, very bad condition. As you know, all this is in evidence and the Judge will instruct you have the right to take it to the jury room and look it over carefully. This is briefly the picture of the woman just as she was found there by the officers. And then you have the other picture here of everybody at the scene, including the defendant, and the lady being taken away on the stretcher. You can look that over in the jury room. Then you have the picture of the defendant which was taken at the police station later."

[2] The above quoted argument of the prosecuting attorney does not suggest that the photographs are evidence of anything more than that which they depict and to which the officers testified. However, it is not apparent how the jury would be aided in solving the facts of the case by pictures showing defendant in the presence of the victim. As defendant says (quoting from People v. Burns (1952), 109 Cal.App.2d 524, 542, 241 P.2d 308, 242 P.2d 9), "photographs should not be offered or admitted for any purpose other than to help the jury." (See People v. Dabb (1948), 32 Cal.2d 491, 498, 197 P.2d 1; People v. Sambrano (1939), 33 Cal.App.2d 200, 213, 91 P.2d 221.)

The People argue that the photographs were admissible to show the scene of the attack, the condition of the victim, and the relevant real evidence of the victim's purse and of the bat which, according to other evidence, had been used as a weapon. (See People v. Ah Lee (1912), 164 Cal. 350, 352, 128 P. 1035; People v. Smith (1940), 15 Cal.2d 640, 649, 104 P.2d 510.) Furthermore, the People say, the photographs were admissible to support the officers' testimony that defendant was with them at the scene of the crime and was in the police station. Obviously the foregoing matters could have been shown without the graphic connection of defendant and the victim which resulted from photographing them together. However, in view of the abundance of other evidence connecting defendant with the crime, it does not appear that the erroneous use of the photographs amounted to prejudicial error requiring a reversal.

The Prosecuting Attorney's Reference to an Asserted Prior Criminal Record of Defendant

[3] The first reference to any prior criminal record of defendant occurred during cross-examination of Officer Brennan, a witness for the People. Brennan was assigned to this case as investigating officer and prepared a report which contained information as to defendant's background. Defendant's counsel asked Brennan, "Since you have testified this morning do you remember anything else you told him or that he said to you that had not come to your mind this morning * * *." The officer replied, "Well, there is another thing, * * after I read this [report] it refreshed my memory that I had asked him if he had ever been arrested before or if he had ever done * * * service in the State Penitentiary and * * * his answer was that he was arrested in '42 for assault and battery and did three months locally. He also stated that he was arrested once in Richmond, California, but that the outcome was that he went into the Army and the case was dismissed." Defendant's counsel proceeded to establish that in 1942 defendant had been 16 years of age, then asked, "Did you inquire of him concerning this arrest that you just told me about any further than what you have just told us?" The officer replied that he had not.

Thereafter defendant produced five character witnesses who testified to his good reputation for peace and quiet. In cross-examining one of these character witnesses, defendant's sister, the prosecuting attorney asked, "Have you ever heard of him being arrested?" The witness testified that she had heard of defendant's being arrested in Richmond. She further testified, over objection of defendant's counsel, that she had not heard what the Richmond charge was, that she had heard that it was dismissed, and that she had not heard of any arrest of defendant in 1942. Another character witness, defendant's brother, was asked on cross-examination, "Have you ever heard that he was convicted of the offense of assault and battery?" After vigorous and repeated objections by defendant's counsel the brother testified, "I heard by way of mouth, and that is all." Further cross-examination and redirect examination of the brother brought out the fact that he meant that he had heard that in 1942 the defendant "had a little trouble down in Los Angeles," and had been accused but not convicted.

Defendant's counsel then called the prosecuting attorney as a witness and asked him whether he had checked official records and found any record of any previous arrest or conviction of defendant. The attorney replied, "I have no record except what the officer told me and what he told me the defendant has told him." Defendant urges that the prosecuting attorney was guilty of prejudicial misconduct in asking the character witnesses whether they had heard of certain arrests and convictions without having first investigated and determined whether such arrests and convictions had actually occurred. Defendant subsequently testified that he had not been convicted of anything and had never spent any time in jail prior to his arrest on the present charge, and that he had not made the statement concerning serving time which the officer attributed to him.

[4] No convincing reason for attributing bad faith to the prosecuting attorney appears; in the absence of knowledge or notice to the contrary he was entitled to accept the apparently credible admissions of a prior conviction to which the police officer had testified. And the manner in which he sought to impeach the character witnesses' testimony to defendant's reputation was proper. "In the absence of a showing of bad faith it is always within the scope of legitimate cross-examination to ask a character witness whether he has heard the person whose reputation is un-

der investigation accused of conduct inconsistent with the character attributed to him by the witness." (People v. McKenna (1938), 11 Cal.2d 327, 335–336, 79 P.2d 1065.) "One way to test the accuracy and weight of the statement of the witness as to the existence of the good reputation of the accused is for the prosecution, in good faith, to ask the witness whether he has heard of certain rumors, occurrences or charges as to specific acts of misconduct of the accused relating in general to the traits involved in the charge." (People v. Gin Shue (1943), 58 Cal.App.2d 625, 634, 137 P.2d 742.)

[5] Defendant urges that the trial judge should have given the following instruction requested by him: "there is no evidence whatever in this record that the Defendant has ever been convicted of any crime * * *." The instruction was properly refused; there was some evidence to that effect (the testimony of the police officer, as to which there was no motion to strike, that defendant had told him he had served three months in jail).

Sustaining of Objections to Defendant's Testimony that His Automobile was Noisy

[6] Defendant was asked by his counsel whether his car was noisy in its operation. Objections to such questions on the ground that they called for immaterial answers were sustained. In the course of an offer of proof made outside the hearing of the jury defendant's counsel stated that he wished to introduce this evidence to show that the crime could not have occurred in the manner shown by portions of the People's evidence; i. e., the testimony of the victim that immediately before she was struck she heard only "light footsteps," and the testimony of an officer that defendant told him that "he turned the car around and got up close to her, took a baseball bat out of the back seat and snuck up behind her and struck her."

As the People point out, defendant was permitted to give other testimony upon which he could base an argument that he could not have been the assailant because the victim would have heard his automobile; i. e., he testified that the car "rattled very loud," and that one "Definitely" could hear the engine. In the circumstances the refusal to admit defendant's cumulative testimony as to whether the car was "noisy" could not have prejudiced him.

Admissibility of Alleged Transcribed Confession

[7] Defendant testified that on the night before the crime he had only four hours' sleep because he had studied for a college examination; that after taking the examination he spent the day in vigorous physical activity in his employment as playground director; that he had no dinner, only coffee, waxed the floors of his home, then went to a party where he had six or seven drinks of bourbon, and was driving to pick up his wife, who had attended another party, when he was arrested. As previously indicated, defendant further testified that as a result of his previous physical and mental exertion and lack of sleep he was exhausted at the time he was questioned by the police.

Defendant also testified that after he was apprehended he was handcuffed so tightly that the circulation in his hands was cut off and his wrists were bruised and bleeding. His wife testified that she saw defendant on the afternoon following his arrest and saw blood "oozing from his wrists." Officer Judd testified that after he handcuffed defendant, defendant complained and the officer found that one of the handcuffs "was a little tight * * so I loosened the tight handcuff." The various officers who observed and questioned defendant testified that there was no visible injury from the handcuffs.

Photographs of defendant's hands and wrists assertedly taken three days after his arrest (the day following his release on bail; defendant's Exhibits G and H), tend to support defendant's testimony that both handcuffs were drawn so tight as to cut through the skin and into his flesh. (It must be remembered that the matter now in controversy before us does not concern possibly indicated proceedings against the apparently offending officer either in respect to his treatment of the prisoner or the possible inaccuracy of his testimony in regard to such treatment; it concerns only questions as to the admissibility of defendant's confession and the trial court's rulings in relation to the proceedings before it.)

Other testimony of defendant, denied by the police officers, concerning the circumstances preceding the preparation of the written statement was as follows: Defendant protested against the taking of pictures at the scene of the crime. After the taking of the pictures Officer Bunda "hit me with his elbow * * * right above the heart * * * several times." The booking officer at the police station spoke to defendant profanely and obscenely, and while defendant was waiting to be fingerprinted the jailer refused his requests for water and cigarettes. Officer Barclay, who directed the preparation of the written statement, told defendant, "if you cooperate with us in every way I will see that you get the softest bed in the house."

The officers testified that defendant made the statement which was transcribed voluntarily and that he read it before signing it. It was not until about 10:30 on the morning of May 12 that one of the officers told defendant that he could call an attorney; there is no evidence that defendant had previously requested and been refused permission to make such a call.

The above summarized evidence does not support defendant's claim that, as a matter of law, the confession was involuntary and, therefore, inadmissible. The evidence presents a substantial conflict. It supports the trial judge's determination of the initial question whether the confession was admissible, and the jury were correctly instructed that it was for them to determine whether the confession was made and whether it was voluntary, and that they must disregard it if they found it was involuntary.

[8] Defendant, as previously indicated, testified that his statement was not made in direct question and answer form, as is the statement introduced in evidence, but that the questions and answers were prepared by the interrogating officers and the stenographer in the course of discussion which was not reported and transcribed. He relies upon People v. Williams (1942), 20 Cal.2d 273, 285, 125 P.2d 9, where a judgment of conviction was reversed because the People, among other things, "failed to prove * * * that the typewritten statement purporting to be his [defendant's] confession was the record of his conversation." The situation here is not like that in the Williams case. Officer Barclay, who assertedly asked the transcribed questions, testified that the transcript was correct. It was for the jury to determine whether his testimony or that of defendant as to the correctness and completeness of the statement was true.

Double Punishment Based Upon One Indivisible Transaction

[9] It is apparent from the descriptions of the criminal transaction in the testimony of the victim and the confessions and admissions of the defendant that the striking of the victim with the baseball bat and the taking of her purse constituted a single, indivisible transaction. The one act of inflicting force with the bat cannot both be punished as assault with a deadly weapon and availed of by the People as the force necessary to constitute the crime of robbery, for "co-operative acts constituting but one offense when committed by the same person at the same time, when combined, charge but one crime and but one punishment can be inflicted." (People v. Clemett (1929), 208 Cal. 142, 144, 280 P. 681; People v. Greer (1947), 30 Cal.2d 589, 604, 184 P.2d 512; People v. Knowles (1950), 35 Cal.2d 175, 187, 217 P.2d 1.)

The People rely upon People v. Thomas (1943), 59 Cal.App.2d 585, 139 P.2d 359, which discusses only the problem of included offenses, not the problem of double punishment. They also rely upon People v. Coltrin (1936), 5 Cal.2d 649, 660, 55 P.2d 1161, which expressly recognizes that "If the act involved in one charge is necessarily involved in the other and is merely incidental to that charge but one offense is committed and it cannot be carved into two offenses in order to inflict a double punishment," and upon People v. Hoyt (1942), 20

Cal.2d 306, 317, 125 P.2d 29. However, as is well stated by defendant's counsel, "no mere combination of words can result in an inflexible yardstick by which *all* cases may be measured; in each case the particular facts have had to be related to the legislative intent." (Italics defendant's.)

Since the Legislature prescribed a greater punishment for the crime of robbery by a person armed with a dangerous or deadly weapon (imprisonment in the state prison for not less than five years; Pen.Code, §§ 211a, 213) than for the crime of assault with a deadly weapon (imprisonment in the state prison for not more than ten years or in the county jail for not more than one year, or fine; Pen.Code, § 245), the robbery must be considered as the more serious offense and the conviction thereof must be affirmed; the conviction for the less serious offense must be reversed. (People v. Knowles (1950), supra, p. 189 of 35 Cal.2d, 217 P.2d 1.)

For the reasons above stated the order denying the motion for a new trial is affirmed; the judgment of conviction of assault with a deadly weapon is reversed; and the judgment of conviction of robbery is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, and SPENCE, JJ., concur.

---

119 Cal.App.2d 490

PEOPLE v. BRANCH.

Cr. 2891.

District Court of Appeal, First District, Division 1, California.

Aug. 4, 1953.

Defendant was convicted in the Superior Court in and for the County of Alameda of possession of marihuana and of an offer to sell marihuana, and he appealed. The District Court of Appeal, Peters, P. J., held that evidence warranted conclusion that possession of marihuana was merely incidental to its sale or offer to sell, and consequently it was error to impose separate sentences for possession and sale.

Judgment of conviction of offer to sell marihuana affirmed; judgment of conviction of possession of marihuana reversed.

1. Criminal Law 🔑37

Although the law will not permit law enforcement officials to entice the innocent to commit a crime that would not otherwise have been committed, the use by law enforcement officers of a decoy will not compel a holding, as a matter of law, of entrapment, even when the decoy encourages or aids in the commission of the offense, as long as there was a pre-existing criminal intent in mind of the wrongdoer.

2. Criminal Law 🔑569

In prosecution for possession of marihuana and for an offer to sell marihuana, wherein it appeared that defendant had produced marihuana after call from one to whom police officers had given marked bills, and that defendant had been apprehended after he had been handed the marked bills, evidence was sufficient to support the implied finding of nonentrapment.

3. Criminal Law 🔑1144(14)

Where record on appeal in criminal case did not include any of the instructions given or refused, if an instruction on the subject of entrapment should have been given, appellate court was bound to conclusively presume that such instruction had been given.

4. Criminal Law 🔑1028

Even when entrapment is a question of fact in a criminal case, such defense must be raised in the trial court by offer of an instruction on subject or otherwise, and cannot be raised for first time on appeal.

5. Poisons 🔑9

Evidence was sufficient to show possession and sale of marihuana. Health and Safety Code, § 11500.

6. Criminal Law 🔑1044

A motion to set aside information or to delete a count thereof which is asserted to have been added after preliminary hearing is a condition precedent to later raising an objection on such ground.

7. Criminal Law ⚷1209

Under statute providing that an act or omission which is made punishable in different ways by different provisions of code may be punished under either of such provisions, but in no case can it be punished under more than one, a single criminal act, whether it gives rise to included offenses or not, can only be punished once, and in order to impose separate punishments, it is requisite that there be evidence of separate and divisible acts that are not incidental to each other. Pen.Code, § 654.

8. Criminal Law ⚷1209

In prosecution for possession of marihuana and offering to sell marihuana, evidence concerning the alleged offenses, when given a broad transactional approach, compelled conclusion that but one offense was involved, and that there was not such a separation as would warrant a separate punishment for each the possession and offering for sale.

9. Criminal Law ⚷1177

Where possession of marihuana was but incidental to a sale or offer to sell, error in imposing separate sentences for possession and sale was not avoided by fact that sentences were made to run concurrently, but the conviction as to the charge of unlawful possession would be reversed.

◆

George E. McDonald and James C. Calkins, Jr., Alameda, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and Arlo E. Smith, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

By an information containing three counts defendant was charged with three violations of section 11500 of the Health and Safety Code, and with a prior conviction and service of a term of imprisonment, for assault and robbery in Louisiana. The first count charged possession of marihuana, and the third with an offer to sell marihuana, both events being charged as having occurred on November 28, 1951. The second count charged defendant with furnishing marihuana on November 25, 1951. Defendant admitted the prior and pleaded not guilty to the other charges. He was found guilty of the charges contained in the first and third counts, and not guilty of the charge contained in the second count. Sentences upon the two guilty counts were made to run concurrently. Defendant appeals from the judgment and from the order denying his motion for a new trial.

The facts are as follows: Appellant was arrested by officers Taylor and Ingram, and Sergeant Plummer, of the narcotics detail of the Oakland Police Department, late on the night of November 28, 1951. One or another of the arresting officers testified that earlier that night, pursuant to a narcotics complaint, they had searched the apartment of Velder Feris Collier, more commonly known as Belle Collier, for narcotics. They discovered only minute particles, too small to use as evidence, of what they presumed to be marihuana. The officers then asked Belle if she could get a "can" or "tin" of marihuana. Belle's testimony at the preliminary examination (read into the record of the present trial without objection because she had died prior to the trial) was to the effect that officer Taylor told her to get a "can," but did not tell her where to get it or from whom, and that she promised to try. In some way not disclosed by the record, Taylor found a telephone number, which turned out to be the telephone number of appellant, although Taylor did not then know that fact. Taylor dialed that number and then handed the receiver to Belle, but stood where he could hear both ends of the telephone conversation. A man answered the phone, and Taylor testified that he immediately recognized the voice of appellant. Belle asked appellant "Can I get a tin?" (The evidence shows that in the language of the underworld a "tin" is one ounce of marihuana.) Appellant replied "Yes," whereupon Belle stated that she would come right over. Appellant admitted receiving a telephone call from Belle, but claimed that she had telephoned about the purchase from him of a rug, and that she had made two earlier telephone calls that same day and discussed the rug with him. While Belle confirmed the fact that she had made the prior calls and discussed the rug with appellant, she confirmed Taylor's version of the later conversation. These conflicts were for the jury.

Taylor, confirmed by Belle, testified that, after the telephone call had been completed, he gave Belle $15 in marked bills, and that then he, and the other officers, drove Belle to a spot near to appellant's apartment. Belle went into the apartment, and the officers parked nearby. About twenty minutes later the officers approached appellant's apartment and, through a tear in a window shade, were able to see into appellant's living room. They saw Belle and appellant sitting on a couch. Appellant had a brown bag in one hand and was pulling out some of the contents with the other. The officers immediately broke into the apartment.

Belle testified that when she arrived at the apartment she asked appellant for her "tin," and that he replied that he would go get it for her; that she then handed him the marked bills; that appellant then left the house and returned in a couple of minutes with a brown bag containing the marihuana; that he did not give the bag to her, but suggested that they "roll a few" marihuana cigarettes; that appellant then sent his brother-in-law, Waymond Johnson, a soldier and a minor, who was then in the apartment, to the store to get some cigarette papers; that upon Johnson's return appellant and Belle sat on the couch getting ready to roll some cigarettes; that at this point the officers broke in.

The officers forced their way into the apartment, this maneuver taking between five and ten seconds. Taylor testified that he rushed through the living room into the bathroom, the door to which was open, and found Johnson and appellant there and the toilet flushing. He was able to remove from the toilet bowl a brown paper bag containing green vegetable matter, which, upon examintion by the state chemist, was determined to be 437 grams or one ounce of marihuana. The marked bills given by Taylor to Belle were found on the person of appellant. Belle testified that when the police broke in she saw appellant run toward the bathroom with the paper bag in his hand.

Johnson, the brother-in-law of appellant, gave (prior to trial because he was about to be and subsequently was transferred from San Francisco by the army) some rather equivocal testimony to the effect that on about November 25, 1951, appellant had furnished him with marihuana. Appellant was acquitted of the offense based on this evidence.

Appellant testified that he did not know there was marihuana in the house until the officers pulled it out of the toilet bowl; that Belle "framed" him; that Belle called about the rug and never discussed narcotics with him; that the money Belle paid him was for the rug; that he had not sent Johnson to the store to buy cigarette papers, but he was sent to buy some barbecue; that barbecue was what was in the bag observed by the officers when they saw him with the brown bag on the couch. Johnson agreed with appellant that some barbecue was in the house that night, but testified that it was all consumed in the kitchen and was not taken into the living room. He also testified that, just prior to the raid, he saw appellant and Belle on the couch with cigarette papers between them, rubbing the material in the bag between their hands.

[1] The appellant's first major contention is that such evidence discloses an illegal entrapment by the police officers, and hence necessitates a reversal. Of course the law will not permit law enforcement officials to entice the innocent to commit a crime that would not otherwise have been committed, but the cases are legion to the effect that the use by law enforcement officers of a decoy will not compel a holding, as a matter of law, of entrapment, even when the decoy encourages or aids in the commission of the offense, as long as there was a pre-existing criminal intent in the mind of the wrongdoer. In other words, merely allowing a willing seller an opportunity to make an illegal sale is insufficient to compel a finding of entrap-

ment. People v. Grijalva, 48 Cal.App.2d 690, 121 P.2d 32; People v. Lee, 9 Cal. App.2d 99, 48 P.2d 1003; In re Wong Poy, 113 Cal.App. 677, 298 P. 1029; People v. Ramirez, 95 Cal.App. 140, 272 P. 608.

The proper rule was stated as follows in People v. Schwartz, 109 Cal.App.2d 450, 455, 240 P.2d 1024, 1027: "There is ample testimony in the evidentiary narrative hereinbefore set forth to justify the jury in concluding that appellant was a willing seller of narcotics, and his conviction is not vitiated merely because enforcement officers or their agent became the willing buyer and merely created the opportunity for appellant to ply his trade. People v. Cherry, 39 Cal.App.2d 149, 152, 154, 102 P.2d 546. It is not the entrapment of a criminal upon which the law frowns, but the seduction of innocent people into a criminal career by its officers is what is condemned and will not be tolerated. Where an accused has a pre-existing criminal intent, the fact that when solicited by a decoy he committed a crime raises no inference of unlawful entrapment." See, also, People v. Roberts, 40 Cal.2d 483, 254 P.2d 501; People v. Lagomarsino, 97 Cal. App.2d 92, 217 P.2d 124; People v. Lindsey, 91 Cal.App.2d 914, 205 P.2d 1114.

[2] It has been held, on facts similar to those here involved, that such evidence, as a matter of law, was insufficient upon which to predicate a request for an entrapment instruction, and that, in such a case, it was not error to refuse to give such proffered instruction. People v. Johnson, 99 Cal. App.2d 559, 222 P.2d 58; People v. Harris, 80 Cal.App. 328, 251 P. 823. Regardless of this rule, however, in the instant case the question of entrapment was, at most, one of fact, and the implied finding of nonentrapment is amply supported. People v. Finkelstin, 98 Cal.App.2d 545, 220 P.2d 934; People v. Malone, 117 Cal.App. 629, 4 P.2d 287.

[3, 4] In the instant case, even if instructions on the subject should have been given, we must conclusively presume that such instructions were given because the appellant has not seen fit to include in the record any of the instructions given or refused. Moreover, even when entrapment is a question of fact, such defense must be raised in the trial court by the offer of an instruction on the subject or otherwise, and cannot be raised for the first time on appeal. People v. Ryan, 103 Cal.App.2d 904, 230 P.2d 359; People v. Schwartz, 109 Cal. App.2d 450, 240 P.2d 1024. Without the instructions in the record appellant has failed to sustain his burden.

[5] Appellant next challenges the sufficiency of the evidence in various respects. The evidence is sufficient to show possession of and sale of the marihuana by appellant.

[6] It is next urged that appellant was charged and held to answer at the preliminary hearing on but two charged counts, but that the information added the offering to sell count as a third count. He also claims that his then attorney was guilty of misconduct in failing to object to this procedure. The merits of these charges cannot be considered for the reason that there is nothing in the record to support them. Moreover, there is nothing in the record to show that a motion was made in the court below to set aside the information or to delete the claimed added count. Such motion is a condition precedent to later raising the point. People v. Ahern, 113 Cal.App.2d 746, 249 P.2d 63; People v. Reimringer, 116 Cal.App.2d 332, 253 P.2d 756.

[7, 8] There is one last point that must be considered, and that is whether appellant has been improperly convicted of two offenses—possession and sale—when, in fact, the possession was incidental to the sale. Appellant did not raise this point in his briefs, but the point was suggested, with commendable objectivity, by the Attorney General because of the opinion of the Supreme Court in People v. Roberts, 40 Cal.2d 482, 254 P.2d 501. In that case it was held that, where the possession and transportation of a narcotic were incidental to a sale of the same, separate convictions for the possession and transportation could not be had. The case is based upon the interpretation of section 654 of the Penal Code as made by the Supreme Court in People v. Knowles, 35 Cal.2d 175, 217 P.2d 1, and People v. Kehoe, 33 Cal.2d

711, 204 P.2d 321. See, also, People v. Logan, 41 Cal.2d 279, 260 P.2d 20; People v. Greer, 30 Cal.2d 589, 184 P.2d 512; People v. Clemett, 208 Cal. 142, 280 P. 681. That code section embodies a rule of law somewhat broader than the double jeopardy rule and its corollary of included offenses. It provides that "An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one". Under the rule of this section, as interpreted by the Supreme Court, a single criminal act, whether it gives rise to included offenses or not, can only be punished once. By this section, it is indispensable in order to impose separate punishments that there be evidence of separate and divisible acts that are not incidental to each other. In determining this question the courts have refused to dissect the evidence minutely in an attempt to find separate offenses, but, on the contrary, have held that a broad transactional approach should be made. The evidence in the instant case, so viewed, shows that the possession of appellant of the marihuana was incidental to its sale or offer to sell to Belle. For that reason but one offense is involved.

[9] The Attorney General seeks to avoid the effects of this error by pointing out that, since the sentences on the two counts have been made to run concurrently, no possible prejudice can result from the judgment. This is an unrealistic approach. The dual judgment may very well adversely affect appellant's rights when he comes before the proper authorities to have his definite term fixed. This factor was sufficient to require a reversal in People v. Kehoe, 33 Cal.2d 711, 204 P.2d 321; People v. Roberts, 40 Cal.2d 482, 254 P.2d 501; People v. Knowles, 35 Cal.2d 175, 217 P.2d 1; People v. Craig, 17 Cal.2d 453, 110 P.2d 403.

For the above reasons the judgment is affirmed as to count three involving the charge of an offer to sell a narcotic, reversed as to count one involving a charge of unlawful possession, and the order denying a new trial is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

---

41 Cal.2d 441

PEOPLE v. BECHTEL.

Cr. 5447.

Supreme Court of California, in Bank.

Aug. 21, 1953.

Defendant was convicted of grand theft. The Superior Court, Los Angeles County, entered judgment, and defendant appealed. The Supreme Court, Shenk, J., held that where court, in a former prosecution of defendant for grand theft committed on or about specified dates, instructed jury that proof need only show that the offenses were in fact committed at any time before filing of indictment and within three year period of limitations, jury could have found defendant guilty of grand theft committed at times other than the "on or about" dates but within such three year period, and subsequent prosecution of defendant, acquitted at first trial, for offenses of same nature alleged to have occurred on or about other specified dates within three year period, evidence of which was before court and jury on first trial, constituted double jeopardy.

Appeal from order denying motion in arrest of judgment dismissed; judgment and orders denying motions for new trial, reversed with direction.

Prior opinion, 254 P.2d 618.

1. False Pretenses 🔑51

In prosecution for grand theft by false pretenses, evidence was sufficient for jury.

2. Criminal Law 🔑739(4)

Whether jeopardy has attached is generally a question of fact, but when the evidence is uncontradicted or leads to a single conclusion, a question of law is presented. Pen.Code, § 1023; Const. art. 1, § 13.

3. Criminal Law ⚿198

Where court, in prosecution for grand theft committed on or about specified dates, instructed jury that proof need only show that offenses were in fact committed at any time before filing of indictment and within three year period of limitations, jury could have found defendant guilty of grand theft committed at times other than the "on or about" dates but within such three year period, and subsequent prosecution of defendant, acquitted at first trial, for offenses of same nature alleged to have occurred on or about other specified dates within such three year period, evidence of which was before court and jury on first trial, constituted double jeopardy. Pen.Code, §§ 951, 1023; Const. art. 1, § 13.

4. Criminal Law ⚿1023(8)

Order denying motion in arrest of judgment is nonappealable.

◆

Frederic H. Vercoe, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Frank Richards, Asst. Atty. Gen., William E. James, Deputy Atty. Gen., S. Ernest Roll, Dist. Atty., J. Miller Leavy and Ralph F. Bagley, Deputy Dist. Attys., for respondent.

SHENK, Justice.

This is an appeal from a judgment of conviction on four counts of grand theft and from orders denying the defendant's motions for a new trial and in arrest of judgment.

On November 30, 1950, the defendant was tried on an indictment charging the following offenses: Count I: violation of Section 67½ of the Penal Code (offering bribe to public official); Count II: grand theft against Dr. Theodore J. Bluechel, committed on or about July 11, 1950; Count III: grand theft against Bluechel, committed on or about June 24, 1950; Count IV: grand theft committed against Bluechel on or about June 17, 1950; Count V: grand theft against Bluechel, committed on or about June 10, 1950; Count VI: violation of Section 653f of the Penal Code (solicitation), committed on or about November 15, 1949. On February 13, 1951, the jury returned verdicts of not guilty on Counts II, III, IV, V and VI and disagreed on Count I.

On February 14, 1951, one day following the verdicts under the first indictment, a second indictment was returned and filed in which Bechtel was accused of the following offenses: Count I: conspiracy to violate Section 67½ of the Penal Code; Count II: grand theft against Dr. Theodore J. Bluechel, committed on or about August 20, 1949; Count III: grand theft against Bluechel, committed on or about August 27, 1949; Count IV: grand theft against Bluechel, committed on or about September 3, 1949; Count V: grand theft against Bluechel, committed on or about September 10, 1949; Count VI: grand theft against Bluechel, committed on or about February 6, 1950.

In addition to pleas of not guilty to all counts, the defendant entered special pleas of former acquittal and once in jeopardy as to all counts. When he sought to prove, in support of his pleas of once in jeopardy, that his trial under the first indictment had subjected him to jeopardy for the crimes of grand theft charged in Counts II, III, IV and V of the present indictment, the district attorney objected to the offer of proof. In ruling the court stated: "The objection of the District Attorney is sustained to the offer of proof in connection with the pleas of former jeopardy and former conviction as to Counts 2, 3, 4, and 5, for the reason that the dates are sufficiently widely apart so far as the pleaded dates in this indictment are concerned and so far as the dates in the other indictment under which the defendant was formerly tried, that even though the dates were not accurately established that the evidence here tends to prove an entirely different series of offenses than those which were tried under the former indictment. The objection is sustained." The jury returned verdicts of not guilty on Counts I and VI and verdicts of guilty on Counts II, III, IV and V. The appeal is from the judgment of convictions on the four counts.

[1] The crimes charged in both indictments arose out of an alleged agreement

with Dr. Bluechel whereby the defendant was to and did receive the sum of $400 per week "protection money" from Dr. Bluechel in return for arranging with the law enforcing authorities not to interfere with the doctor's abortion operations. The prosecution charged that the defendant had no intention of using the money to arrange for "protection", but intended to and actually did convert it to his own use. There is substantial evidence in support of the convictions of grand theft on this theory under Counts II, III, IV and V.

The transactions in which the defendant was involved with Dr. Bluechel occurred during the period between August 1949, and July, 1950. This period covers the "on or about" dates specified in both the former and the present indictments. The evidence in the record of the present case covers the whole period of the transactions between the defendant and the doctor, although the counts of grand theft are charged to have been committed "on or about" dates in the early part of the period only. In the former indictment the acts of grand theft charged were those alleged to have been committed in the latter part of the period only. The record in the former case is not now before this court but it has been stipulated that the evidence in the first trial was "substantially the same" as that in the present record. It therefore appears that in the trial under the former indictment the jury heard evidence of the defendant's activities during the entire period, including those dates designated as "on or about" in the present indictment.

Of vital significance is the instruction of the court on the first trial wherein the jury was informed of the scope of the acts embraced within the charges in that indictment as follows: "The crimes with which the defendant is charged in the indictment, and which are described in another instruction, are all charged to have been committed 'on or about' certain dates. The court instructs the jury that the precise time at which the offenses were committed need not be stated in the indictment. It is wholly immaterial on what day or night the offenses charged in the indictment were committed, provided you believe from the evidence the offenses were committed, and that the same were committed within the period of the statute of limitations, which, in so far as this case is concerned, would be within three years prior to the filing of the indictment in this case. The indictment in this case was filed on July 13, 1950. The evidence need not show the precise time on which the offenses were committed. The proof need only show that the offenses were in fact committed at any time before the filing of the indictment and within the three-year period of the statute of limitations."

The defendant contends that under the evidence received in proof of the crimes charged and the trial court's instructions at the first trial the jury might have found him guilty of those crimes had they believed he committed the acts charged in the present indictment. He asserts that the trial court erred prejudicially in the exclusion of the tendered proof of former acquittal and once in jeopardy for the reason that the error resulted in a denial of his constitutional and statutory rights.

The Fifth Amendment to the Federal Constitution prohibits double jeopardy. Although this has been held to be a prohibition against federal action only, Palko v. State of Connecticut, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288, the State Constitution also provides that "No person shall be twice put in jeopardy for the same offense * * *." Article I, § 13. It has been said by this court that this provision is "as important, and to be as sacredly regarded, as the right of trial by jury, or any other constitutional provision intended for the protection of the life, liberty, or property of a citizen." People v. Defoor, 100 Cal. 150, 158, 34 P. 642, 644.

Section 1023 of the Penal Code, in elaboration on the constitutional right and as it existed at all times pertinent to these proceedings, provided as follows: "When the defendant is convicted or acquitted, or has been once placed in jeopardy upon an indictment or information, the conviction, acquittal, or jeopardy is a bar to another indictment or information for the offense charged in the former, or for an attempt to commit the same, or for an offense necessarily included therein, of which he might have been convicted under that indictment or information." In 1951 an amendment substituted "accusatory pleading" for "indictment or information".

[2] Whether jeopardy has attached is generally a question of fact, but when the evidence is uncontradicted or leads to a single conclusion a question of law is presented. People v. Greer, 30 Cal.2d 589, 596, 184 P.2d 512; People v. Warren, 16 Cal.2d 103, 113, 104 P.2d 1024; People v. Newell, 192 Cal. 659, 221 P. 622. Here the facts are undisputed and a question of law only is to be determined.

The prosecution contends that inasmuch as the offenses charged in the two indictments were separated in time by an interval of approximately ten months an offense charged to have been committed "on or about" a certain date could not reasonably include an offense committed ten months prior thereto. It relies upon Section 951 of the Penal Code in which the use of the phrase "on or about" is authorized, and upon decisions wherein former jeopardy was unsuccessfully relied upon, such as People v. Warren, supra, 16 Cal.2d 103, 104 P.2d 1024; People v. Lachuk, 5 Cal.App.2d 729, 43 P.2d 579; and People v. Wilson, 79 Cal. App. 709, 250 P. 879. It also states that precise dates were alleged in both indictments, and cites authority for its contention that the jury could not properly have convicted the defendant on the first trial except upon a finding that he committed the offenses on those dates. But that conclusion does not follow. It does not appear in any of the cases relied on that the jury was given an instruction similar to the one given on the first trial of the defendant in the present case.

There is merit in the defendant's contention that under the instruction given at the first trial the jury might have convicted him if it had believed from the evidence that he committed the offenses on the dates charged in the second indictment. The instruction that the "proof need only show that the offenses were in fact committed at any time before the filing of the indictment and within the three-year period of the statute of limitations" does not confine the individual offenses to the stated periods. Under these circumstances the jury could have found the defendant guilty of crimes committed at times other than the "on or about" dates but within the period of the statute of limitations. The offenses charged in the second indictment were committed "within the three-year period of the statute of limitations" and the evidence of those acts were before the court and jury on the first trial.

The prosecution contends that the instruction given at the first trial served merely to inform the jury of the operation of the applicable statute of limitations and was given in a standard and approved form. But the instruction is of broader scope. It is also concerned with the time within which the acts charged in the indictment could be identified and proved within the statutory period. The instruction correctly states the law with reference to the statute of limitations, and its validity otherwise is not here brought into question. The defense of alibi was not interposed and the effect of the instruction in such a case is not herein involved. See People v. Notz, 73 Cal.App. 2d 439, 166 P.2d 607; People v. Waits, 18 Cal.App.2d 20, 21, 62 P.2d 1054.

[3] Section 1023 of the Penal Code states that a prior acquittal of the defendant is a bar to a second indictment for any offense "of which he might have been convicted" under the former indictment. The conclusion is irresistible that under the undisputed facts and the instruction of the court the jury on the first trial might have convicted the defendant had it found that he committed the acts on or about the dates named in the present indictment. The offered evidence should have been admitted and the conclusion reached by the court that the defendant had been once in jeopardy for the offenses of grand theft charged in the present indictment.

[4] The order denying the motion in arrest of judgment is nonappealable and the appeal therefrom is dismissed. The judgment and the orders denying motions for a

new trial are reversed with direction to the trial court to dismiss the action.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

---

41 Cal.2d 322

ELBERT, Ltd. v. GROSS.

L. A. 22222.

Supreme Court of California, in Bank.

Aug. 14, 1953.

Rehearing Denied Sept. 10, 1953.

Action for partition of lot to which plaintiff had been issued deed by city treasurer as result of foreclosure of street improvement bonds issued in 1925. Defendant filed cross-complaint to quiet title, alleging that state conveyed land to him by deed based on nonpayment of taxes and that he held city treasurer's certificate of sale issued pursuant to foreclosure of bond dated 1928. The Superior Court of Los Angeles County, Emme, J., entered judgment for plaintiff and defendant appealed. The Supreme Court, Edmonds, J., held that issuance of city treasurer's deed distinguished lien of city treasurer's certificate of sale.

Judgment affirmed.

Shenk and Schauer, JJ., dissented.

Prior opinion, App., 243 P.2d 867.

1. Municipal Corporations 🔑575

Under statute which required purchaser of property at foreclosure of improvement bond to serve notice "upon the owner of the property purchased, or his agent if he is named in the certificate of sale", purpose of punctuation was to limit qualifying clause to "agent" so that notice was required to be served on owner unless name of his agent appeared in certificate of sale, in which case service might be made on agent. Streets and Highways Code, § 6550.

2. Statutes 🔑196

A limiting clause in statute is to be confined to the last antecedent, unless the context or the evident meaning of the statute requires a different construction.

3. Municipal Corporations 🔑575

Where statute required holder of certificate of sale under street improvement bond to serve notice on "owner or agent of the property purchased, if named in such certificate", in order to obtain deed, amendment requiring notice to be served on "owner of the property purchased, or his agent if he is named in the certificate of sale" was intended to clarify rather than to change existing law. Streets and Highways Code, § 6550.

4. Statutes 🔑147

The Legislature may amend existing laws by enacting codifications which substantially change the phraseology or punctuation of prior statutes.

5. Municipal Corporations 🔑575

Under statute requiring holder of certificate of sale under street improvement bond to serve written notice upon owner of property and upon party occupying the property, if the property is occupied, in order to obtain deed, the limiting clause refers only to the occupant, and fact that property is unoccupied does not dispense with service on owner. Streets and Highways Code, § 6550.

6. Municipal Corporations 🔑578

Statute providing that any action contesting validity of deed issued to holder of certificate of sale under street improvement bond must be brought within six months after issuance of deed, and if deed is not contested within that six months period it shall not be thereafter contested or questioned in any action, is not limited as a defense to an action brought directly to challenge validity of deed. Streets and Highways Code, § 6571.

7. Municipal Corporations 🔑581

Under statute declaring that owner of property sold on foreclosure of street improvement bond shall have right of redemption indefinitely until notice is given and deed applied for, and statute providing that any action contesting validity of deed must be brought within six months after issuance of deed, the expiration of period of redemption is not sufficient of itself to extinguish owner's right to redeem but that result may be accomplished only by the purchaser's application for a deed. Streets and Highways Code, §§ 6551, 6571.

8. Constitutional Law ⚷290(7)
Municipal Corporations ⚷579

Under statute providing that holder of certificate of sale under street improvement bond shall serve written notice on owner before expiration of time of redemption or before date of application for deed, and statute providing that any action contesting validity of deed must be brought within six months after issuance of deed, failure to give record owner proper notice of application for deed did not deprive him of his property without due process of law, and he could not question validity of deed in action commenced more than 18 months after delivery of deed to holder of certificate of sale. Streets and Highways Code, §§ 6550, 6551, 6571.

9. Municipal Corporations ⚷583

Where city treasurer's deed, delivered to holder of certificate of sale under 1925 street improvement bond, conveyed property free of all encumbrances except the lien for state, county and municipal taxes, such deed extinguished lien of certificate of sale under 1928 street improvement bond, since it was in the nature of a lien for a special assessment. Streets and Highways Code, § 6555.

◆

Myron J. Glauber, Los Angeles, Alfred L. Armstrong, Hollywood, and Maurice J. Hindin, Los Angeles, for appellant.

John F. Bender, Compton, and Gizella M. Allen, Los Angeles, for respondent.

EDMONDS, Justice.

Elbert, Ltd., a corporation, sued to obtain a partition of certain real property. The appeal of Joseph M. Gross from a judgment in favor of Elbert presents for decision questions as to the validity of a tax deed.

The real property in controversy is an unimproved lot situated in the City of Los Angeles. In 1925, a street improvement bond was issued under the provisions of the Improvement Act of 1911. Stats.1911, p. 730, Deering's Gen.Laws, 1937, Act 8199, now Sts. & Hy. Code, Div. 7, §§ 5000–6794. The bond was foreclosed in 1946 and the property sold to one Sipe, who assigned his certificate of sale to the corporation. This certificate stated that the owner of the lot was "unknown".

In 1945, the State of California conveyed the land to Gross by a deed based upon the nonpayment of taxes. Gross also holds a certificate of sale from the city treasurer issued to him pursuant to the foreclosure of a street improvement bond dated in 1928.

After the expiration of the time within which the lot could have been redeemed from the sale in connection with the foreclosure of the 1925 bond, the city treasurer conveyed the lot to Elbert. At that time, Gross was the record owner of the property, and it has been stipulated that he was not served with notice of the corporation's application for a deed.

The present action for partition is based upon the theory that under the parity principle, Monheit v. Cigna, 28 Cal.2d 19, 168 P.2d 965, 167 A.L.R. 995; Elbert, Ltd. v. Nolan, 32 Cal.2d 610, 197 P.2d 537; Stafford v. Realty Bond Service Corp., 39 Cal.2d 797, 249 P.2d 241, Elbert and Gross are co-owners of the lot. Gross answered the complaint, denying the validity of the deed to Elbert and seeking by cross-complaint to quiet his title against the claims of the corporation. In the alternative, he sought an equitable lien against the proceeds of a partition sale for the amount of certain real property taxes and expenses paid by him in connection with the property.

By its judgment, the trial court declared that Gross and the corporation, as tenants in common, each own an undivided one-half interest in the lot. It directed a sale of the property and a division of the proceeds, after expenses of sale, allowing each party an equitable lien for certain claimed expenditures. The court also ordered that the certificate of sale held by Gross be canceled.

As grounds for reversal of the judgment, Gross contends that the corporation's failure to give notice to the record owner of its application for a deed of sale from the city treasurer rendered such deed invalid, and he claims the right to redeem the land. He also argues that the judgment erroneously failed to allow him a lien against the proceeds of the partition sale for the amount of the indebtedness stated by the certificate of sale to be due and unpaid upon the foreclosure of the 1928 bond. Finally, he takes the position that Elbert's complaint is defective in that not all the parties having an interest in the property are joined in the action.

The corporation asserts that Gross' right to object to the validity of the treasurer's deed now is barred by the statute of limitations. The lien arising from the foreclosure of the 1928 bond, it declares, was extinguished by the failure of Gross either to redeem the land or to purchase the prior lien upon foreclosure of the 1925 bond.

At the time this action was commenced, section 6550 of the Streets and Highways Code read in part as follows: "In order to obtain a deed the purchaser of the property or his assignees shall, 30 days prior to the expiration of the time of redemption, or 30 days before the date of his application for a deed, serve upon the owner of the property purchased, or his agent if he is named in the certificate of sale and upon the party occupying the property, if the property is occupied, a written notice * * *. If the property is unoccupied, a similar notice must be posted in a conspicuous place upon the property".

[1, 2] The corporation contends that such notice need be given only if the owner is named in the certificate of sale. Its position is that the clause, "if he is named in the certificate of sale", modifies both "owner" and "agent". However, the clause and the word "agent" both appear in the same part of the sentence and are separated from the word "owner" by a comma. The evident purpose of such punctuation is to limit the qualifying clause to "agent". Giving support to this conclusion is the established rule that "a limiting clause is to be confined to the last antecedent, unless the context or the evident meaning of the statute requires a different construction." County of Los Angeles v. Graves, 210 Cal. 21, 26, 290 P. 444, 446; Hopkins v. Anderson, 218 Cal. 62, 65, 21 P.2d 560.

So construed, in its original form, section 6550 required notice to be served upon the owner of the property, unless the name of his agent appeared in the certificate of sale, in which case, service might have been made upon the agent instead of the owner. It is significant that when the section was amended in 1950, Stats. 1950, First Ex. Session, p. 515, and the word "agent" omitted, the Legislature also deleted the clause "if he is named in the certificate of sale".

The corporation relies upon Elbert, Ltd. v. de Gaffey, 108 Cal.App.2d 388, 238 P.2d 1044, in which a contrary rule was stated. That decision was based upon the wording of section 74* of the Improvement Act of 1911, Stats.1911, p. 730; as amended by Stats.1921, p. 292, the statutory predecessor of section 6550 of the Streets and Highways Code. Section 74 required notice to be served upon "the owner or agent of the property purchased, if named in such certificate * * *." The court construed the Streets and Highways Code as making no requirement for notice unless the name of the owner or his agent appeared in the certificate of sale. Although recognizing the clear import of section 6550, the court felt constrained to interpret the statute according to its construction of the predecessor section because the Code Commission was not vested with authority to, nor did it intend to, amend the Improvement Act.

[3] From the wording of section 74 it could not be said with certainty whether the clause, "if named in such certificate," qualified owner, agent, or both. Section 6550, in its original and in its present form, makes clear the inapplicability of the qualifying clause to the word "owner". Under such circumstances, a legislative intent to clarify the existing law may be in-

---

* Originally and upon the first amendment to the act, this section appeared as section 75. Stats.1911, p. 730, 762; Stats. 1915, pp. 1464, 1476. Thereafter, it appeared as section 74. Stats.1921, pp. 292, 296. Unless otherwise indicated, reference is to sections as numbered immediately prior to codification.

ferred. Bermite Powder Co. v. Franchise Tax Board, 38 Cal.2d 700, 704, 705, 242 P.2d 9; Coca-Cola Co. v. State Board of Equalization, 25 Cal.2d 918, 923, 156 P.2d 1; Standard Oil Co. v. Johnson, 24 Cal. 2d 40, 48, 147 P.2d 577; Union League Club v. Johnson, 18 Cal.2d 275, 279, 115 P.2d 425.

[4] The Legislature may amend existing laws by enacting codifications which substantially change the phraseology or punctuation of prior statutes. In re Trombley, 31 Cal.2d 801, 806, 193 P.2d 734; Scott v. McPheeters, 33 Cal.App.2d 629, 633, 92 P.2d 678, 93 P.2d 562. Section 2 of the Streets and Highways Code provides: "The provisions of this code, in so far as they are substantially the same as existing statutory provisions relating to the same subject matter, shall be construed as restatements and continuations thereof and not as new enactments." The phrase, "in so far as they are substantially the same as existing statutory provisions", indicates that some changes were contemplated. The reasonable conclusion is that the legislative change in wording of section 6550 of the Streets and Highways Code from its predecessor section was to make it clear that the clause, "if he is named in the certificate of sale", has reference only to "agent". The holding of the de Gaffey case to the contrary is disapproved.

Elbert also urges that section 6550 should be interpreted as dispensing with personal service upon the owner if, as in the present case, the property is unoccupied. It construes the qualifying clause, "if the property is occupied", as applying to both "owner" and "party occupying the property". So read, if the property were occupied, the section would require service of notice upon both the owner and occupant, but, if unoccupied land were to be conveyed, it would be sufficient if notice were posted.

[5] No sound reason is suggested for making the owner's right to notice dependent upon occupancy. Furthermore, such interpretation of the section is contrary to the rule of statutory construction that a limiting clause should be confined to the last antecedent. County of Los Angeles v. Graves, supra; Hopkins v. Anderson, supra. The more reasonable conclusion is that the clause refers only to the occupant. So construed, it performs the very obvious function of eliminating the requirement of serving notice upon "the party occupying the property" when it is unoccupied. In that case, notice may be posted upon the property. Thus the section insures that notice will be given both to the owner and to the person in possession or who may thereafter come into possession.

Although, if presented in a timely proceeding Elbert's failure to give notice might have invalidated the deed, Gross now is barred from asserting such defect. The present action was commenced more than 18 months after the city treasurer executed and delivered his deed to Elbert. Section 6571 of the Streets and Highways Code provides: "Any action, suit or proceeding attacking or contesting the validity of any deed issued under the provisions of this division, or the validity of the proceedings subsequent to the issuance of the certificate of sale, must be brought within six months after the issuance of the deed, and if the validity of the deed or of the proceedings is not contested within that six months' period, it shall not be thereafter contested or questioned in any action, suit or proceeding."

[6] Gross asserts that section 6571 is available only as a defense to an action brought directly to challenge the validity of the deed. A complete answer to this contention is the explicit language of the section, that the deed "shall not be thereafter contested or questioned in *any* action, suit or proceeding." (Emphasis added.)

[7] Another argument is that section 6551 of the same code extends the right of redemption indefinitely, and that, unless it be deemed an exception to section 6571, they are irreconcilable. Section 6551 of the Streets and Highways Code declares: "The owner of the property shall have the right of redemption indefinitely, until such notice is given and the deed applied for, upon the payment of the fees, penalties and costs as required."

There is no conflict when these sections are read in the context of their statutory predecessors. Originally, section 6551 was part of section 74 of the Improvement Act, which dealt exclusively with proceedings prior to the issuance of a deed. More specifically, it concerned the procedure by which the holder of a certificate of sale might secure a deed to the property after the period of redemption had expired. The part of section 74 from which section 6551 of the Streets and Highways Code was taken made clear the legislative intent that the expiration of the period of redemption was not sufficient of itself to extinguish the owner's right to redeem, but rather, that such result might be accomplished only by the purchaser's application for a deed. Cf. Sts. & Hy. Code § 6530.

The provisions relating to the effect to be given the issuance of a deed were found in section 75 of the act. The first paragraph of that section made the deed primary evidence of the regularity of all prior proceedings. Now Sts. & Hy. Code § 6555. In the third paragraph of the same section, under the marginal note "Limitation of actions", appeared the language which was carried into section 6571. Had the Legislature intended to create an exception to the statute of limitations, the more logical place to do so would have been in section 75, rather than in section 74, of the act. Instead, it made those sections separate and distinct enactments, each concerned with a different subject matter. No reasonable basis appears for presuming a different intent upon codification of the act.

[8] Moreover, if section 6571 were interpreted in the manner urged by Gross, portions of it would become meaningless. Unless the deed is challenged within the statutory period, "the validity of the proceedings subsequent to the issuance of the certificate of sale" cannot be questioned. But the only actions which the purchaser must take are the filing of his affidavit of notice and application for a deed. Sts. & Hy. Code, §§ 6550, 6552, 6554.

Gross argues, however, that unless a proper notice has been given, the city treasurer is without jurisdiction to issue a deed. To give a deed conclusive effect under such circumstance, he asserts, is to deprive him of his property without due process of law.

The constitutional question was considered in Saranac Land & Timber Co. v. Comptroller of New York, 177 U.S. 318, 20 S.Ct. 642, 44 L.Ed. 786. It was held that a statute of limitations properly may conclude the property owner's right of redemption despite so-called "jurisdictional defects" provided he be given a reasonable time in which to enforce his rights. Whether a failure to give notice would be deemed a bar to the operation of the statute was to be determined according to applicable state law.

The same problem was presented in Tannhauser v. Adams, 31 Cal.2d 169, 187 P.2d 716, 5 A.L.R.2d 1015. In that case there was a failure to give to the record owner proper notice of the purchaser's application for a deed. But the purchaser had been in possession of the property from the time the tax deed to him was issued. After reviewing the decisions in this state and in other jurisdictions, it was said: "Regardless of what may be the law under other circumstances it appears to us that there is no sound reason why the right of one out of possession to attack a tax title for the defect here relied upon, whether it be considered jurisdictional or otherwise, should not be barred if his action is not instituted within the prescribed statutory period, provided that such period is a reasonable one. In Miller & Lux, Inc. v. Secara, 193 Cal. 755, 765, 227 P. 171, 174, this court declared that although 'a total lack of jurisdiction due to absence of notice sufficient to constitute due process of law cannot be cured by a curative act or by a curative provision in the statute, * * * we see no reason why such a defect may not be cured, in effect, by a statute of limitations, provided the latter is not unreasonable, and is therefore valid.'" 31 Cal.2d at page 176, 187 P.2d at page 721. In reaching this conclusion, the court recognized that a contrary rule prevailed in other jurisdictions where an owner had been in continuous and undisturbed possession from a time prior to the period of limitation.

More recently, this court stated: "As the discussion in the Tannhauser case indicates, the rule of inapplicability of statutory limitation has been said to apply as to owners who because of their possession could not be assumed to have actual knowledge of claims of adverse interest by persons not in possession. As the discussion also shows, that rule, borrowed from cases involving mortgages, trusts and the like, has been applied in some jurisdictions where the original owner of land sold to the state remains in undisturbed possession. In the Tannhauser case the plaintiff, the original tax-delinquent owner, was out of possession and was held to be at no greater disadvantage than other litigants who by reason of their lack of promptness in asserting their claims find themselves either without remedy or without right." McCaslin v. Hamblen, 37 Cal.2d 196, 199, 231 P.2d 1, 3.

In the McCaslin case, the plaintiffs acquired the property after issuance of the tax deed and after the limitation period had commenced to run. It was held that they could not qualify as owners in undisturbed possession, having received constructive notice of the outstanding tax deed and the rights acquired pursuant to it, as well as actual notice of the defendants' hostile claims. As an alternative ground for the decision, the court stated: "Furthermore it has been held that, whatever might be the rights of an owner in possession, the rule has no application in cases of unimproved and unoccupied land where the only possession is that which is presumed from the fact of conveyance." 37 Cal.2d at page 199, 231 P.2d at page 3.

It is undisputed that the property here concerned is unoccupied and unimproved. Accordingly, despite Elbert's failure to give proper notice of its application for a deed, Gross may not question the deed's validity. The corporation's timely objection to the introduction of evidence concerning such defect was properly sustained.

[9] In addition to giving to the grantee absolute title to the land, the treasurer's deed conveyed the property "free of all encumbrances, except the lien for State, county and municipal taxes." Sts. & Hy. Code § 6555. The lien of the certificate of sale held by Gross, being in the nature of a lien for a special assessment, was therefore extinguished.

There is no merit in the contention that the complaint is defective because all necessary parties were not joined. Gross does not name any necessary party who was not sued, nor did he demur to the complaint or otherwise present any objection on this ground in the trial court.

The judgment is affirmed.

GIBSON, C. J., and CARTER, TRAYNOR and SPENCE, JJ., concur.

SHENK, Justice.

I dissent. This case deals with the effect of a treasurer's deed issued to satisfy a delinquent street assessment where the owner of the land, the defendant in this case, received no notice whatsoever of the application for the deed as required by section 6550 of the Streets and Highways Code. The majority opinion correctly holds that the defendant was entitled to the written notice required by that section but it also holds that he was cut off from all defenses by the statute of limitations. If an action to invalidate the deed had been brought within the time limit provided for in section 6571 of the Streets and Highways Code (within six months after the issuance of the deed) it would undoubtedly have been successful because of lack of statutory notice.

The question is whether a statute of limitations can cut off the right of a property owner to contest a treasurer's deed under the undisputed facts of this case. The defendant was the record owner of the property and entitled under the statute to thirty days' written notice of the application for the deed. Within that thirty day period he had the right to redeem; and unless and until the notice was given the right to redeem was extended indefinitely. He received no notice whatsoever of the application for the deed. The plaintiff was the owner of the certificate of sale and entitled to institute proceedings to obtain a deed. The statute imposed upon the plaintiff the duty to give the defendant the written notice. It did not do so. It intentionally withheld it and obtained the deed without complying with the statute. It now invokes the statute of limitations to cut off all defenses on behalf of the defendant.

"The essential elements of due process of law are notice and opportunity to defend." Simon v. Craft, 182 U.S. 427, 21 S.Ct. 836, 839, 45 L.Ed. 1165. More recently the United States Supreme Court has restated the obvious: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to * * * afford them [interested parties] an opportunity to present their objections. [Citatations.]" Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314–315, 70 S.Ct. 652, 657, 94 L.Ed. 865.

In the present case the statute required the giving of notice by the party now relying on the statute of limitations, and that notice was not given. Extensive research fails to disclose a case in which a statute of limitations has been allowed to run against a right where the assertion of that right depended on notice from a private party invoking the statute and that notice was not given. The cases proceed on the theory that there must be actual, statutory, or constructive notice. Here there was none and the time did not commence to run by virtue of any provision of law from which notice could be inferred or implied. The periods provided by statute within which redemption might be made and the time within which objections to the deed might be interposed are here held to have expired when that result could be brought about only through the arbitrary discretion and wrongful act of the holder of the certificate of sale in withholding the required notice. The plaintiff's noncompliance with the statute and its intentional withholding of notice have resulted in depriving the defendant of his property without due process of law. I would hold that the tax deed proceedings were void for lack of due process and that the period of redemption has not expired. The judment should be reversed.

SCHAUER, J., concurs.

Rehearing denied; SHENK, CARTER and SCHAUER, JJ., dissenting.

---

41 Cal.2d 455

LOS ANGELES COUNTY v. DEPARTMENT OF SOCIAL WELFARE et al.

L. A. 22661.

Supreme Court of California, in Bank.

Aug. 25, 1953.

Mandate proceeding by county to compel State Social Welfare Board to set aside order directing Department of Social Welfare to withhold part of state and federal funds to which county would normally be entitled as reimbursement for cost of aid to the aged and blind, wherein certain recipients of old age security and needy blind assistance intervened. The Superior Court, Los Angeles County, William B. McKesson and Frank G. Swain, JJ., entered judgment in favor of county, and respondents and intervenors appealed. The Supreme Court, Gibson, C. J., held that Department of Social Welfare and State Social Welfare Board had no power to supervise or control administration of indigent relief by county.

Judgment affirmed.

Prior opinion 250 P.2d 708.

1. Administrative Law and Procedure 🔑234
Mandamus 🔑13

Exhaustion of administrative remedies by application for rehearing before administrative board is not a prerequisite to maintenance of mandate proceeding to compel board to set aside allegedly invalid order, if board lacked jurisdiction over subject matter of proceedings in which such order was made.

2. Social Security and Public Welfare 🔑62, 221

The Department of Social Welfare, of which the State Social Welfare Board is a component part, is charged with supervising the administration of old age security and needy blind assistance. Welfare and Institutions Code, §§ 103.5, 103.6.

3. Social Security and Public Welfare 🔑4

Federal and state funds appropriated for maintenance and support of aged and blind persons must be used by the counties exclusively for such purposes. Welfare and Institutions Code, §§ 114(a), 2021, 2186, 2187, 3025, 3026, 3087–3087.3.

4. Social Security and Public Welfare 🔑74, 227

Old age security and needy blind aid payments are inalienable by assignment, sale, attachment, or otherwise, and no person concerned with administration of blind aid may dictate how an applicant may expend the money granted him. Welfare and Institutions Code, §§ 2006, 3003, 3008.

5. Paupers 🔑39(3)

The counties alone are charged with the duty of furnishing relief to indigent residents who are not otherwise supported. Welfare and Institutions Code, § 2500.

6. Paupers 🔑41, 42

The administration of county relief to indigents, as distinguished from old age security and needy blind assistance, is vested exclusively in the county supervisors who have discretion, without supervision by the state, to determine eligibility for type and amount of, and conditions to be attached to indigent relief. Welfare and Institutions Code, §§ 103.5, 103.6, 2500.

7. Social Security and Public Welfare 🔑74, 227

A recipient of old age security or blind assistance may use the money thus received for support of his spouse as well as himself and such use does not constitute an alienation of payments to him in violation of statute or result in any diversion of federal or state funds. Welfare and Institutions Code, §§ 114(a), 2006, 2021, 2186, 2187, 3003, 3008, 3025, 3026, 3087–3087.3.

8. Paupers 🔑43(2)

Prior to adoption of statutory and constitutional amendments, providing that aid to a blind person is intended to meet his individual needs and shall not be construed as income to anyone other than recipient, and rejection of bill which would have added comparable language to statutes providing for old age assistance, the law did not prohibit county practice of treating old age security and needy blind assistance received by husband or wife of applicant for indigent relief as family income in determining amount to be paid to spouse by county as indigent relief. Welfare and Institutions Code, §§ 114(a), 2006, 2021, 2186, 2187, 3003, 3008, 3025, 3026, 3087–3087.3; Const. art. 4, § 22.

9. Paupers 🔑42

The Department of Social Welfare and State Social Welfare Board had no power to supervise or control the administration of indigent relief by county and had no jurisdiction to consider complaints relating to the adequacy of indigent relief allowed by county to spouses of recipients of old age security or needy blind assistance. Welfare and Institutions Code, §§ 103.5, 103.6, 114(a), 2006, 2021, 2186, 2187, 2500, 3003, 3008, 3025, 3026, 3087–3087.3.

Edmund G. Brown, Atty. Gen., and Lee B. Stanton, Deputy Atty. Gen., for defendants and appellants.

Kenny & Morris and Eleanor V. Jackson, Los Angeles, for interveners and appellants.

Harold W. Kennedy, County Counsel, Gerald G. Kelly, Asst. County Counsel, and John B. Anson, Deputy County Counsel, Los Angeles, for respondent.

GIBSON, Chief Justice.

Eleven persons who were receiving monthly payments of old age security or needy blind aid complained to the State Social Welfare Board that Los Angeles County was improperly treating such assistance as family income when computing the amount of county relief to be allowed to their indigent husbands or wives. As a result of this practice there was a reduction in the amount of county indigent relief allowed to the spouse of each of the eleven aged or blind persons. In every instance, however, the aged or blind person received monthly warrants for the maximum amount of aid provided by law.

After a hearing the state board ordered the county to discontinue the practice complained of and, in the event of noncompliance, directed the Department of Social Welfare to withhold from the county part of the state and federal funds to which the county would normally be entitled as reimbursement for the cost of aid to the aged and blind. The county, which had made a special appearance at the hearing for the sole purpose of contesting the jurisdiction of the board, did not apply for a rehearing. Thereafter the county commenced this mandate proceeding against the department and the board. The eleven persons who had complained to the board intervened in the proceeding.

The trial court concluded that the orders of the board purported to determine the eligibility for and the amount and type of relief to be paid by the county to applicants for indigent relief, that the county supervisors had exclusive jurisdiction to determine such matters, and that the action of the state board was void. A writ was issued requiring the board and the department to set aside the orders and to refrain from withholding state and federal funds due to the county. The department, the board and the interveners have appealed.

[1] A preliminary question is presented as to whether it was necessary for the county to apply for a rehearing before the board as a condition precedent to the maintenance of this proceeding. There are exceptions to the general rule requiring the exhaustion of administrative remedies, and if, as contended by the county, the state board lacked jurisdiction over the subject matter of the proceedings, it was not necessary for the county to seek a rehearing before the board. See Stockton v. Department of Employment, 25 Cal.2d 264, 267, 153 P.2d 741; Bernstein v. Smutz, 83 Cal.App.2d 108, 115, 188 P.2d 48; McPheeters v. Board of Medical Examiners, 82 Cal.App.2d 709, 717, 187 P.2d 116; Ware v. Retirement Board, 65 Cal.App.2d 781, 151 P.2d 549; People v. Keith Railway Equipment Co., 70 Cal.App.2d 339, 346, 161 P.2d 244; People v. West Publishing Co., 35 Cal.2d 80, 87, 216 P.2d 441.

Appellants contend that the practice adopted by the county of treating old age security and needy blind payments as family income in determining the needs of an indigent spouse in effect required the aged or blind recipient of such aid to use part of it for the support of his spouse. They argue that this constituted an alienation of or an unlawful limitation on the recipient's use of the payments and resulted in a diversion of state and federal funds appropriated for old age and blind assistance, and that, accordingly, the board had authority to order the county to discontinue the practice.

[2–4] The Department of Social Welfare, of which the State Social Welfare Board is a component part, is charged with supervising the administration of old age security and needy blind assistance. Welf. & Inst.Code, §§ 103.5, 103.6. The cost of both types of aid is defrayed largely by federal and state funds, and the money appropriated for the maintenance and support of aged and blind persons must be used by the counties exclusively for such purpose. Welf. & Inst.Code, §§ 114(a), 2021, 2186, 2187, 3025, 3026, 3087–3087.3. Payments to the aged and needy blind are inalienable by assignment, sale, attachment or otherwise, and no person concerned with the administration of blind aid may dictate how an applicant may expend the money granted him. Welf. & Inst.Code, §§ 2006, 3003, 3008.

[5, 6] The counties alone are charged with the duty of furnishing relief to indigent residents who are not otherwise supported. Welf. & Inst. Code, § 2500; County of Los Angeles v. Frisbie, 19 Cal.2d 634, 122 P.2d 526. No federal or state funds are provided for this purpose, and the counties are not required to grant any specific type of relief or to pay any specific amount of money. The administration of county relief to indigents, as distinguished from old age security and needy blind assistance, is vested exclusively in the county supervisors who have discretion, without supervision by the state, to determine eligibility for, the type and amount of, and conditions to be attached to indigent relief. Patten v. County of San Diego, 106 Cal.App.2d 467, 235 P.2d 217.

[7] The county practice of treating old age security and needy blind payments as family income was directed to a determination of the necessity for and the amount to be allowed as indigent relief, and, as we have seen, the county has exclusive power to make such a determination. Each of the eleven interveners admittedly received war-

rants for the maximum amount of old age or needy blind assistance provided by law and was paid the face value thereof. No conditions or limitations were placed by the county on such payments. A recipient of old age security or blind assistance may use the money for the support of his spouse as well as himself if he so desires, and the use of a part of the money for the benefit of his spouse does not constitute an alienation of the payment to him nor does it result in any diversion of federal or state funds. Cf. Board of Social Welfare v. County of L. A., 27 Cal.2d 81, 162 P.2d 630, Id., 27 Cal.2d 90, 162 P.2d 635; Board of Social Welfare v. County of L. A., 27 Cal. 2d 98, 101, 162 P.2d 627.

[8] After the writ was issued in this proceeding statutory and constitutional amendments were adopted which provide that aid to a blind person is intended to meet his individual needs, is not for the benefit of any other person, and shall not be construed as income to anyone other than the blind recipient. Welf. & Inst. Code, § 3003; Cal.Const., art. IV, § 22. At the same legislative session in which the code section relating to blind aid was amended, a bill was introduced for the purpose of adding comparable language to the statutes providing for old age assistance, but it failed to pass. This indicates that the law in effect before the amendments did not prohibit the practice adopted by the county in determining the need for indigent relief, and obviously any change resulting from the amendments is applicable only to blind aid.[1] See People v. Valentine, 28 Cal.2d 121, 142, 169 P.2d 1; Nutter v. City of Santa Monica, 74 Cal.App.2d 292, 303, 168 P.2d 741.

[9] The Department of Social Welfare and the State Social Welfare Board had no power to supervise or control the administration of indigent relief and had no jurisdiction to consider complaints relating to the adequacy of indigent relief allowed by the county to the spouses of the interveners.

The judgment is affirmed.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

---

41 Cal.2d 447

STEWART v. STEWART.

L. A. 22581.

Supreme Court of California, in Bank.

Aug. 25, 1953.

Rehearing Denied Sept. 24, 1953.

Application by divorced mother for modification of divorce decree awarding custody of minor children to their paternal aunt and her husband. From an order of the Superior Court, Orange County, denying her application, the mother appealed. The Supreme Court, Shenk, J., held that since father did not seek custody and no finding had been made as to unfitness of mother to have custody, the question of her fitness should be tried out in the usual way and in absence of sufficient evidence and a finding of unfitness, custody of children should be awarded to her.

Order reversed.

Schauer, J., and Gibson, C. J., dissented.

Prior opinion, 252 P.2d 740.

1. Divorce 🔑301

Either divorced parent is recognized as being naturally and presumptively a fit person to have the care, custody and control of minor children of the marriage.

2. Divorce 🔑301

Agreement of parties to divorce action that minor children should be placed in custody of father's sister and her husband would not operate to rebut presumption as to fitness of mother to have custody of children nor as a waiver of her right to a finding on the subject upon her subsequent application for custody. Probate Code, § 1407.

---

[1] After the effective date of the amendments the county ceased treating blind aid as income to the family unit in determining the need for indigent relief to the spouse of a blind person.

3. Parent and Child ⚷2(1, 3.5)

Where a parent applying for custody of minor child is in a position to take the child and is not shown to be unfit, court may not award custody to strangers merely because it feels that they may be more fit or that they may be more able to provide financial, educational, social, or other benefits. Probate Code, § 1407.

4. Divorce ⚷296

The discretionary power of trial court in a divorce case to determine custody of minor children is limited by Code provisions setting forth express legislative policy regarding general questions of custody and by judicial interpretations of such Code provisions in relation to the specific questions presented by the particular case. Civ. Code, § 138; Probate Code, § 1407.

5. Parent and Child ⚷2(1)

Code provisions setting forth legislative policy regarding general questions of custody contemplate that the care of a minor child shall be awarded to a parent, if a fit and proper person, as against a stranger. Civ.Code, § 138; Probate Code, § 1407.

6. Divorce ⚷303(3)

Where divorce decree, pursuant to agreement of parties, placed minor children of marriage in custody of father's sister and her husband without any adjudication of unfitness of mother to have custody of children and father did not thereafter seek custody, proof of a change in circumstances was not necessary to justify modification of custodial orders upon subsequent application by mother so as to award custody to her. Probate Code, § 1407.

7. Divorce ⚷303(2)

Congenial remarriage of mother, financial ability to provide for children, maintenance of a suitable home, desire and willingness of stepfather to have children in his home and ability to provide for them the parent-and-child relationship constituted such a change in circumstances as would justify modification of divorce decree, placing minor children in custody of father's sister and her husband, so as to award custody to mother. Probate Code, § 1407.

8. Infants ⚷19

Courts are concerned with avoiding emotional disturbances involved in a change in custody of minor children and are given wide discretion within the law in the determination of such matters.

9. Parent and Child ⚷2(1)

The custody, care and nurture of child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.

10. Divorce ⚷289

Divorce proceedings gave the state, through its courts, the right to determine custody of minor children of the marriage.

11. Divorce ⚷303(3)

Where divorce decree, pursuant to agreement of the parties, placed minor children in custody of father's sister and her husband without determining fitness of parents to have custody of children, but pursuant to stipulation provided that if question of custody should arise, evidence of fitness could be introduced, and father did not thereafter seek custody of children, upon subsequent application by mother for modification of divorce decree and custody of children, the issue of fitness should be tried out in usual way with evidence and findings on the subject, and in absence of sufficient evidence and a finding of unfitness of mother, she should be awarded custody. Probate Code, § 1407.

◆

Will H. Winston, Long Beach, for appellant.

Leonard Di Miceli, San Pedro, for respondent.

SHENK, Justice.

This is an appeal by the mother of an 11-year old boy and a 9-year old girl from an order denying her application for modification of previous orders under which custody of the children was given to their paternal aunt and her husband, Mrs. and Mr. Arch Havens. The children's father has not sought custody in his own behalf but he opposes any change of custody from his sister's family to his former wife.

On February 3, 1949, an interlocutory decree of divorce was granted to Mr. Stewart on his cross-complaint. The plaintiff presented no evidence in support of her complaint nor in opposition to the cross-complaint. The decree approved a property settlement agreement which contained a provision that the custody of the children, then 8 and 6 years of age, be placed with Mr. and Mrs. Havens. The agreement and the decree provided that neither parent should visit the children or seek the society of either child for three months after the entry of the interlocutory decree; that thereafter either parent could visit the children at the convenience of the Havens; and that "during the first year the children are with the Havens neither parent, except in the event of an emergency such as the death of the Havens, shall request the court for an order changing the custody of the children or either of them." The decree stated that it was understood that the "Havens are not required by either agreement or court order to maintain the custody of the children for any particular period of time." Mr. Stewart was ordered to contribute $100 per month to the Havens for the support of the children. The decree provided that pursuant to a stipulation of the parties no order would be made "at this time with reference to the fitness of either of the parties involving the care, custody and control of the minor children * * * but that at any time in the future, should the question of custody of the minors arise, evidence can be introduced by any interested party at that time as to any act or things, past or future, which might bear upon the question of the fitness of the party desiring such custody." Jurisdiction to enquire into the question of the fitness of the parties both past, present and future, at any future time, was expressly reserved by the court. A final decree of divorce was entered February 3, 1950.

In June, 1950, Mrs. Stewart married Mr. Herleman, her present husband. In November of that year she obtained a modification of the custodial order giving her the right to visit the children every other Sunday from 1 p.m. to 7 p.m. and to take them from the Havens' home during those hours. The record indicates that she has exercised her visitation rights.

On January 21, 1952, the mother filed an application for a further modification of the custodial orders and for complete custody of the children. Her petition alleged that since those orders were made the conditions and circumstances surrounding the parties and upon which the former orders were based had materially changed. She stated that she was happily married to Mr. Herleman; that they were both regularly employed; that they had purchased a house for the purpose of providing a home for the children; that she and her husband were fit and proper persons to have the care, custody and control of the children; that the children were of an age where they required the loving and tender care of a mother in a home of their own; and that she desired to have them with her to give them this care. The petitioner also alleged that difficulty had been experienced with the Havens over her visitation rights, and that this was not conducive to the best interests of the children.

An affidavit in opposition was filed by Mr. and Mrs. Havens in which they denied that petitioner and her husband were fit and proper persons to have the care, custody and control of the children; denied that any difficulty had arisen over visitations except for just or reasonable cause; denied that the petitioner could and would give the children a mother's loving and tender care; and alleged that a change of custody would not be for the best interest of the children but would result in serious emotional disturbance. The children's father, Mr. Stewart, did not file an affidavit in opposition. However he testified at the hearing and stated that he objected to any change in the custody provisions. The court heard the testimony of Mr. and Mrs. Herleman, Mr. and Mrs. Havens, and Mr. Stewart, and interviewed the children in chambers in the presence of counsel for both sides. The matter was submitted on the affidavits and the testimony. At the hearing the parties had stipulated that the Probation Officer should make a supplemental report regarding the present suitability of the Havens' home and a continuation of the former investigation of the Herlemans with reference to their suitability to have custody of the children. A report was submitted but no recommendation as to custody was made. The report indicated that either home would provide proper care and supervision. It stated that the children were well adjusted and happy where they were, both at home and at school and in church activities, and that they had expressed a preference to reside with the Havens. It also stated that the stepfather and mother appeared to have conducted themselves in a proper manner and had expressed a sincere desire to make a home for the children.

[1] No findings were made or ordered by the court in denying a modification. On her appeal Mrs. Herleman contends that as the mother she is entitled to the care, custody and control of her children; that in the absence of a finding by the court that she is unfit the court erred in placing the children in the custody of strangers; and that she had made a sufficient showing of change of circumstances since the prior orders were made to support her petition for custody. Under the statutes and decisions of this state it is well settled that either parent is recognized as being naturally and presumptively a fit person to have the care, custody and control of the children of the marriage. Stever v. Stever, 6 Cal.2d 166, 170, 56 P.2d 1229.

[2] The Havens argue that the original custody was placed in them by the agreement of the parties and that upon any application for change of custody fitness of the moving party would have to be proved. They contend that the burden of proving fitness is placed on the parent seeking custody. However the agreement should not operate to rebut the presumption of fitness to which the mother is entitled nor as a waiver of her right to a finding on that subject when as here her application for custody is denied and strangers are given preference. Cases cited by the respondents in support of their contention that findings are not necessary to support a modification of a custodial order, Exley v. Exley, 101 Cal.App.2d 831, 225 P.2d 662; Booth v. Booth, 69 Cal.App.2d 496, 159 P.2d 93; Gavel v. Gavel, 123 Cal.App. 589, 11 P.2d 654; Simmons v. Simmons, 22 Cal.App. 448, 134 P. 791 are not here in point. Those cases involved contests between parents over custody, not between a parent and a stranger.

[3–5] Where a parent applying for custody is in a position to take the child and is not shown to be unfit, the court may not award custody to strangers merely because it feels that they may be more fit or that they may be more able to provide financial, educational, social, or other benefits. Roche v. Roche, 25 Cal.2d 141, 144, 152 P.2d 999, citing In re White, 54 Cal.App.2d 637, 640, 129 P.2d 706; Becker v. Becker, 94 Cal.App.2d 830, 831, 211 P.2d 598. "[T]he discretionary power of a trial court necessarily is limited by those provisions of the codes wherein the express policy of the legislature regarding general questions of custody are set forth, Civ.Code §§ 138, 197; Probate Code, §§ 1407–1408, and by the judicial interpretation of those code provisions in relation to the specific questions presented by the instant case." Robertson v. Robertson, 72 Cal.App.2d 129, 132, 164 P.2d 52, 54. Section 1407 of the Probate Code provides that as between persons equally entitled in other respects to the guardianship of a minor preference is to be given first to a parent. This section has been construed to be substantially the same as former section 246(3) of the Civil Code and section 1751 of the Code of Civil Procedure which provided, in substance, that a parent if competent is entitled to custody in preference to any other person. Section 138 of the Civil Code provides that as between parents adversely claiming the custody, neither parent is entitled to it as of right, but other things being equal, if the child is of tender years it should be given to the mother; if it is of an age to require education and preparation for labor and business, then to the father. The code sections contemplate that the care of a minor child be awarded to a parent, if a fit and proper person, as against a stranger. Roche v. Roche, supra, 25 Cal.2d 141, 152 P.2d 999; Stever v. Stever, supra, 6 Cal.2d 166, 56 P.2d 1229; In re Guardianship of Sloot, 92 Cal.App.2d 296, 206 P.2d 862; In re White, 54 Cal.App.2d 637, 129 P.2d 706; Eddlemon v. Eddlemon, 27 Cal.App.2d 343, 80 P.2d 1009.

[6, 7] Respondents further argue that to support a modification of a custody order a change of circumstances must be shown, Smith v. Smith, 85 Cal.App.2d 428, 193 P.2d 56, and that the burden of proof is on the moving party to satisfy the court that conditions have so changed as to justify modification. Johnson v. Johnson, 72 Cal.App. 2d 721, 165 P.2d 552. The rule announced in those cases is not applicable in this proceeding where no adjudication of unfitness of the only parent seeking custody has been made. However, if a change in circumstances were required, the record indicates that petitioner has made a sufficient showing of such a change. She has shown a congenial remarriage; financial ability to provide for the children; the maintenance of a suitable home; a desire and willingness by the stepparent to have the children in his home; and ability to provide for them the parent-and-child relationship.

[8–11] It is true that a change of custody of children may entail "serious emotional disturbance." The courts are concerned with avoiding these distresses and are given wide discretion within the law in the determination of such matters. The Supreme Court of the United States has well pointed out the guiding principle in custody cases in Prince v. Massachusetts, 321 U.S. 158, at page 166, 64 S.Ct. 438, at page 442, 88 L.Ed. 645. It is there said: "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. [Citations.] And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter." Here the divorce proceedings gave the state, through its courts, the right to determine the custody of the children. The originial determination of custody by the court was in accord with the agreement of the parents themselves to place custody in strangers with certain limitations. Those limitations have now been removed. The agreement anticipated that there might be in the future a contest concerning the fitness of the one asserting a right to the custody of the children. That contest developed in this case. The issue of fitness should be tried out in the usual way with evidence and findings on the subject. In the absence of sufficient evidence and a finding of unfitness on the part of the parent seeking custody, the law of preference should take its course.

The order is reversed.

EDMONDS, CARTER, TRAYNOR, and SPENCE, JJ., concur.

SCHAUER, Justice.

I dissent. As I have attempted to make clear in my dissents in Roche v. Roche (1944), 25 Cal.2d 141, 144–149, 152 P.2d 999, and Guardianship of Smith (1953), 255 P.2d 761, 767–771, neither the law, reason, justice, nor socially desirable consequences require that a child's natural parents be branded in a public and permanent judicial record as "unfit" before custody (always temporary and subject to change, as a matter of law) can be awarded to one not a parent. On the contrary, such a finding will in many cases only result in unnecessary and irreparable harm to both parent and child.

It is a matter of common knowledge, proven over and over again in the annals of experience, that often the award of custody of a child to a person other than the natural parent will not only safeguard the child and advance his temporal, moral, and other interests for the time being but will also exercise a sobering and beneficial influence on warring parents who have but temporarily lost perspective on the relative values of some of the closest of human relationships.

Here, from the terms of the agreement of the parents, made at the time of, or preceding the divorce, it is apparent that intelligent and loving consideration, on the part of some one, was at that time given to the welfare of the children, and that the parents and children received the benefit of enlightened legal advice. The best interests of the children apparently were then given paramount effect. This was as it should be, and as our Legislature has enacted. Whether or not one of the parents has merely suffered a change of mind, or whether or not the best interests of the children admit of a change of custody, are questions for the trial court. Findings, unless waived, should specify where the best interests of the two children who are the subject of this proceeding lie, and the custody order should be made accordingly. But the matter should be determined on that basis and not on any theory of Divine—or mercenary—parental right. We should not in any event, in a case such as this, presume a wisdom and a power superior to the Legislature and strike down its direction that the interests of the children, rather than of a parent, be paramount in custody awards. Nor should we gratuitously add to the burdens of these children and their parents a court-made requirement that either the best interests of the children must be disregarded or the parents branded as "unfit."

GIBSON, C. J., concurs.

Rehearing denied; GIBSON, C. J., and SCHAUER, J., dissenting.

---

41 Cal.2d 334

LORENSON et al. v. CITY OF LOS ANGELES.

L. A. 22775.

Supreme Court of California, in Bank.

Aug. 14, 1953.

Action against city to recover salary due police officer for period during which he was relieved from duty pending determination of charge against him. The Superior Court, Los Angeles County, William S. Baird and Stanley N. Barnes, JJ., rendered judgment for plaintiffs, and defendant appealed. The Supreme Court held that the city was estopped from asserting that order relieving officer from duty was void from its inception and that claim for unpaid salary was barred as to semi-monthly salary payments due more than six months before claim was filed.

Judgment affirmed.

Prior opinion, App., 254 P.2d 54.

1. Estoppel 🔑62(4)

Where city acting through police department temporarily relieved police officer from duty on a charge which department knew was legally insufficient and secured continuances of hearing thereon beyond six months period allowed by city charter for filing claims, city was estopped from asserting that order relieving officer from duty was void from its inception and that hence claim for unpaid salary filed one month after dismissal of charge and restoration of officer to duty was barred as to semi-monthly salary payments due more than six months before filing of claim. St. 1927, p. 2014, § 376; St.1935, p. 2347, § 202; St.1941, p. 3493, § 363.

2. Municipal Corporations 🔑186(4)

Provision of city charter limiting to six months' salary the compensation of a person restored to duty after "suspension" uses quoted word as referring to a penalty which may be imposed upon accused officer if found guilty by board of rights, whereas charter provision authorizing chief of police to temporarily "relieve from duty" an officer or employee refers to status of accused pending hearing and determination of charges by board of rights. St.1935, p. 2347, § 202(1–3, 7, 12–14, 19).

See publication Words and Phrases, for other judicial constructions and definitions of "Relieve from Duty" and "Suspension".

Ray L. Chesebro, City Atty., Bourke Jones, Asst. City Atty., George William Adams, and Alan G. Campbell, Deputy City Attys., Los Angeles, for appellant.

Thomas D. Kelly, Daniels & Daniels, Burdette J. Daniels and Eugene M. Elson, Los Angeles, for respondents.

PER CURIAM.

Defendant City of Los Angeles appeals from a judgment rendered by the court sitting without a jury awarding to plaintiff[1] the payment of salary covering a period during which, pursuant to an order of the chief of police, he was temporarily relieved "from duty from his position as" captain in the police department of defendant city. The principal ground urged by the city as requiring a reversal is plaintiff's failure to file a claim for the salary within the time limited by certain provisions of the city charter. For the reasons hereinafter stated we have concluded that the judgment should be affirmed.

The evidence is without substantial conflict. On April 12, 1949, plaintiff was indicted by the Los Angeles County Grand Jury on a charge of conspiracy to violate certain sections of the Penal Code. On the following day the chief of police of defendant city, purporting to act under section 202[2] of the Los Angeles city charter, Stats.1935, p. 2347, by a written order temporarily relieved plaintiff from duty, upon the charge (set forth in a formal complaint filed with the Board of Police Commissioners and served upon plaintiff, as required for continued effectiveness of an order temporarily relieving an officer from duty) that plaintiff "was indicted by the Los Angeles County Grand Jury on a charge of conspiracy to violate [certain specified] Sections * * * of the Penal Code, such action causing embarrassment to the Department." Lieutenant McCauley, who was then advocate[3] of the police department (hereinafter termed the department) for the presentation of charges under section 202 of the charter, had drafted the charge against plaintiff at the direction of Chief of Police Horrall. Lieutenant McCauley doubted the sufficiency of the proposed charge and therefore discussed the matter with two of the deputies in the city attorney's office. They advised him that they thought the charge to be legally insufficient. Lieutenant McCauley reported their opinions to Chief Horrall, who instructed him "to go ahead and write up the charges anyway * * * regardless of anyone's opinion." The reason given to Lieutenant McCauley for proceeding despite the questioned sufficiency of the charge was that "immediate action had to be taken * * *. We were all in agreement * * *. That there weren't any other charges * * * they could file on Captain Lorenson." Lieutenant McCauley did not at any time bring to plaintiff's attention the fact that he had been told the charge was insufficient as "Feeling that I was acting for the Chief of Police I felt that * * * it was a matter between myself and the Chief of Police."

---

[1] In this opinion the term plaintiff will refer to plaintiff Harry M. Lorenson only, although his wife was joined as a coplaintiff in deference to the community property laws of California.

[2] Subdivision (2) of city charter section 202 authorizes the chief of police to "(a) Temporarily relieve from duty any officer or employee of the police department pending a hearing before and decision by the Board of Rights of any charge or charges pending against such officer or employee"; or "(b) Suspend such officer or employee for a total period not to exceed thirty (30) days with loss of pay and with or without reprimand, subject however, to the right of such officer or employee to a hearing before a Board of Rights. * * *"

Subdivision (3) of section 202 provides that within five days after any order of relief from duty is made under paragraph (a) of subdivision (2), the chief of police "must * * * file with the Board of Police Commissioners, a copy of a verified written complaint upon which such order of relief from duty * * * is based * * *. Such complaint * * * must contain a statement in clear and concise language of all the facts constituting the charge made. In the event that the Chief of Police fails to file the aforesaid statement and complaint within the five (5) day period heretofore prescribed, the aforesaid order of temporary relief from duty * * * shall thereupon become void and of no effect and shall be automatically revoked, and the accused officer * * * restored to duty with the department without loss of pay and without prejudice, the same as if no order of relief from duty * * * had been made."

[3] It appears that advocate of the department is a position in the department's "Personnel Division" (later termed the "Bureau of Internal Affairs"), which, under supervision of a deputy chief of police, handled disciplinary matters. The advocate "is the chief investigating officer concerning disciplinary matters * * *. He also draws charges in the case of Board of Rights hearings, prosecutes the defendant in the hearing, and * * * [performs] other related tasks." McCauley, as advocate, had "charge of the case so far as the Police Department was concerned" when the charge against plaintiff "actually came to trial before the Board of Rights."

Following filing of the charge against plaintiff a board of rights was chosen, under procedure set forth in section 202 of the charter, to hear and decide the matter. A hearing was first set for April 19, 1949, but it was continued from time to time in compliance with the policy of the department, as explained by Lieutenant McCauley, to continue such matters "until the criminal courts had arrived at a decision. * * * [T]here had been much publicity * * * [I]f we went ahead with this trial, there wouldn't be much doubt but that Captain Lorenson would be exonerated, and * * * we would again receive publicity to the effect that the Department had whitewashed or cleared a man who had still pending a trial in the criminal courts." Plaintiff, to whom McCauley had suggested that "we had better" continue the board hearing while the criminal proceedings were pending, did not object to the continuances.

On "about March 14," 1950, the indictment against plaintiff was dismissed by the court on motion of plaintiff's "attorney, consented to by the District Attorney, on the ground there was not sufficient evidence to prosecute." Hearing before the board of rights was thereupon held on March 16, 1950. At that time Deputy Chief Parker, who had general supervision, under the then Chief of Police Worton, over disciplinary matters, stated to the board that the city attorney had ruled the charge against plaintiff was not legal and the department had been so advised, that plaintiff should not have been relieved from duty, and "that it was the Department's desire to withdraw the charges." The attorney who had represented plaintiff in the criminal proceedings and who was present at the March 16 board hearing thereupon moved to dismiss the charge against plaintiff "upon the ground that the charge as stated does not constitute legal grounds for action by this Board." The board thereupon made its finding and decision "that the charge brought by the Department against Captain Lorenson does not constitute a legal charge and that he should be restored to duty, with all rights to which he is entitled under the provisions of the Charter of the City of Los Angeles and all pertinent ordinances adopted pursuant thereto." Accordingly the chief of police on the same day (March 16, 1950)—*but not until then*—restored plaintiff to duty as a captain.

The first inkling given plaintiff that following reinstatement his salary would not be paid for the full period he was relieved from duty "was at the final meeting of the Board of Rights" on March 16, 1950, when Deputy Chief Parker stated "that he was going to have to ask for an opinion before he could approve a salary, full pay or not * * *." Prior to that time plaintiff had at no time been informed that the charge against him was "considered insufficient by the Police Department or by the City Attorney's office," and plaintiff himself "considered them good, due to the fact that the Chief of Police had filed them." On "almost every occasion" plaintiff discussed the board hearings and continuances with McCauley, he was told that "if these things were thrown out in court and cleared up, that I would be given an early hearing immediately and put back to work. * * * About December * * * I mentioned to him that it was a long time between paydays. He said, 'Yes, but when you get one it's going to be a good one.' * * * I said, 'I am not going to stand for a loss of salary by waiver or other means.' I told him that I had no part in any conspiracy and that I was not going to take any rap for it. He said, '* * * Don't worry about it. You will be put back to work.'" Plaintiff further testified that if he had been informed the city attorney considered the charge to be not sufficient he would have asked for an immediate board hearing and would have taken the matter to court if it had not been granted; that he had relied entirely on the statements made to him by McCauley, who had the immediate authority in the matter, and did not try to "go over his head" to speak with his superior officers in the department. Neither did plaintiff discuss the matter of sufficiency of the charge against him or of his back salary with the city attorney's office or with the board of rights prior to the March 16 hearing. Plaintiff further stated that he was familiar with and was relying upon subdivision (12) of section 202 of the city charter, which provides among other things that if the board of rights finds the accused " 'not guilty', said board shall order his restoration to duty without loss of pay and without prejudice, and such order shall be self-executing and immediately effective", and had expected to receive his full pay in case he was exonerated.

Following his restoration to duty plaintiff was told the city attorney was working on the matter of his salary "and that it appeared favorable. Then I was advised by Lieutenant McCauley in the first part of April that I had better * * * file a claim before the City Clerk for back salary * * * immediately." On April 18, 1950, plaintiff filed a claim for all of the salary that had accrued between April 13, 1949, and March 16, 1950, in the total sum of $5,652.74. On recommendation of the city attorney that although plaintiff had been illegally deprived of his salary during the time he was relieved from duty, he was entitled to be paid only upon filing a claim under sections 363 and 376 of the city charter, St.1941, p. 3493, St.1927, p. 2014, the claim was allowed and paid in the sum of $2,541.77, which represented the amount plaintiff would have received as salary if he had been on duty continuously during the six months' period preceding the date he filed his claim. He thereupon brought this action to recover the balance, and was given judgment for the full amount,[4] from which defendant city appeals.

Defendant contends that the act of its department head (the chief of police) in making the order relieving plaintiff from duty was illegal and void from the time it was made, that the charge filed against plaintiff was at all times legally insufficient and "would not support * * * [his] suspension or discharge upon a finding of guilt by a Board of Rights," that therefore plaintiff's right to his unpaid salary accrued semi-monthly thereafter as the salary became due, and that the judgment must be reversed because of plaintiff's failure to file timely claims therefor under sections 363 and 376[5] of the city charter. Both in his complaint and at the trial plaintiff, although not suggesting or conceding the illegality or invalidity of the order temporarily relieving him from duty, or the insufficiency of the charge filed against him, relied upon the theory of estoppel of the city to invoke such above mentioned sections.

Upon the evidence summarized hereinabove the trial court found, among other things, that the department, knowing the charge against plaintiff was not legally sufficient, kept the knowledge from plaintiff, although plaintiff "was a faithful employee of over twenty years' service"; that plaintiff reasonably relied upon the act of the chief of police in relieving him from duty and upon the acts of the board of rights in continuing the hearings in accordance with department policy; and that agents of the department "induced and misled plaintiff * * * to believe that" plaintiff "would suffer no detriment or lose no salary by allowing said charge before said Board of Rights to be continued * * * until said criminal charges were disposed of." The court concluded, accordingly, that the city must pay plaintiff the balance of his back salary.

---

[4] Plaintiff had no outside earnings during the period here involved.

[5] Section 363: "Every claim for money or damages against the City, or any officer, board or department thereof * * * shall be filed with the City Clerk * * * [T]he filing of any such claim * * * as above provided * * * shall constitute a compliance with the provisions of Section 376 as to the presentation of a claim prior to suit or action thereon."

Section 376: "No suit shall be brought on any claim for money or damages against the City of Los Angeles * * * until a demand for the same has been presented, as herein provided, and rejected in whole or in part. * * * Except in those cases where a shorter period of time is otherwise provided by law, all claims for damages against the city must be presented within six (6) months after the occurrence from which the damages arose, and all other claims or demands shall be presented within six (6) months after the last item of the account or claim accrued. * * *"

[1] As pointed out in Farrell v. County of Placer, 1944, 23 Cal.2d 624, 627–631, 145 P.2d 570, 571, 153 A.L.R. 323, "there are many instances in which an equitable estoppel in fact will run against the government where justice and right require it." In that case, before the time for filing a claim for personal injuries had expired, agents of defendant county learned from plaintiff her version of the accident and by statements upon which she relied lulled her into a sense of security and persuaded her not to file a claim within the time limited by statute. It was held that filing of the claim was "nothing more than a procedural requirement as to the [governmental] agency, which, as to the claimant, may be excused by estoppel", and that such estoppel had been established. We are satisfied that the learned trial court correctly applied the same principle in the present case. Here plaintiff's superior officers, who were responsible for the conduct of the department and who, at least when acting lawfully, had the power to relieve subordinates from duty, relieved plaintiff from duty, filed a charge against him which they now say they were fully aware was legally insufficient, and secured continuances of the hearing for a period beyond the six-months' claims provision which the city seeks to invoke. Plaintiff as mentioned, as a captain of the police department, held an office subordinate to the chief of police; the order relieving plaintiff from duty was not vacated and he was not restored to duty until after the board of rights dismissed the charge on March 16, 1950. The filing of the formal charge, the issuing of the written order relieving plaintiff from duty, and the procurement by the department of the several continuances of the board of rights hearing, together with the other representations and acts on the part of the city, all combine to create a set of facts upon which plaintiff was reasonably entitled to rely until such time as the order relieving him from duty had been revoked or he had been otherwise restored to duty. Furthermore, the acts and conduct related support the finding of bad faith on the part of an official department of the city. Under all of those circumstances the city is properly held estopped to repudiate its own acts and declarations to its own monetary advantage and at the expense of the employe who was concededly illegally deprived of his salary. See Benner v. Industrial Accident Comm., 1945, 26 Cal.2d 346, 349–350, 159 P.2d 24; Tyra v. Board of Police, etc., Com'rs, 1948, 32 Cal.2d 666, 670–671, 197 P.2d 710; Schulstad v. City & County of San Francisco, 1946, 74 Cal.App.2d 105, 108–109, 168 P.2d 68; Mendibles v. City of San Diego, 1950, 100 Cal.App.2d 502, 506, 224 P.2d 42; Cruise v. City & County of San Francisco, 1951, 101 Cal.App.2d 558, 225 P.2d 988. We do not, therefore, reach or decide the question of whether, as urged by the city, the charge against plaintiff and the order relieving him from duty were illegal or void.

Other charter provisions which the city also urges as requiring reversal of the judgment clearly do not apply. For instance, with respect to section 112½,[6] *plaintiff* has not claimed that he was illegally, wrongfully or invalidly "suspended, laid off or discharged". Rather, he has at all times protested his belief, and his right to believe, that the order of the chief of police temporarily relieving him from duty, although unjust and unfounded in ultimate truth, was legal and valid until such time as the board of rights had disposed of the charge against him. It has been defendant city which has attempted to claim—and this only since dismissal of the charge by the board of rights—that the relief from duty was illegal and wholly void from the time it was ordered, a claim which, for the reasons already discussed hereinabove, the city is estopped to make. Since plaintiff has not made the claim which is essential to applicability of section 112½ we do not reach the question as to whether being temporarily "relieved from duty" under section 202 is encompassed within the expression "suspended, laid off or discharged" as the latter terms are used in section 112½.

---

[6] Section 112½: "Whenever it is claimed *by any person that he* has been unlawfully suspended, laid off or discharged, and that such lay-off, suspension or discharge is ineffective for any reason, any claim for compensation must be made and a demand for reinstatement must be presented in writing within ninety days following the date on which it is claimed that such person was first illegally, wrongfully or invalidly laid off, suspended or discharged * * * Proof of filing the claim for compensation within the time and in the manner herein specified shall be a condition precedent to any recovery of wages or salary claimed to be due on account of said lay-off, suspension or discharge. Except as herein specified, such claims for compensation shall conform to the requirements of Sections 363, 369 and 376 of this charter." St. 1937, p. 2858. (Italics added.)

[2] With respect to subdivision (19)[7] of section 202 (the section under which the department purported to act in relieving plaintiff from duty and filing the charge against him), it is apparent from a reading of all of the provisions of that section (particularly of subdivisions (1), (2),[8] (3), (7), (12), (13) and (14) thereof) that the term "suspension" as used therein refers to a penalty which may be imposed upon the accused officer if he is found guilty by the board of rights or if he fails to defend himself against the charges made, whereas the term "relieved from duty" refers to the status of the accused pending hearing and determination by the board of the charges. Thus the limitation of recovery to six-months' salary placed by subdivision (19) upon those who have been wrongfully subjected to "suspension or removal" *by way of punishment* would not limit the salary recoverable by plaintiff, who was only temporarily, and not in any sense by way of punishment, "relieved from duty" pending the board hearing. This view finds further support in the provision of subdivision (12) that in case the board finds the accused to be guilty, the maximum period for which the accused may be suspended "with total loss of pay" is six months.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR and SPENCE, JJ., concur.

EDMONDS, Justice (concurring).

I concur in the affirmance of the judgment but not upon the grounds stated in the majority opinion.

Section 376 of the city charter requires as a condition precedent to suit the presentation of a demand within six months from the time a claim has accrued. Therefore, the decisive question presented in this case is: When did that time commence to run?

Throughout this proceeding Lorenson has maintained that his claim for compensation did not arise until the board of rights declined to order his restoration to duty without loss of pay. On the ground that the order relieving him from duty was void, the city asserts that a claim for salary arose at the end of each semi-monthly period for which he was not paid. Although the court declines to decide which of the two positions is correct, the conclusion that Lorenson is entitled to recover on the basis of estoppel necessarily must be based upon the city's contention. In my opinion, the applicable provisions of the city charter may not be so construed.

Paragraph 2(a) of section 202 of the charter authorizes the chief of police to relieve from duty temporarily any officer or employee "pending a hearing before and decision by the Board of Rights of any charge or charges pending against such officer or employee". In the event the chief takes no further steps, the order is revoked and the accused restored to duty without loss of pay and without prejudice. Par. (3). However, if the chief thereafter, within five days from the order relieving the accused from duty, files with the board of police commissioners a complaint and statement of charges, then the right to receive compensation for the period the accused is off duty is governed solely by the disposition of the charges against him in the hearing before the board of rights.

---

[7] Section 202, subdiv. (19): "Any person restored to duty or reinstated in his office or position after suspension or removal, as provided in and under any provision of this section, shall be entitled to receive full compensation from the city the same as if such suspension or removal had not been made, provided that such compensation shall not be for more than six (6) months salary."

[8] Subdivision (2) is quoted in part in footnote 2, hereinabove.

Paragraph (14) of section 202 provides that "[i]n any case of penal suspension or removal prescribed by the Board of Rights * * * the time of such suspension shall be computed from the first day such officer or employee was so suspended or relieved from duty pending hearing before and decision by the Board of Rights, and such removal shall relate back to and be effective as of the date of such relief from duty pending hearing before and decision by the Board of Rights". Paragraph (12) of the same section declares: "If the accused is found 'not guilty', said board shall order his restoration to duty without loss of pay and without prejudice". According to the clear import of these sections, an accused may not claim a right to receive compensation for a period of relief from duty until the board has made a decision favorable to him.

In the present case, Lorenson's right to receive compensation for the period in question was not determined until March 16, 1950, when the board dismissed the charges against him. Since his claim was presented only one month later, it was timely filed.

To hold, as the majority imply, that a claim must be filed within six months from the date each salary payment otherwise would have been due, places a burden upon an accused not warranted by any provision of the charter. Under the present decision, to protect his right, an accused must file numerous claims in anticipation of the possibility that the board will acquit him but without an order for the payment of his salary during the time he was relieved from duty.

I would follow the plain provisions of the charter which give every policeman rights to which he is clearly entitled. The rule of estoppel is based upon facts from which different inferences may be drawn. The right to the payment of salary for the time one has been relieved from duty and thereafter acquitted of the charges made against him, should not rest upon such an uncertain basis.

41 Cal.2d 419

PETERS v. CITY AND COUNTY OF SAN FRANCISCO et al.

S. F. 18772.

Supreme Court of California, in Bank.

Aug. 21, 1953.

Action by pedestrian against city and abutting landowners for injuries received when pedestrian fell after stepping into depression made in sidewalk by landowner's predecessor to allow automobiles to enter landowners' garage whose floor was lower than sidewalk level. The Superior Court, San Francisco County, entered judgment on verdict for pedestrian as against city but against pedestrian with regard to landowners, and both pedestrian and city appealed. The Supreme Court, Gibson, C. J., held that, where city was directly liable for its own negligence to pedestrian, city would not be entitled to reversal of judgment against it solely because of error affecting judgment in favor of codefendant adjoining landowners.

Judgment affirmed as to city and reversed as to landowners.

Prior opinion 250 P.2d 675.

1. Municipal Corporations ⚷808(1)

An abutting landowner may be held liable for dangerous condition of portions of public sidewalk which have been altered or constructed for benefit of his property and which serve use independent of and apart from ordinary and accustomed use for which sidewalks are designed.

2. Municipal Corporations ⚷808(1)

Duty to maintain portions of sidewalk which have been altered for benefit of property runs with land, and property owner cannot avoid liability on ground that condition was created by or at request of his predecessors in title.

3. Municipal Corporations 🔑806(1, 2)

In absence of notice or knowledge to contrary, pedestrian making normal use of public sidewalk has right to assume that it is in reasonably safe condition and, while he must use ordinary care for his personal safety and make reasonable use of his faculties to avoid injury to himself, he is not required to keep his eyes fixed on ground or to be on a constant lookout for danger.

4. Municipal Corporations 🔑821(25)

Even if defect is one which might be visible to person who is looking for such condition, it does not follow that pedestrian is guilty of negligence as matter of law in failing to see and avoid such defect.

5. Municipal Corporations 🔑821(20)

In action by pedestrian against abutting landowners for injuries received when pedestrian fell after stepping into depression made in sidewalk by landowners' predecessor to allow automobiles to enter garage whose floor was lower than sidewalk level, question of pedestrian's contributory negligence was for jury.

6. Municipal Corporations 🔑741(2)

Where plaintiff, while bed-ridden in nursing home following accident, signed original and several copies of claim against city in presence of her attorney, and claim contained separate verification in usual form, which plaintiff signed upon original and some of copies, and thereafter attorney took original and copies to notary public who, upon being informed that attorney had seen plaintiff sign them, signed the jurat on original, claim would be regarded as "verified" within statute requiring verification of such claims. Pen.Code § 121.

See publication Words and Phrases, for other judicial constructions and definitions of "Verified".

7. Municipal Corporations 🔑741(2)

Object of requiring verification of claims against a city is to hold claimant responsible for any false statements made in claim. Pen.Code, § 121.

8. Municipal Corporations 🔑741(1)

Purpose of requiring presentation of written claim by one making claim against municipality is to give appropriate municipal body timely notice of accident and opportunity to investigate it. Pen.Code, § 121.

9. Municipal Corporations 🔑741(1)

Where person having tort claim against city filed carbon copy of claim with clerk of board of supervisors and notified clerk that original had been filed in controller's office, and both original and copy reached attorney's office within time prescribed by statute for filing such claims, substantial compliance with claim statute existed. Pen.Code, § 121.

10. Municipal Corporations 🔑788(1), 791(1)

Under statute defining municipal liability for condition of public streets, element essential to recovery is proof that municipality had actual or constructive notice of existence of a dangerous condition. Government Code, §§ 53050, 53051.

11. Municipal Corporations 🔑791(1, 2)

City will be charged with constructive notice of substantial defects in public sidewalk which have existed for such length of time and are of such conspicuous character that reasonable inspection would have disclosed them. Government Code, §§ 53050, 53051.

12. Municipal Corporations 🔑821(25)

Where, in action by pedestrian against city and abutting landowners for injuries received when pedestrian fell after stepping into depression made in sidewalk by landowners' predecessor to allow automobiles to enter landowners' garage whose floor was lower than sidewalk level, verdict was for pedestrian against city but against pedestrian in regard to landowners' liability, implied finding that dangerous condition was substantial and conspicuous enough to charge city with constructive notice thereof did not establish that pedestrian was guilty of negligence as matter of law in failing to observe such danger. Government Code, §§ 53050, 53051.

13. Municipal Corporations ⚷806(1)

Pedestrian, who was injured when she stepped into depression in sidewalk, could not be held to duty of examining sidewalk with same care which would be required of city in discharging its duty of inspection.

14. Municipal Corporations ⚷764(1), 795

Municipality must exercise diligence in keeping its streets safe and is bound to make reasonable inspections to that end.

15. Municipal Corporations ⚷763(1), 808(1)

Abutting landowner has duty not to create or maintain dangerous conditions in sidewalk for benefit of his property, but city has duty to use due care to discover and remove defective conditions. Government Code, §§ 53050, 53051.

16. Municipal Corporations ⚷763(1)

City is directly liable to pedestrians for failing to correct dangerous sidewalk condition of which it has notice, and it is not relieved of such responsibility merely because condition was created or maintained by property owner who might also be liable to pedestrian for injuries resulting therefrom. Government Code, §§ 53050, 53051.

17. Municipal Corporations ⚷814

With regard to persons who are injured by dangerous sidewalk condition, city and abutting landowner are joint or concurrent tort feasors, each is directly liable for his own wrong, and each may be held liable for entire damage suffered. Government Code, §§ 53050, 53051.

18. Municipal Corporations ⚷755(1)

Even if municipality had right to contribution or indemnity from abutting landowner for damages recovered from city because of dangerous sidewalk conditions, municipality's liability to pedestrians would not be merely dependent or derivative from that of landowner. Government Code, §§ 53050, 53051.

19. Contribution ⚷5

Indemnity ⚷1

Rule against contribution between joint tort-feasors admits of some exceptions, and right of indemnification may arise as result of contract or equitable considerations and is not restricted to situations involving wholly vicarious liability.

20. Municipal Corporations ⚷819(3)

In action by pedestrian against city and abutting landowners for injuries received when pedestrian fell after stepping into depression made in sidewalk by landowners' predecessor to allow automobiles to enter landowners' garage whose floor was lower than sidewalk level, evidence was sufficient to sustain judgment against city. Government Code, §§ 53050, 53051.

21. Appeal and Error ⚷877(5)

Where city was directly liable for its own negligence to pedestrian for injuries sustained when pedestrian fell after stepping into depression made in sidewalk to allow automobiles to enter garage whose floor was lower than sidewalk level, city would not be entitled to reversal of judgment against it solely because of error affecting judgment in favor of codefendant adjoining landowners. Government Code, §§ 53050, 53051.

◆

FitzGerald Ames, Sr., and Guernsey Carson, San Francisco, for plaintiff and appellant.

Dion R. Holm, City Attorney, and Lawrence S. Mana, Deputy City Attorney, San Francisco, for defendant and appellant.

Daniel C. Miller, Anna White Garlund, Keith, Creede & Sedgwick and Frank Creede, San Francisco, for respondents.

GIBSON, Chief Justice.

Plaintiff fell and was seriously injured while walking on a sidewalk in San Francisco in front of an apartment house belonging to defendants Duque. She sued for damages, joining the city and the Duques and alleging that her injuries were proximately caused by the negligence of all defendants. The jury found for the plaintiff against the city but against the plaintiff with regard to the liability of the Duques. Judgment was entered on the verdict, and both plaintiff and the city have appealed.

The sidewalk in the area where the accident occurred was fifteen feet wide and was already in existence when the apartment house was erected in 1919 by one of the Duques' predecessors in title. The building contained a garage having doors which opened directly onto the sidewalk. The garage floor was lower than the adjoining sidewalk, and, at or about the time the building was erected, a ramp or slope had been made in the walk leading down to the level of the garage floor in order to provide access for automobiles. The depression created by the alteration was wide enough to accommodate a car, and it reached a depth of eleven inches below the normal level of the sidewalk at the building line. The slope extended six feet, seven inches out from the building to a point approximately halfway across the sidewalk. The Duques acquired the property in 1940, and at the time the accident occurred the driveway was in substantially the same condition as when it was constructed. Plaintiff, an elderly woman, was walking along the sidewalk alone and did not see the depression caused by the driveway. She stepped into it unexpectedly at a point approximately six feet away from the building line and fell to the ground, breaking her hip.

Plaintiff's Appeal

Plaintiff's principal contention is that the court erred in instructing the jury with respect to the liability of the Duques for the condition of the sidewalk where plaintiff fell. The jury was told that "No affirmative duty rested on said defendants Duque as the owners of property abutting said sidewalk or otherwise to keep the sidewalk in safe condition, but our law does provide that when the owner of property abutting a sidewalk creates, by some positive action, a condition which is likely to cause harm to persons lawfuly using the sidewalk, and a person so using the walk is injured as a proximate result of such condition, the property owner is then liable for that injury, in the absence, of course, of contributory negligence."

[1, 2] The instruction does not contain an accurate statement of the law with respect to the liability of a property owner for the condition of the sidewalk adjoining his property. The rule is that an abutting landowner may be held liable for the dangerous condition of portions of the public sidewalk which have been altered or constructed for the benefit of his property and which serve a use independent of and apart from the ordinary and accustomed use for which sidewalks are designed. Sexton v. Brooks, 39 Cal.2d 153, 157, 245 P.2d 496. The instruction erroneously implies that only the property owner who himself creates the dangerous condition in the sidewalk may be held liable therefor. The duty to maintain portions of a sidewalk which have been altered for the benefit of the property runs with the land, and a property owner cannot avoid liability on the ground that the condition was created by or at the request of his predecessors in title. Sexton v. Brooks, supra, 39 Cal.2d at page 157–158, 245 P.2d 496.

There was ample evidence from which it could be inferred that the sidewalk had been altered by one of Duques' predecessors in title for the benefit of the property to serve a use independent of and apart from the ordinary accustomed use for which sidewalks are designed, and it appears that the jury might have returned the verdict in favor of the Duques under the erroneous belief that they were automatically relieved from liability because of the fact that they had nothing to do with creating the condition in question.

The Duques nevertheless argue that the judgment in their favor should be affirmed because the evidence assertedly establishes as a matter of law that plaintiff was guilty of contributory negligence. It appears from photographs which were placed in evidence that the depression in the sidewalk extended several feet farther out from the building line than did other driveways in the vicinity. Plaintiff testified that she was walking along the approximate center of the sidewalk in a leisurely manner, somewhat closer to the building line than to the curb. She had never before been on that side of the street. It was shortly before noon, the weather was clear, and the sun was shining directly overhead. Plaintiff stated that she looked "straight ahead" as she walked and did not look down at her feet. She said that she noticed the deep part of the depression near the garage door but that she did not see the portion of the driveway which lay in her line of travel and that she "did not dream that it came out that far * * *." When asked if she saw the particular place in the driveway where she fell, plaintiff said "You couldn't. It looks just like the sidewalk. The drop deceives you * * * it is not visible until it is too late. It was not visible."

[3-5] It is well settled that, in the absence of notice or knowledge to the contrary, a pedestrian making normal use of the public sidewalk has a right to asume that it is in reasonably safe condition, and while he must use ordinary care for his personal safety and make reasonable use of his faculties to avoid injury to himself, he is not required to keep his eyes fixed on the ground or to be on a constant lookout for danger. Meindersee v. Myers, 188 Cal. 498, 499, 503-504, 205 P. 1078; Perkins v. Sunset Telephone Co., 155 Cal. 712, 722, 103 P. 190; Barry v. Terkildsen, 72 Cal. 254, 256, 13 P. 657; Sykes v. City of Los Angeles, 110 Cal.App.2d 57, 60-61, 241 P.2d 1004; Owen v. City of Los Angeles, 82 Cal.App.2d 933, 939-940, 187 P.2d 860; Lay v. Pacific Perforating Co., 62 Cal.App.2d 233, 237, 144 P.2d 395; Scholz v. Hilbert, 30 Cal.App.2d 228, 231, 85 P.2d 902; City of San Diego v. Perry, 9 Cir., 124 F.2d 629, 631-632; Berland v. City of Hailey, 61 Idaho 333, 101 P.2d 17, 19; Little v. Kansas City, 239 Mo. App. 1007, 197 S.W.2d 1005, 1006-1008; see cases collected in 19 McQuillan, Municipal Corporations [1950] §§ 54.122-54.123. Even if a defect is one which might be visible to a person who is looking for such a condition, it does not follow that a pedestrian is guilty of negligence as a matter of law in failing to see and avoid it. Sykes v. City of Los Angeles, supra, 110 Cal.App.2d 57, 60-61, 241 P.2d 1004; see cases collected in 19 McQuillan, Municipal Corporations [1950] at pp. 458-459. Whether plaintiff made reasonable use of her faculties and whether she should have observed the condition which caused her injury were questions of fact. Eastlick v. City of Los Angeles, 29 Cal.2d 661, 674, 177 P.2d 558, 170 A.L.R. 225; Sykes v. City of Los Angeles, supra, 110 Cal.App.2d 57, 60-61, 241 P.2d 1004; Owen v. City of Los Angeles, supra, 82 Cal.App.2d 933, 939-940, 187 P.2d 860.

The evidence was clearly sufficient to support a finding that the driveway was dangerous, and it appears that the jury might have returned a verdict in favor of plaintiff against the Duques if it had been properly instructed on the law applicable to the liability of abutting property owners for conditions they create or maintain on the public sidewalk. Accordingly, the judgment in favor of the Duques must be reversed.

The City's Appeal

The city contends that the judgment against it must be reversed because plaintiff assertedly failed to file a verified claim with the clerk of the board of supervisors, as required by statute. Stats.1931, p. 2475; 2 Deering's Gen.Laws, Act 5149, now Gov. Code, § 53052. While plaintiff was bedridden in a nursing home following the accident she signed an original and several carbon copies of a claim against the city in the presence of her attorney. The claim contained a separate verification in the usual form, and plaintiff signed it on the original and some of the copies. The attorney then took the original and the copies to a notary public and informed her that he had seen plaintiff sign them, whereupon the notary signed the jurat on the original. The following day the attorney filed the signed and notarized original of the claim with the city controller's office. Immediately thereafter he presented the clerk of the board of supervisors with two carbon copies of the claim and informed him that he had filed the original with the controller. One of the copies was signed by plaintiff. The clerk of the board stamped the signed claim "Received," returned it to the attorney, and retained the unsigned copy for the files.

The city argues that the claim was not properly verified because not signed and acknowledged in the presence of the notary and that, even if it be assumed that the verification was proper, the requirements of the statute were not satisfied by presenting the original to the city controller and filing an unsigned copy with the board of supervisors.

[6, 7] The claim may be regarded as a "verified" one within the meaning of the statute although plaintiff did not appear before a notary to sign the verification. Cf. Germ v. City & County of San Francisco, 99 Cal.App.2d 404, 222 P.2d 122 [involving an identical provision in the city charter]. The object of requiring verification is to hold the claimant responsible for any false statements made in the claim, and, as pointed out in the Germ case, it is no defense to a prosecution for perjury that the person accused of swearing falsely "did not go before, or was not in the presence of, the officer purporting to administer the oath, if such accused caused or procured such officer to certify that the oath had been taken or administered." Germ v. City & County of San Francisco, 99 Cal.App.2d 404, 413–414, 222 P.2d 130; Pen.Code, § 121; see People v. Darcy, 59 Cal.App.2d 342, 139 P.2d 118. It may be inferred from the evidence that plaintiff was aware that she was required to sign the verification under oath, and her attorney caused the notary to certify that plaintiff had sworn to the statement made in the claim. Accordingly, it appears that there has been substantial compliance with the statutory requirement of verification.

[8, 9] Similarly, while plaintiff should have filed the signed original of the claim with the clerk of the board of supervisors, her failure to do so does not defeat her right to recover. The purpose of requiring presentation of a written claim is to give the appropriate municipal body timely notice of the accident and an opportunity to investigate it. Even if it be assumed that filing the claim with the city controller did not of itself meet this purpose, plaintiff also filed a carbon copy with the clerk of the board of supervisors and notified him that the original had been filed with the controller's office, and both the original and the copy reached the city attorney's office within the time prescribed by the statute for filing claims. Under the circumstances we are satisfied that there has been substantial compliance with the claim statute.

[10, 11] We come next to the question of the sufficiency of the evidence to support the finding that the city was negligent. The Public Liability Act of 1923, which defines municipal liability for the condition of the public streets, provides that a city shall be liable for injuries resulting from a dangerous or defective condition where it has notice or knowledge of the condition and fails to remedy it within a reasonable time. (Stats.1923 p. 675, 2 Deering's Gen.Laws, Act 5619, now Gov.Code, §§ 53050–53051). An element essential to recovery under this statute is proof that the municipality had actual or constructive notice of the existence of a dangerous condition. Barrett v. City of Claremont, 41 Cal.2d 70, 256 P.2d 977; Laurenzi v. Vranizan, 25 Cal.2d 806, 812, 155 P.2d 633; Nicholson v. City of Los Angeles, 5 Cal.2d 361, 363, 54 P.2d 725. While there is no evidence of actual notice in the present case, it is well settled that the city will be charged with constructive notice of substantial defects in the public sidewalk which have existed for such a length of time and are of such a conspicuous character that a reasonable inspection would have disclosed them. Laurenzi v. Vranizan, supra, 25 Cal.2d at page 812, 155 P.2d 633; see Barrett v. City of Claremont, supra, 41 Cal.2d 70, 256 P.2d 977; Nicholson v. City of Los Angeles, supra, 5 Cal.2d at pages 364–367, 54 P.2d 725. In view of the evidence as to the size and character of the depression in the sidewalk and the number of years it had existed, we cannot say as a matter of law that it was not a dangerous condition or that it was not sufficiently conspicuous to give the city constructive notice.

[12–14] What we have said with respect to contributory negligence in our discussion of plaintiff's appeal is applicable to the contentions made by the city in that regard. The implied finding that the dangerous condition was substantial and conspicuous enough to charge the city with constructive notice does not, of course, establish that plaintiff was guilty of negligence as a matter of law in failing to observe the danger. She obviously cannot be held to examine the sidewalk with the same care which would be required of the city in discharging its duty of inspection. Idlett v. Atlanta, 123 Ga. 821, 51 S.E. 709, 711; Hanson v. City of Anamosa, 177 Iowa 101, 158 N.W.

591, 594. A municipality must exercise vigilance in keeping its streets safe and is bound to make reasonable inspections to that end. Laurenzi v. Vranizan, 25 Cal.2d 806, 812, 155 P.2d 633; Nicholson v. City of Los Angeles, 5 Cal.2d 361, 365, 54 P.2d 725; Kirack v. City of Eureka, 69 Cal.App.2d 134, 138, 158 P.2d 270. To "inspect" is "to look upon, to view closely and critically especially so as to ascertain quality or state, to detect errors, * * * to examine." (Webster's New Internatl. Dict. [2d ed.]; see O'Hare v. Peacock Dairies, Inc., 26 Cal.App.2d 345, 353, 79 P.2d 433, and cases collected in 21 Words and Phrases at page 646. On the other hand, as we have seen, in the absence of knowledge to the contrary, a pedestrian is entitled to assume that a sidewalk is reasonably safe and is not required to be on a constant lookout for defective conditions. as stated in Hanson v. City of Anamosa, 177 Iowa 101, 158 N.W. 591, at page 594, "A pedestrian making use of city walks is not bound to constitute himself an inspector of walks."

[15] There is no necessary inconsistency in the judgment exonerating the Duques and holding the city liable. The verdict in favor of the landowners does not, as asserted by the city, establish that the sidewalk was safe or that plaintiff was guilty of contributory negligence. To the contrary, the verdict against the city necessarily indicates a finding in plaintiff's favor on those issues and, as we have already pointed out, the judgment in favor of the Duques may have been the result of the erroneous instruction on the law relating to the liability of abutting landowners. It is, of course, true that the liability of both the property owner and the municipality depends upon a determination that the sidewalk was unsafe and that plaintiff was free from contributory negligence, but, beyond that, different elements are necessary to support a judgment against each type of defendant. Before a property owner can be held liable it must appear that the dangerous condition of the walk was created by him or his predecessors in title for the benefit of the private property to serve a use apart from the ordinary use for which sidewalks are designed. Sexton v. Brooks, 39 Cal.2d 153, 157, 245 P.2d 496. On the other hand, as we have seen, the liability of the city depends upon a showing that it had notice of the dangerous condition and failed to remedy it within a reasonable time. Barrett v. City of Claremont, 41 Cal.2d 70, 256 P.2d 977. The duty of the landowner is to use due care not to create or maintain a dangerous condition for the benefit of his property, while that of the city is to use due care to discover and remove defective conditions. See City of Tuscaloosa v. Fair, 232 Ala. 129, 167 So. 276, 279, 281. Thus, the liability of each type of defendant is based upon his individual wrongful act or omission, and it is possible to have a valid verdict exonerating one and holding the other. See City of Tuscaloosa v. Fair, 232 Ala. 129, 167 So. 276, 279; cf. Fowden v. Pacific Coast Steamship Co., 149 Cal. 151, 155, 86 P. 178; see Rest. Torts, § 883, illus. 7.

[16, 17] The city nevertheless argues that the judgment against it must be reversed because there is no judgment against the Duques. It bases this contention on the theory that, where a sidewalk has been altered by a landowner for the benefit of his property, the liability of the city to pedestrians for dangerous conditions thereby created is dependent upon or derivative from that of the property owner and that, in the absence of a judgment against him, a judgment against the city cannot stand. We do not agree. The city is under a duty to keep sidewalks in safe condition, it is directly liable to pedestrians for failing to correct a dangerous condition of which it had notice, and it is not relieved of its responsibility in this regard merely because the condition was created or maintained by a property owner who might also be liable to pedestrians for injuries resulting therefrom. Schaefer v. Lenahan, 63 Cal.App2d 324, 327, 146 P.2d 929; City of Pineville v. Lawson, 225 Ky. 542, 9 S.W.2d 517, 519; City of Tuscaloosa v. Fair, 232 Ala. 129, 167 So. 276, 279; see City of Chicago v. Robbins, 2 Black 418, 422–423, 425, 67 U.S. 418, 422–423, 425, 17 L.Ed. 298, 302–303 and cases collected in 19 McQuillan, Municipal Corporations [1950], §§ 54.17, 54.19. With

regard to persons who are injured by such a condition, the city and the landowner are joint or concurrent tort-feasors; each is directly liable for his own wrong and each may be held liable for the entire damage suffered. See Brooks v. City of Birmingham, 239 Ala. 172, 194 So. 525, 527; City of Tuscaloosa v. Fair, 232 Ala. 129, 167 So. 276, 279; Belcaro Realty Inv. Co. v. Norton, 103 Colo. 485, 87 P.2d 1114, 1117; Salt Lake City v. Schubach, 108 Utah 266, 159 P.2d 149, 157–158, 160 A.L.R. 809, 821–822; cf. Summers v. Tice, 33 Cal.2d 80, 85–86, 199 P.2d 1, 5 A.L.R.2d 91; Adams v. White Bus Line, 184 Cal. 710, 195 P. 389; Fowden v. Pacific Coast Steamship Co., 149 Cal. 151, 157, 86 P. 178; see Rest. Torts § 879; Prosser on Torts [1941] p. 330, 1102–1104.

[18, 19] The city relies on cases from other jurisdictions which characterize the liability of the municipality as "secondary" in situations where a dangerous condition is created or maintained by a property owner. See Herron v. City of Youngstown, 136 Ohio St. 190, 24 N.E.2d 708, 711; Town of Argos v. Harley, 114 Ind.App. 290, 49 N.E. 2d 552, 556. To the extent that such cases may stand for the proposition that the liability of the city is in some way derivative from that of the landowner, we cannot agree with their reasoning. See Brooks v. City of Birmingham, 290 Ala. 172, 194 So. 525, 527–528. The opinions in those cases, however, recognize that the city has an independent duty to correct dangerous conditions of which it has notice, regardless of who created them, and the term "secondary" is not used therein to indicate that the city is merely liable vicariously for the negligence of the landowner. Instead, it appears that the term is used as a means of indicating that, in the jurisdiction where the case arose, a city has a right to be indemnified by a landowner in the event it is compelled to pay damages resulting from a dangerous condition he created or maintained and for which he would be liable to pedestrians. In this regard it may be noted that a number of jurisdictions which adhere to the view that the city and the landowner are joint or concurrent tort-feasors make an exception to the general rule against contribution between joint wrongdoers and hold that a municipality has a right to be indemnified by the property owner in such a situation. Chicago v. Robbins, 2 Black 418, 422–423, 425, 67 U.S. 418, 422–423, 425, 17 L.Ed. 298, 302–303; Washington Gaslight Co. v. District of Columbia, 161 U.S. 316, 16 S.Ct. 564, 568, 40 L.Ed. 712; Salt Lake City v. Schubach, 108 Utah, 266, 159 P.2d 149, 157–158, 160 A.L.R. 809, 821–822; City of Tuscaloosa v. Fair, 232 Ala. 129, 167 So. 276, 279; Gulf, Mobile & Ohio R. Co. v. Arthur Dixon Transfer Co., 343 Ill. App. 148, 98 N.E.2d 783, 785; 19 McQuillan, Municipal Corporations [1950] § 54.19, p. 91–94; Prosser on Torts [1941] p. 1116; 1 Freeman on Judgments [5th ed.] § 477, p. 980. We are not presented with the problem whether the city might have a right over against the Duques in the event it pays the judgment and the jury returns a verdict against the property owners on a new trial, and nothing we say here should be taken as indicating our views on that matter. See, generally, Adams v. White Bus Line, 184 Cal. 710, 714, 195 P. 389; Dow v. Sunset Tel. & Tel. Co., 162 Cal. 136, 121 P. 379. Even if such a right to contribution or indemnity were recognized, however, it would not mean, as asserted by the city, that its liability to pedestrians is merely dependent or derivative from that of the landowner and not joint or direct. As noted above, the rule against contribution between joint tort-feasors admits of some exceptions, and a right of indemnification may arise as a result of contract or equitable considerations and is not restricted to situations involving a wholly vicarious liability, such as where a master has paid a judgment for damages resulting from the voluntary act of his servant. See Washington Gaslight Co. v. District of Columbia, 161 U.S. 316, 16 S.Ct. 564, 568–569, 40 L.Ed. 712; Salt Lake City v. Schubach, 108 Utah 266, 159 P.2d 149, 158–159; Prosser on Torts [1941] p. 1114–1117; 1 Freeman on Judgments [5th ed.] § 477, p. 980.

[20, 21] The judgment against defendant city is supported by the evidence and is entirely proper. Being directly liable to plaintiff for its own negligence, the city is not entitled to a reversal of the judgment

against it solely because of error affecting the judgment in favor of its codefendants. Cf. Blackwell v. American Film Co., Inc., 189 Cal. 689, 698, 209 P. 999; Talcott Land Co. v. Hershiser, 184 Cal. 748, 756, 195 P. 653; see Fowden v. Pacific Coast Steamship Co., 149 Cal. 151, 155–157, 86 P. 178.

As to defendant city the judgment is affirmed; as to defendants Duque the judgment is reversed.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

---

41 Cal.2d 432

HARDIN v. SAN JOSE CITY LINES, Inc.

S. F. 18808.

Supreme Court of California, in Bank.

Aug. 21, 1953.

Rehearing Denied Sept. 17, 1953.

Action for injuries sustained while riding in defendant's bus. The Superior Court, City and County of San Francisco, Frank T. Deasy, J., entered judgment for plaintiff, and defendant appealed. The Supreme Court, Gibson, C. J., held that where passenger walked to front of bus and stood in stairway at right of driver, facing door to get off bus at intersection, and bus came to sudden halt when about 150 feet from regular stopping place causing plaintiff to be thrown forward, res ipsa loquitur instruction which assumed happening of accident was erroneous, but error was not prejudicial in view of other instructions.

Affirmed.

Prior opinion 252 P.2d 46.

1. Trial 🔑191(9), 296(9)

In passenger's action for injuries received when she stood in stairway of bus at right of driver, facing door to get off bus at intersection, and bus came to sudden halt when about 150 feet from regular stopping place, causing passenger to be thrown forward, res ipsa loquitur instruction which assumed happening of accident was erroneous, but error was not prejudicial in view of other instructions.

2. Trial 🔑194(18)

In passenger's action for injuries received when she stood in doorway at right of driver facing door to get off bus at intersection, but bus came to sudden halt when about 150 feet from regular stopping place, causing passenger to be thrown forward, res ipsa loquitur instruction did not create presumption of negligence and did not invade province of jury.

3. Negligence 🔑121(2)

The doctrine of res ipsa loquitur raises an inference of negligence and not a presumption.

4. Trial 🔑142

Generally whether a particular inference shall be drawn is a question of fact for jury, even in absence of evidence to contrary. Code Civ.Proc. § 1958.

5. Carriers 🔑316(1)

An inference of negligence based on res ipsa loquitur doctrine arises in cases where passenger on common carrier is injured as result of operation of vehicle, and carrier is obliged to meet inference by sufficient evidence.

6. Carriers 🔑321(21)

An instruction to effect that, as bus came to sudden stop when about 150 feet from regular stopping place while passenger stood in stairway causing passenger to be thrown forward, an inference arose that passenger's injury was caused by carrier's negligence, and that it was incumbent upon carrier to rebut inference by showing that it had exercised utmost care and diligence, did not shift burden of proof from passenger to carrier, but placed upon carrier burden of going forward with evidence. Civ. Code, § 2100.

7. Carriers 🔑321(23)

In action against carrier for injuries sustained when carrier stopped at point approximately 150 feet from regular stopping place, causing passenger to be thrown forward against handrail, instruction with reference to excessive speed was proper where evidence was introduced that bus was traveling at 30 miles per hour in residential district in which signs were posted designating speed limit of 25 miles per hour, that there was a medium amount of traffic, and that there were a number of intersecting streets near place where bus came to sudden halt. Vehicle Code, §§ 510, 511, 513.

8. Carriers ⚿333(2)

Passenger who left seat on bus and walked up aisle and took position near bus driver in stairway while bus was in motion and who was thrown forward and injured when bus suddenly stopped was not negligent in grasping vertical bar with left hand while carrying bag of groceries on the right arm where such position was adequate to guard against any normal change in speed of the bus which passenger might reasonably have been expected to foresee.

◆

Campbell, Hayes & Custer, Frank L. Custer, San Jose, and W. R. Dunn, Burlingame, for appellant.

Rettig & Dunn and Frederick E. Rettig, San Francisco, for respondent.

GIBSON, Chief Justice.

This action was brought to recover damages for injuries which plaintiff sustained while riding in a bus operated by defendant. The jury returned a verdict for plaintiff, and defendant has appealed from the judgment.

Plaintiff testified that she was riding in one of defendant's buses and that when she was near her destination she signaled for a stop, arose from her seat while the bus was in motion, and went forward to the stairwell at the right of the driver, where she stood facing the door. Under her right arm she was carrying a shopping bag containing groceries, and with her left hand she grasped a vertical bar at the top of the stairwell. The bus was traveling at approximately 30 miles an hour in a 25-mile zone, and it came to a sudden halt when it was about 150 feet from the regular stopping place. Plaintiff was thrown forward and struck her back against a horizontal handrail which extended across the front of the bus, and she sustained serious injuries. She did not see anything that would have caused the bus to come to a sudden stop but heard the driver exclaim, "That darned fool will kill himself and someone else, too." The driver then asked plaintiff if she was hurt, and she replied that she did not think she was. He also asked for her name and address, and she gave them to him.

Defendant's evidence with respect to the happening of the accident consisted of the testimony of two of its officers that the company received no report of the accident, although its drivers had orders to report all such occurrences, and the testimony of five bus drivers who were said to be the only drivers on the route traveled by plaintiff at the time. Each of the drivers testified that no incident of the kind described by plaintiff had occurred on his bus. Another witness testified that about a month after the alleged accident plaintiff stated that her back was bothering her, that it was bandaged because a man named Ray had hit her, and that she was suing the city bus line.

[1] The principal question is whether the court erred in giving the following instruction upon the doctrine of res ipsa loquitur: "Now, from the happening of an accident such as involved here, there arises an inference that the proximate cause of the occurrence was some negligent conduct on the part of the defendant. That inference is a form of evidence, and if there is none other tending to overthrow it, or if the inference preponderates over contradictory evidence, it warrants a verdict for the plaintiff. Therefore, you should weigh any evidence tending to overcome that inference, bearing in mind that it is incumbent upon the defendant to rebut the inference by showing that it, in fact, exercised the utmost care and diligence, or that the accident occurred without being proximately caused by any failure of duty upon it, the bus' part * * *."

The first sentence of the instruction erroneously assumes that an accident occurred in the manner claimed by plaintiff. As we have seen, there was evidence from which it might be reasonably inferred that no accident in fact occurred and that plaintiff's injuries were the result of having been struck by a person with whom plaintiff was acquainted. In these circumstances the instruction should have been prefaced by language such as "If, and only in the event, you should find that there was an accidental occurrence as claimed by plaintiff * * *." Cf. Black v. Partridge, 115 Cal.App.2d 639, 650, 252 P.2d 760; see Freitas v. Peerless Stages, Inc., 108 Cal.App.2d 749, 757, 239 P.2d 671; California Jury Instructions, Civil [B.A.J.I.] No. 206, as compared with No. 206–B. It does not appear, however, that the error was prejudicial since the jury was told in other instructions that there was a dispute as to whether an accident had in fact occurred and that the burden was on plaintiff to prove by a preponderance of the evidence that an accident happened as she claimed. The erroneous assumption contained in the res ipsa loquitur instruction is indirect and inferential, and in view of the specific instructions upon the factual issue it seems clear that the jury was not misled. Moreover, several of the instructions requested by defendant likewise assumed the occurrence of the accident, and this may well have operated to invite the error.

[2–4] Defendant claims that the instruction in effect creates a presumption of negligence and that it invades the province of the jury. When considered as a whole, the instruction directs the jury that an inference of negligence arises from the happening of the accident and that the verdict must be for plaintiff if the inference is not rebutted by other evidence. While some of the earlier decisions in this state used the word "presumption" in discussing the effect of res ipsa loquitur, it is now settled that the doctrine raises an inference of negligence and not a presumption. Scott v. Burke, 39 Cal.2d 388, 398 et seq., 247 P.2d 313; Rose v. Melody Lane, 39 Cal.2d 481, 487–488, 247 P.2d 335; Zentz v. Coca Cola Bottling Co., 39 Cal.2d 436, 440, 447–449, 247 P.2d 344; Anderson v. I. M. Jameson Corp., 7 Cal.2d 60, 66–67, 59 P.2d 962. It is, of course, the general rule that whether a particular inference shall be drawn is a question of fact for the jury, even in the absence of evidence to the contrary. Code Civ.Proc. § 1958; Blank v. Coffin, 20 Cal.2d 457, 461, 126 P.2d 868; Hamilton v. Pacific Elec. Ry. Co., 12 Cal.2d 598, 602–603, 86 P.2d 829.

[5] It is equally well settled, however, that an inference of negligence based on res ipsa loquitur arises in cases where a passenger on a common carrier is injured as the result of the operation of the vehicle and that the carrier is obliged to meet the inference by evidence sufficient to offset or balance it. See Mudrick v. Market Street Ry. Co., 11 Cal.2d 724, 731–734, 81 P.2d 950, 118 A.L.R. 533; St. Clair v. McAlister, 216 Cal. 95, 98–99, 13 P.2d 924; Smith v. O'Donnell, 215 Cal. 714, 721–722, 12 P.2d 933; O'Neill v. City and County of San Francisco, 209 Cal. 418, 420, 287 P. 449; Scarborough v. Urgo, 191 Cal. 341, 346, 216 P. 584; Dowd v. Atlas Taxicab & Auto Service, 187 Cal. 523, 531–532, 202 P. 870; White v. Red Mountain Fruit Co., 186 Cal. 335, 337–338, 340–342, 199 P. 318; Rystinki v. Central California Traction Co., 175 Cal. 336, 344, 165 P. 952; Housel v. Pacific Electric Ry. Co., 167 Cal. 245, 247, 139 P. 73, 51 L.R.A.,N.S., 1105; Valente v. Sierra Railway Co., 151 Cal. 534, 539, 91 P. 481; Cody v. Market St. Railway Co., 148 Cal. 90, 92–93, 82 P. 666; Osgood v. Los Angeles etc. Co., 137 Cal. 280, 282, 70 P. 169; Green v. Pacific Lumber Co., 130 Cal. 435, 440, 62 P. 747; Bush v. Barnett, 96 Cal. 202, 203–204, 31 P. 2; Treadwell v. Whittier, 80 Cal. 574, 583, 22 P. 266, 5 L.R.A. 498; Boyce v. California Stage Co., 1864, 25 Cal. 460, 467–469; Fairchild v. California Stage Co., 1859, 13 Cal. 599, 603–605.

[6] Accordingly, the trial court could properly instruct the jury that, if the accident happened as described by plaintiff, an inference arose that her injury was caused by defendant's negligence and that it was incumbent upon defendant to rebut the inference by showing that it exercised the utmost care and diligence.[1] This, of course, does not mean that the burden of

---

[1] Section 2100 of the Civil Code provides: "A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill."

proof shifts from plaintiff to defendant. The defendant has merely the burden of going forward with the evidence, that is, the burden of producing evidence sufficient to meet the inference of negligence by offsetting or balancing it. Scarborough v. Urgo, 191 Cal. 341, 346–347, 216 P. 584; Valente v. Sierra Railway Co., 151 Cal. 534, 538–542, 91 P. 481; Dodge v. San Diego Electric Ry. Co., 92 Cal.App.2d 759, 766–767, 208 P.2d 37; see St. Clair v. McAlister, 216 Cal. 95, 98–99, 13 P.2d 924; Bonneau v. North Shore R. R. Co., 152 Cal. 406, 410–412, 93 P. 106; Cody v. Market St. Railway Co., 148 Cal. 90, 92–93, 82 P. 666; Williamson v. Pacific Greyhound Lines, 78 Cal.App.2d 482, 486, 177 P.2d 977.

The decisions in this state do not clearly define the extent to which the rule relating to the procedural effect of res ipsa loquitur in carrier cases may be applicable to other situations, and we have been urged to discuss the general subject in this opinion as a guide to the profession even though such a discussion is unnecessary to a determination of this case. There are other cases now pending before this court, however, which involve certain phases of the subject, and the problem can be more appropriately dealt with there.

[7] The next question is whether the court erred in instructing the jury with reference to the effect of excessive speed. The jury was told: "The speed at which a vehicle travels upon a highway, considered as an isolated fact and simply in terms of so many miles an hour, is not proof of negligence nor of the exercise of ordinary care. Whether that rate of speed is a negligent one is a question of fact, the answer to which depends upon all the surrounding circumstances, but the basic speed all over California is as follows, in the terms of the law: 'No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent, having due regard for the traffic on and the surface and width of the highway, and in no event at a speed which endangers the safety of persons or property.' A violation of this rule, if it is the proximate cause of the injury complained of, would be negligence."

The part of the instruction which sets forth the basic speed law is a quotation from section 510 of the Vehicle Code. A number of cases have held that it is proper to give an instruction in the terms of this section and to inform the jury that a violation of the statute is negligence. Pohler v. Humboldt Motor Stages, 100 Cal.App.2d 571, 577, 224 P.2d 440; Ferrula v. Santa Fe Bus Lines, 83 Cal.App.2d 416, 418–420, 189 P.2d 294; Maus v. Scavenger Protective Ass'n, 2 Cal.App.2d 624, 628–629, 39 P.2d 209 (decided under the provision as it appeared in the former California Vehicle Act). The portion of the instruction to the effect that the speed of a vehicle, considered as an isolated fact and simply in terms of so many miles an hour, is not proof of negligence, is in accord with section 513 of the Vehicle Code,[2] and the courts have approved similar statements of the rule. Pohler v. Humboldt Motor Stages, 100 Cal.App.2d 571, 576–577, 224 P.2d 440; Ferrula v. Santa Fe Bus Lines, 83 Cal.App.2d 416, 418–420, 189 P.2d 294; see Reich v. Long, 97 Cal. App.2d 657, 661, 218 P.2d 589; Hazelett v. Miller, 115 Cal.App.2d 801, 807, 252 P.2d 997 (substantially identical statement in Cal. Jury Instructions, Civil [B.A.J.I., 1943] No. 144 was "admittedly proper").

The jury was also instructed: "If you find that the public street upon which the bus of the defendant San Jose City Lines was being operated was in a business or residence district * * * then the prima facie speed limit on the part of the bus is 25 miles an hour, and speed in excess of 25 miles an hour would be prima facie unlawful. However, a violation of law is of no consequence unless it was the proximate cause or contributed in some degree as a proximate cause to an injury found to have been suffered by the plaintiff."

---

[2] Section 513 of the Vehicle Code provides: "In any civil action proof of speed in excess of any prima facie limit declared in section 511 hereof at a particular time and place shall not establish negligence as a matter of law but in all such actions it shall be necessary to establish as a fact that the operation of a vehicle at such excess speed constituted negligence."

It is proper under section 513 of the Vehicle Code to give an instruction on the prima facie speed limit even though proof of speed in excess of that limit is not enough, standing alone, to show that the vehicle was being operated negligently. This statute, applicable only in civil actions, provides that speed in excess of any prima facie limit declared in section 511[3] shall not establish negligence as a matter of law and that it is necessary to show as a fact that "such excess speed" constituted negligence. The words "such excess speed" clearly refer to an excess over the prima facie limit mentioned in the first part of the section, and it follows that the plaintiff may introduce evidence of the prima facie speed limit in order to show that there was "such excess speed." It has been held, accordingly, that in civil cases the prima facie speed limit is a factor to be considered with other pertinent factors and that the plaintiff is entitled to an instruction thereon. Lloyd v. Southern Pacific Co., 111 Cal.App.2d 626, 640–641, 245 P.2d 583; Johnson v. Williams, 100 Cal. App.2d 294, 297–299, 223 P.2d 266; Burch v. Valley Motor Lines, Inc., 78 Cal.App.2d 834, 846–849, 179 P.2d 47; cf. Anderson v. Newkirch, 101 Cal.App.2d 171, 178, 225 P. 2d 247; Van Fleet v. Heyler, 51 Cal.App. 2d 719, 727, 125 P.2d 586; Daniels v. City & County of San Francisco, 40 Cal.2d 614, 255 P.2d 785; Reynolds v. Filomeo, 38 Cal. 2d 5, 11–13, 236 P.2d 801; Guerra v. Brooks, 38 Cal.2d 16, 19–20, 236 P.2d 807. The case of Westberg v. Willde, 14 Cal.2d 360, 94 P. 2d 590, relied on by defendant, may be distinguished because the instruction which was there held erroneous contained language relating to the burden of proof which was applicable only in criminal cases. Hazelett v. Miller, 115 Cal.App.2d 801, 807–808, 252 P.2d 997; Burch v. Valley Motor Lines, Inc., 78 Cal.App.2d 834, 848, 179 P.2d 47.

There was evidence that the bus was traveling at about 30 miles per hour in a residence district in which signs were posted designating a speed limit of 25 miles per hour, that there was a medium amount of traffic and that there were a number of intersecting streets near the place where the bus came to a sudden stop. Under the circumstances it was proper to give an instruction upon the effect of excessive speed.

[8] Finally, it is contended that the court erred in refusing to give an instruction on contributory negligence. Defendant concedes that negligence may not be inferred from the mere fact that plaintiff was standing at the stairwell while the bus was in motion, but it claims that she should not have held the vertical bar with her left hand while carrying a bag of groceries in her right arm. Defendant asserts that a sudden application of the brakes would cause a person standing in the position just described to swing to the left in a revolving motion with the vertical bar acting as a pivot, and it argues that plaintiff should have used her left arm to hold the bag of groceries and should have grasped the vertical bar with her right hand in order to "brake her momentum" should the bus come to a sudden stop. Plaintiff, however, was not bound to anticipate that the bus would come to a sudden halt before arriving at the regular stopping place, and it does not appear that the manner in which she steadied herself was inadequate to guard against any normal change of speed of the bus which she might reasonably have

---

3. Section 511 of the Vehicle Code, insofar as pertinent here, provides: "The speed of any vehicle upon a highway in excess of any of the limits specified in this section or established as authorized in this code is prima facie unlawful unless the defendant establishes by competent evidence that any said speed in excess of said limits did not constitute a violation of the basic rule declared in Section 510 hereof at the time, place and under the conditions then existing.

"The prima facie limits referred to above are as follows and the same shall be applicable unless changed as authorized in this code * * *.

"(b) Twenty-five miles per hour:

"(1) In any business or residence district."

expected. The trial court properly concluded that there was no evidence which would support a finding that plaintiff was negligent and the requested instruction was therefore properly refused.

The judgment is affirmed.

SHENK, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

41 Cal.2d 414

SCHLOTHAN et al. v. RUSALEM et ux.

L. A. 22650.

Supreme Court of California, in Bank.

Aug. 19, 1953.

Action to reform deed. The Superior Court, Riverside County, entered judgment of dismissal, and plaintiffs appealed. The Supreme Court, Spence, J., held that where counsel for plaintiffs made 3 round trips of 1,000 miles in order to appear for trial, and at third appearance when court was engaged in another trial, court made statement indicating that cause would "trail" but that it would not be called for trial before April 29 because April 28 was regular calendar and pretrial day, counsel returned to office 500 miles away and court on April 28 dismissed action because plaintiffs' counsel failed to appear, court had abused discretion.

Judgment reversed.

Prior opinion 252 P.2d 356.

1. Appeal and Error 🔑966(1)
Continuance 🔑7

The granting or refusal of a continuance is a matter of discretion with trial court and its ruling will not ordinarily be disturbed.

2. Trial 🔑15

Orders that cause is to "trail" case then on trial, while they may have the effect of causing inconvenience at times to certain counsel and litigants, are not to be condemned when reasonably used in interest of expedition of administration of justice.

3. Dismissal and Nonsuit 🔑60(9)

Where counsel for plaintiffs made 3 round trips of 1,000 miles in order to appear for trial, and at third appearance when court was engaged in another trial, court made statement indicating that cause would "trail" but that it would not be called for trial before April 29, counsel returned to office 500 miles away and court on April 28 dismissed action because plaintiffs' counsel failed to appear, court had abused discretion. Code Civ.Proc. § 581, subd. 3.

Phillip Barnett, San Francisco, for appellants.

Hilton H. McCabe, Palm Springs, for respondents.

SPENCE, Justice.

Plaintiffs appeal from a judgment of dismissal entered upon motion of defendants pursuant to Code of Civil Procedure, section 581, subdivision 3, which provides that "An action may be dismissed * * * when either party fails to appear on the trial and the other party appears and asks for the dismissal * * *." The determinative question is whether the trial court abused its discretion in ordering the dismissal of the action under the circumstances hereinafter set forth. Plaintiffs so contend and the record sustains their position.

The action (to reform a deed to real property in Palm Springs) was commenced on August 10, 1950. After the cause was at issue, a pretrial conference was had in Indio on February 18, 1952, at which plaintiffs' counsel, Phillip Barnett, appeared, ready for trial.[1] Plaintiffs and defendants resided in Palm Springs, defendants' counsel had his office there. Plaintiffs' counsel maintained his office in San Francisco, some 500 miles distant from Indio. At the mentioned conference the trial was set for March 6, 1952. On that day plaintiffs' counsel, Mr. Barnett, and their witnesses appeared in Indio, ready for trial. Neither plaintiffs nor their counsel had been notified that the court was to be engaged in another trial on the assigned day or that no other provision was to be made for their proceeding as scheduled. The case was then continued to April 25, 1952.

---

[1] The letter to counsel from the presiding judge directing the pretrial appearance stated: "The case is scheduled for pretrial Monday, February 18. I suggest you have your matter ready for trial when you go into the pretrial conference February 18 * * *."

It appears that plaintiffs' counsel, Mr. Barnett, mailed to defendants' counsel and to the court on April 14, 1952, a notice of motion for continuance of the trial, with supporting affidavit declaring that he would be unable to be present in Indio on April 25 because another case in which he was engaged was scheduled to be on trial in New York at that time. The trial court (through no fault of plaintiffs' counsel) did not receive the original documents until April 25, but a copy thereof, received by defendants' counsel, was utilized by the court in its denial of the motion on April 21.

On April 25, Rodney H. Robertson, an associate of Mr. Barnett, appeared in court, ready to proceed with the trial in view of Mr. Barnett's absence in New York. Again the court was engaged in another trial, a personal injury action, wherein arguments were then being made to the jury, but neither plaintiffs nor their counsel had been previously advised of the developing situation. Mr. Robertson renewed plaintiffs' request for a continuance and presented the further ground, by affidavit of Mr. Barnett, that the latter was a material witness and was prepared to testify as to the various contracts and oral statements made between the parties in their negotiations. The court stated that it was apparent that the trial could not commence that day as scheduled but a continuance to a definite date would not be granted and the case would have to "trail." April 25 was a Friday. Mr. Robertson, being the only other lawyer in Mr. Barnett's office and having other legal matters then to attend in San Francisco incident to their recalendaring so as to meet the requirements of the Indio trial date, asked the court: "Do you try matters on Monday"? The court answered: "Not normally, it is calendar day and pretrial calendar, but it will follow at the very earliest opportunity, it will be the next case tried, I can assure you of that, that's all I can say, you will trail." In the course of the previous discussion, defendants' counsel had expressed his agreement that the matter "trail" and "in the ordinary course of things * * * would therefore be heard possibly on Tuesday or Wednesday of [the] next week." It is thus apparent that counsel for both plaintiffs and defendants left the courtroom with the understanding that plaintiffs' case would not be called for trial on Monday, April 28.

Trial of the personal injury action was concluded about 6:30 p. m. on Friday, April 25. On Monday, April 28, in the afternoon, the trial court called the present case for trial and counsel for defendants announced that he was ready to proceed. Mr. Robertson, substituting for Mr. Barnett who was in New York, was not present; he had returned to San Francisco firm in his belief that the case would not be called for trial prior to Tuesday, April 29, the next regular trial day. As above noted, the court in its ambiguous statement had so indicated; and the clerk of the court had similarly assured Mr. Robertson, upon the latter's inquiry on April 25, that "Monday [April 28] was a motion and pretrial conference day [so that] the case would undoubtedly not be heard that day * * * and in all probability would be tried on or about Wednesday, April 30, 1952." The court granted defendants' motion for a dismissal after stating: "Counsel were * * * advised [when the continuance was ordered on April 25] that if the case concluded on the twenty-fifth that was then on trial, that in all probability the trial of this case * * * would take place on Monday, being today, the 28th day of April." Accordingly, the judgment of dismissal was entered.

[1, 2] The granting or refusal of a continuance is a matter of discretion with the trial court and its ruling will not ordinarily be disturbed. 5 Cal.Jur. 968, sec. 5; May v. Rosen, 91 Cal.App.2d 794, 798, 205 P.2d 1118; Maynard v. Bullis, 99 Cal.App.2d 805, 807, 222 P.2d 685. In view of the conclusion hereinafter reached, we may assume for the purpose of this discussion that there

was no abuse of discretion on the part of the trial court in denying on April 21 and on April 25 plaintiffs' motions for a continuance to a definite date. Upon such denial on April 25, the trial court ordered that the cause "trail" the case then on trial. This last-mentioned order appears to be the type of order frequently made under such circumstances; and while such orders may have the effect of causing inconvenience at times to certain counsel and litigants, they are not to be condemned when reasonably used in the interest of the expedition of the administration of justice.

[3] The record, however, supports plaintiffs' contention that thereafter the trial court abused its discretion in dismissing the action on Monday, April 28, because of the failure of plaintiffs' counsel to appear on that day. Such dismissal was based upon the trial court's erroneous assumption that said counsel had been "advised * * * that in all probability the trial of this case * * * would take place on Monday, being today. * * *" No such advice had been given to plaintiffs' counsel, but on the contrary, every statement made on April 25, including the ambiguous statement made by the trial court, indicated that the cause would not be called for trial before Tuesday, April 29, as Monday, April 28, was the regular "calendar and pretrial" day, on which day cases were "not normally" tried. It therefore appears that Mr. Robertson was justified in assuming that he could safely return to San Francisco to arrange his affairs and then return to Indio on Tuesday prepared for trial rather than remain in Indio over the weekend awaiting the calling of the case for trial on the following Tuesday, or possibly not until the following Wednesday. Under these circumstances we must conclude that despite the unquestioned sincerity of the learned trial judge in his belief of the nature of the advice which had been given to counsel and his commendable desire to expedite the business of a busy court, it was an abuse of discretion to dismiss the action upon the calling of the cause for trial on the afternoon of Monday, April 28, solely because of the failure of plaintiffs' counsel to appear at that time.

There is nothing in the record which would indicate that plaintiffs' counsel had been dilatory or lacking in diligence in proceeding with the case, or had been otherwise than cooperative with both court and defendants' counsel in undertaking to bring the case to early trial. Including the pretrial conference, counsel for plaintiffs, without having had a trial on the merits, had been put to the expense and loss of time incident to three round trips to Indio from San Francisco, and through no fault of plaintiffs or their counsel, such trips had been unproductive. In view of all the circumstances, it must be concluded that the court, in ordering the dismissal, acted arbitrarily and without fair regard for the rights of both litigants to have the case determined on its merits. By reason of such abuse of its discretion, the court's order dismissing the present action cannot be sustained.

The judgment is reversed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR and SCHAUER, JJ., concur.

41 Cal.2d 354

SOUTHERN PAC. CO. v. PUBLIC UTILITIES COMMISSION et al.

S. F. 18667.

Supreme Court of California, in Bank.

Aug. 14, 1953.

Rehearing Denied Sept. 10, 1953.

Proceedings brought by railroad company for review of an order of the public utilities commission. The Supreme Court, Shenk, J., held that commission order, requiring that use of steam locomotive and standard railway equipment employed in operation of certain passenger trains be abandoned and that there be substituted in their place "modern self-propelled railway passenger cars", was within authority of commission, notwithstanding contention that such order unlawfully usurped function of management.

Affirmed.

Edmonds, J., dissented.

1. Administrative Law and Procedure 🔑786, 789

Public Service Commissions 🔑32

Findings and conclusions drawn from undisputed evidence from which conflicting inferences may not reasonably be drawn present questions of law; and therefore, in Public Utilities Act section governing judicial review of commission's decisions, provision that findings and conclusions of commission on questions of fact shall be final necessarily refers only to the findings and conclusions arrived at from consideration of conflicting evidence and undisputed evidence from which conflicting inferences may reasonably be drawn. Public Utilities Code, §§ 1756, 1757.

2. Administrative Law and Procedure 🔑751

Public Service Commissions 🔑32

If there is a basis in public utilities commission's findings and its conclusions therefrom for an order of the commission, and the commission has acted within constitutional bounds, its action may not be disturbed by Supreme Court on review. Public Utilities Code, § 1756.

3. Public Service Commissions 🔑6.5

For purposes of public utility regulation, word "necessity" must be taken in a relative sense rather than in its lexicographical sense of "indispensably requisite." Public Utilities Code, §§ 730, 761–763.

See publication Words and Phrases, for other judicial constructions and definitions of "Necessity".

4. Railroads 🔑227

Whether public convenience and necessity require continuance of railroad service cannot turn on question of deficits in operation of some particular segment of railroad company's intrastate business. Public Utilities Code, §§ 730, 761–763.

5. Railroads 🔑227

Where overall operation of railroad's intrastate service is profitable, commission may compel continuation of portion of such services at a financial loss and such compulsion will raise no issue under federal Constitution. Const. art. 12, § 23.

6. Railroads 🔑227

In proceedings brought by railroad company to review an order of the public utilities commission refusing to approve discontinuance of passenger train service, Supreme Court would not attempt to resolve conflicts in evidence on question of public convenience and necessity or to substitute its judgment for that of the commission on such subject, which was peculiarly within the commission's jurisdiction and which was justifiably based on the record before the commission. Public Utilities Code, § 705.

7. Railroads 🔑229

Commission order, requiring that use of steam locomotive and standard railway equipment employed in operation of certain passenger trains be abandoned and that there be substituted in their place "modern self-propelled railway passenger cars", was within authority of commission, notwithstanding contention that such order unlawfully usurped function of management. Public Utilities Code, §§ 730, 761–763.

8. Administrative Law and Procedure 🔑459, 485

Railroads 🔑223

However widespread asserted general complaints might be concerning inadequacy of present equipment and service, such complaints could not serve as basis for finding of commission on subject; and so-called judicial notice on part of commission as to such conditions, with respect to necessity for regulatory order, could not take place of evidence regularly received and necessary findings to support it. Public Utilities Code, §§ 730, 761–763.

9. Administrative Law and Procedure 🔑349

Public Service Commissions 🔑11

Railroads 🔑226

Commission may, on its own motion, institute proceedings to investigate subject matter based upon complaints, informal or otherwise, or its general knowledge of conditions pertaining to service of utility under its jurisdiction; and therefore order, requiring railroad to make a study and prepare a plan for establishment of automotive passenger service from terminal presently serviced by ferry, was within commission's jurisdiction to make on its own motion. Public Utilities Code, § 1760.

◆

George L. Buland, E. J. Foulds, James E. Lyons, Robert L. Pierce and Charles W. Burkett, Jr., San Francisco, for petitioner.

Everett C. McKeage, Roderick B. Cassidy and Harold J. McCarthy, San Francisco, for respondents.

SHENK, Justice.

This proceeding was brought by Southern Pacific Company to review an order of the Public Utilities Commission.

On April 15, 1950, the company filed an application with the commission for the approval of its proposal to discontinue the operation of its midday passenger trains, "The Statesman" and "The Governor", running between Oakland Pier and Sacramento. The approval was sought on the ground that these "passenger trains do not handle sufficient business to justify their continued operation and that due to other services available, the public will suffer no substantial, if any, inconvenience by their discontinuance." A public hearing on this application was held on July 6, 1950, and the matter was submitted.

On September 27, 1950, the commission re-opened the matter for further hearing, and also ordered, on its own motion, as authorized by section 705 of the Public Utilities Code, an investigation into the adequacy of the company's passenger train service "between various sections of the state, and particularly between San Francisco and Sacramento, and points intermediate thereto, and between San Francisco, Sacramento and points on its San Joaquin Valley and Coast lines, including local service between San Francisco and San Jose and points intermediate thereto."

This order stated that the commission had received numerous complaints charging insufficiency and inadequacy of the service afforded by the company, including the service between San Francisco and Sacramento and intermediate points, and that the application for discontinuance of "The Statesman" and "The Governor" should not be determined without further study for the purpose of inquiring whether improvement in service and economies of operation might be effected to justify continued operation of those trains and the inauguration of sufficiently frequent and convenient passenger train schedules between those points. The two proceedings were consolidated. Public hearings were held on April 26, 1951, and September 20, 1951.

Pending the determination of the matter the commission's staff made a 12 month's survey and investigation of the services provided by the two trains involved and by other trains and carriers in the area in question. Based on the evidence taken at the hearings and on the investigation of its staff the commission, under date of May 13, 1952, rendered its opinion and the items of the order now under consideration. In the opinion the commission outlined the proceedings that had been taken and a portion of the evidence before it. It then concluded that the company had not justified its request for the discontinuance of the midday trains in question; that the public interest required that the use of the steam locomotive and standard railway equipment employed in the operation of those trains be abandoned and that there should be substituted in their place "modern self-propelled railway passenger cars"; that trains other than the midday trains were in need of refurbishingg and modernization; and that the public interest required that the company make studies and submit to the commission certain plans designated in the order. The order consists of four items as follows:

1. That the company discontinue its midday passenger trains ("The Statesman" and "The Governor") "by the use of steam locomotive and standard railway passenger equipment and shall substitute in lieu thereof railway passenger service by modern self-propelled railway passenger cars."

2. That other trains of the company ("The Senator" and "The El Dorado") be "refurbished to a standard comparable to modern, railway passenger equipment."

3. That the company "shall make a study and prepare and submit to the commis-

sion a plan for establishment of automotive passenger service between San Francisco and its East Bay stations in Oakland and Berkeley to be operated in conjunction with its railway passenger train service"; and

4. That the company "shall make a study and prepare and submit to the commission a comprehensive plan for modernization of its Oakland Pier passenger terminal facilities."

A petition for rehearing was filed. Particularly applicable to item 1 it alleged that the decision "is unlawful in that the commission has not regularly pursued its authority, has acted beyond or in excess of its jurisdiction, and has violated the rights" of the company under the state and federal constitutions; that the application to discontinue its midday trains was denied notwithstanding the undisputed evidence that they were being operated at a net annual loss of $105,000 or more; that there was a lack of evidence of further need for the operation of those trains, and that there was undisputed evidence of the existence of an abundance of public-carrier passenger transportation service furnished by other common carriers between the points served by those trains, and "sufficient to meet every public passenger transportation request"; that the commission in ordering the substituted service has done so without an affirmative finding that the public interest requires it, and has completely usurped the "role of management" by prescribing the particular type of equipment.

With reference to item 2 the rehearing was sought on the ground that it pertained to the equipment of trains other than midday trains not sought to be discontinued, and as to which no findings were made by the commission to support the order.

Item 3 was objected to on the ground that it was made without notice or opportunity to be heard on the subject, and without evidence or findings to support it as required by law.

Item 4 was challenged also on the ground that it was made without notice or an opportunity to be heard and without findings to support it.

The petition for a rehearing was denied but the commission modified the decision by supplementing its findings to meet the contentions of the company in the petition for rehearing. It was found that public convenience and necessity required that the midday passenger service between San Francisco and Sacramento be continued, that "the service, equipment and facilities, now being furnished, used and employed, are inadequate and insufficient," and that an improvement in such service is required; that the company has not discharged its public duty in that it failed to provide the improvements in service required, having the ability so to do; that the improvements in service, equipment and facilities required will not constitute an undue financial or other burden upon the company; and that public convenience and necessity require that the investigations and reports ordered by the commission be made by the company and submitted to the commission; that the "operations, service, equipment and facilities concerning which said studies and reports are to be made are inadequate and insufficient and that public convenience and necessity requires the improvement thereof."

The items in the order will be considered separately as enumerated. As to item 1 the company reiterates its contention that in refusing to authorize the discontinuance of the midday passenger service between Oakland Pier and Sacramento, and in requiring a change in equipment for that service, the commission has exceeded its authority; that its action is not supported by and is contrary to the evidence; that its action is arbitrary and unreasonable and deprives the company of its property without due process of law, and that the action of the commission is an unauthorized burden on interstate commerce.

The power of the commission to act in the premises and the scope of review by this court are again brought into question and sought to be examined. These questions have been determined, it would seem, with sufficient particularity and clarity; however they will again be briefly stated.

It is provided in Section 23 of Article XII of the state constitution that the commission shall have and exercise such jurisdiction to supervise and regulate public utilities in this state "as shall be conferred upon it by the Legislature, and the right of the Legislature to confer powers [upon the commission] respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution."

Referring to the re-organization of the commission in 1911 this court said in San Diego & Coronado Ferry Co. v. Railroad Comm., 210 Cal. 504, at page 509, 292 P. 640, at page 642 (in 1930 and before the amendment of section 67 of the Public Utilities Act in 1933, hereinafter noted),: "The administration of the new law was placed in the hands of the Railroad Commission [now called Public Utilities Commission], unhampered and uncontrolled by court interference, except to a specified and limited extent. Section 67 of the Public Utilities Act, with reference to the powers of this court, provides in part: 'The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the constitution of the United States, or of the State of California. The findings and conclusions * * * on questions of fact shall be final and shall not be subject to review; such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination. * * * No court of the state (except the supreme court to the extent herein specified) shall have jurisdiction to review, reverse, correct or annul any order or decision of the commission. * * *' In Clemmons v. Railroad Comm., 173 Cal. 254, at page 258, 159 P. 713, it was said that 'the Legislature might have withheld from the courts of the state any power of reviewing the acts of the Commission. Pacific Tel. & Tel. Co. v. Eshleman, (166 Cal. 640, 137 P. 1119, 50 L.R.A.,N.S., 652). The power to review which is given must be exercised within the limits and upon the conditions which the Legislature has seen fit to fix.' In Oro Electric Corp. v. Railroad Comm., 169 Cal. 466, at page 471, 147 P. 118, 119, this court said: 'The validity of section 67 of the Public Utilities Act, in so far as it limits the scope of review by state courts of the acts of the Commission, must be regarded as finally settled by the Telephone Company Case. By that section, the findings and conclusions of the Commission on questions of fact are made final and not subject to review. Here the Commission found the ultimate fact that the public convenience and necessity did not require the exercise of the privileges in controversy, and neither the sufficiency of the evidence, nor the soundness of the reasoning, upon which that finding was based, can be considered on this proceeding.' Again, referring to said section 67, it was said in Sexton v. Atchison, etc. Ry. Co., 173 Cal. 760, 161 P. 748, 749: "The clear intent of the provision as a whole is to place the commission, in so far as the state courts are concerned, in a position where it may not be hampered in the performance of any official act by any court, except to the extent and in the manner specified in the act itself.' See, also, Truck Owners & Shippers v. Superior Court, 194 Cal. 146, 228 P. 19."

Language found in the opinion of the Supreme Court of the United States in Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287, 40 S.Ct. 527, 64 L.Ed. 908, apparently was responsible for some apprehension concerning the sufficiency of the court review provided by our statute when federal constitutional questions were involved, and that due process required the further independent judgment of this court in such cases on both the law and the facts. Accordingly the legislature in 1933 amended Section 67 of the Public Utilities Act, Stats. 1933, p. 1157, now Section 1760 of the Public Utilities Code, enacted 1951. That section as amended reads as follows:

> "In any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the Constitution of the United States, the Supreme Court shall exercise an independent judgment on the law and the

> facts, and the findings or conclusions of the commission material to the determination of the constitutional question shall not be final."

The construction, scope and application of the amended section first came before this court in 1936 in Southern California Edison Co. v. Railroad Commission, 6 Cal. 2d 737, 59 P.2d 808. It was there held that the amendment did not have the effect of changing the powers and duties of the commission or of this court theretofore existing in the consideration of questions arising under the federal constitution. It was also held that the legislature did not intend by that amendment, even if it could so provide, to transfer to this court the traditional regulatory functions of the commission; nor was it contemplated that it should have the effect of constituting the court the arbiter of disputed questions of fact in matters coming before the commission.

The purpose of the review by this court is also stated in Section 1756 of the Public Utilities Code as that "of having the lawfulness of the * * * order or decision * * * inquired into and determined" and in the second sentence of Section 1757 which provides: "The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of this State." [1] The inquiry under either section is obviously the same, namely, the consideration by the court of the validity of the order under applicable law.

[1, 2] Although Section 1757 provides that the findings and conclusions of the commission on questions of fact shall be final, the findings and conclusions referred to necessarily are those arrived at from the consideration of conflicting evidence and undisputed evidence from which conflicting inferences may reasonably be drawn. Findings and conclusions drawn from undisputed evidence and from which conflicting inferences may not reasonably be drawn, present questions of law. In either event it is for the commission under the statute to make its findings and draw its conclusions therefrom as a basis for its order. If there is such a basis and the commission has acted within constitutional bounds, its action may not be disturbed by this court on review.

The powers expressly conferred upon the commission by the legislature with particular reference to item 1 of the present regulatory order are set forth in Sections 730, 761, 762 and 763 of the Public Utilities Code, the pertinent portions of which provide:

> "§ 730. The commission shall, upon a hearing, determine the kind and character of facilities and the extent of the operation thereof, necessary reasonably and adequately to meet public requirements for service furnished by common carriers * * *."
>
> "§ 761. Whenever the commission, after a hearing, finds that * * *

---

[1] Sections 1756 and 1757 in full provide:

"§ 1756. Within 30 days after the application for a rehearing is denied, or, if the application is granted, then within 30 days after the decision on rehearing, the applicant may apply to the Supreme Court of this State for a writ of certiorari or review for the purpose of having the lawfulness of the original order or decision or of the order or decision on rehearing inquired into and determined. The writ shall be made returnable not later than 30 days after the date of issuance, and shall direct the commission to certify its record in the case to the court. On the return day, the cause shall be heard by the Supreme Court, unless for a good reason shown it is continued.

"§ 1757. No new or additional evidence may be introduced in the Supreme Court, but the cause shall be heard on the record of the commission as certified to by it. The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of this State. The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review except as provided in this article. Such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination."

equipment, appliances, facilities, or service of any public utility * * * are * * * unreasonable, * * * improper, inadequate, or insufficient, the commission shall determine and, by order * * * fix * * * practices, equipment, appliances, facilities, service, or methods to be observed, furnished, constructed, enforced, or employed. * * *"

"§ 762. Whenever the commission, after a hearing, finds that * * * improvements to, or changes in, the existing * * * equipment, * * * facilities, or other physical property of any public utility * * * ought reasonably to be made * * * to promote the * * * convenience of * * * the public, or in any other way to secure adequate service or facilities, the commission shall make and serve an order directing that such additions, * * * improvements, or changes be made * * * in the manner and within the time specified in the order. * * *"

"§ 763. Whenever the commission, after a hearing, finds that any railroad corporation * * * does not run a sufficient number of trains or cars, or possess or operate sufficient motive power, reasonably to accommodate the traffic, passenger or freight, transported by or offered for transportation to it, or does not run its trains or cars with sufficient frequency or at a reasonable or proper time having regard to safety, or does not stop its trains or cars at proper places, or does not run any train or car upon a reasonable time schedule for the run, the commission may make an order directing such corporation to increase the number of its trains or cars or its motive power or to change the time for starting its trains or cars or to change the time schedule for the run of any train or car, or to change the stopping place or places thereof. The commission may make any other order that it determines to be reasonably necessary to accommodate and transport the traffic, passenger or freight, transported or offered for transportation."

Based on an extended record the commission concluded as to the subject matter of item 1 that the midday train service with present equipment and facilities be discontinued; however that public convenience and necessity required a continuance of such a scheduled service and that it be continued by the substitution of the modern equipment specified. In so concluding the commission took the view that the new equipment when employed would result in facilities more attractive to the traveling public, would materially expedite service between the terminal cities and would probably result in an increase in revenue. There was a division of opinion in the commission on these questions. Two of the commissioners were of the opinion that the record failed to support a finding that public convenience and necessity required the continuance of this midday service and that the substituted service would not result in increased patronage or sufficiently reduce the deficits to justify the continuance. On the question of the sufficiency of the evidence to support the finding of public convenience and necessity the commission points out that this midday service is between the Capital of the State and the great metropolitan San Francisco-Oakland Bay Area and that it serves the numerous intervening urban communities and territory with desirable midday railroad passenger train service. It took into consideration the report of the survey of its own staff, made over an extensive period. The commission also had before it evidence on behalf of numerous intervening communities protesting against the discontinuance of the service and giving their reasons therefor; also protests from public and semi-public organizations in Sacramento, Oakland, Martinez, Richmond, Dixon, Suisun, Fairfield, Elmira and other localities. Representatives of the counties of Contra Costa and Solano and various employee unions appeared in protest.

The company contends that even if there is some evidence of public convenience, which is not conceded, the evidence on the question of public necessity is undisputed and should compel a finding in its favor. It refers to the report of the commission's staff which estimates that 80 per cent of the travelers between San Francisco and Sacramento use private automobiles; 13 per cent go by bus; and the remaining 7 per cent go by rail or by plane; that despite increasing population in the area, the traffic on the company's local trains over the route has been decreasing since 1946 at the annual rate of 15 per cent; that spot checks disclosed that between 34 and 43 revenue passengers daily used the runs sought to be discontinued; that to pay expenses an increase in passenger revenue of between 58 and 128 per cent would be necessary; that U. S. Highway No. 40, connecting Oakland and Sacramento, consists for the most part of four lanes and is five miles shorter than the railroad distance between the two cities; that the running time by automobile between San Francisco and Sacramento is from one hour and fifty-five minutes; that the runs by the trains in question consume about two hours and thirty minutes between Oakland and Sacramento and require an additional thirty minutes for ferry connections with San Francisco; that bus transportation between the two cities requires two hours and five minutes for an express, and the slowest locals require up to three hours and fifteen minutes; that airlines require less than an hour to make the flight but an estimated hour and one-half is required to travel to the airport; that in addition to its midday service the company operates two other local trains daily (not midday) between Oakland and Sacramento; that Pacific Greyhound Lines operates about 25 busses each way daily between the two cities, including 7 non-stop runs; that Burlington Transportation Co. runs 4 busses each way daily; that United Air Lines and Southwest Airways operate a total of 10 flights daily between the two cities.

The commission points to the estimate of its staff that with the new equipment the net annual operational deficit would be reduced to $19,000. To this the company replies that the new equipment would not carry mail, express or baggage, resulting in a loss of $150,000 annually and that the purchase of the new equipment would require a capital outlay of $140,000 per car, with an added $10,000 per car for spare parts.

[3] When the question of "necessity" is presented, that term should be given the meaning ascribed to it in San Diego & Coronado Ferry Co. v. Railroad Comm., supra, 210 Cal. 504, at page 511, 292 P. 640, 643, where it was said, "The word 'necessity' must be taken in a relative sense. The Supreme Court of Illinois has well expressed its meaning in Wabash C. & W. Ry. Co. v. Commerce Comm., 309 Ill. 412, 141 N.E. 212, 214, where it was said: 'When the statute requires a certificate of public convenience and necessity as a prerequisite to the construction or extension of any public utility, the word "necessity" is not used in its lexicographical sense of "indispensably requisite." If it were, no certificate of public convenience and necessity could ever be granted. * * *'"

The company calls attention to the fact that on the financial side the cost of continuing the operation of the trains in question with the substituted equipment would result in the continuation of a loss of approximately $105,000 annually, and it is argued that for that additional reason public convenience and necessity does not appear.

[4] Whether public convenience and necessity exist cannot turn on the question of deficits in the operation of some particular segment of the company's intrastate business. This is not and cannot be seriously controverted. But the company contends that since there have been deficits in the operation of the midday trains, and admittedly there will be a substantial deficit in such operation under the substituted service as ordered, the interstate commerce business in which the company is engaged will be unconstitutionally burdened. The company refers to and relies upon decisions of the United States Supreme Court holding that attempts by state commissions to compel railroads at substantial expense to stop interstate trains at local stations were invalid as an unconstitutional burden

on interstate commerce, citing Atlantic Coast Line R. Co. v. Wharton, 207 U.S. 328, 28 S.Ct. 121, 52 L.Ed. 230; Chicago B. & Q. Ry. Co. v. Railroad Comm. of Wis., 237 U.S. 220, 35 S.Ct. 560, 59 L.Ed. 926; St. Louis & S. F. Ry. Co. v. Public Service Comm., 254 U.S. 535, 41 S.Ct. 192, 65 L.Ed. 389; and referring to Southern Pacific Co. v. Arizona, 325 U.S. 761, 65 S.Ct. 1515, 89 L.Ed. 1915, holding invalid a requirement of the Arizona statute limiting the length of railroad trains engaged in interstate commerce.

[5] The cases so relied upon are not controlling for the reason that the railroad business here involved is entirely intrastate and there is no contention that the intrastate operations of the company as a whole are unprofitable. Where the overall operations of the railroad's intrastate service is profitable it has been rightly stated that the commission may compel the continuation of a portion of such services at a financial loss and that such requirement raises no issue under the Federal Constitution. Alabama Public Service Comm. v. Southern Railway Co., 1951, 341 U.S. 341, 71 S.Ct. 762, 95 L.Ed. 1002. The decision in that case went upon a procedural point but the majority of the court clearly and correctly announced the conclusion that a review of an order requiring performance of a particular utility service, even at a pecuniary loss, is subject to considerations quite different from those involved where the return on the entire intrastate operations of a utility are drawn into question. It has also been held [341 U.S. 347, 71 S.Ct. 767] that problems raised by the discontinuance of local trains "cannot be resolved alone by reference to * * * loss in their operation but depend more upon the predominantly local factor of public need for the service rendered." Chesapeake & Ohio R. Co. v. Public Service Comm. of West Virginia, 242 U.S. 603, 608, 37 S.Ct. 234, 61 L.Ed. 520.

Based upon the evidence before it the commission found that the company had not sustained the burden resting upon it to make out a case justifying a discontinuance of this particular service. It also found that public convenience and necessity requires the continuance of the service between San Francisco and Sacramento; that the service, equipment and facilities, now being furnished, used and employed, are inadequate and insufficient; and that the company has attempted to maintain this service "with outmoded equipment which was relegated to this service when it became outmoded and uneconomical in the service where it was originally used."

[6] This court will not attempt to resolve conflicts in the evidence on the question of public convenience and necessity nor substitute its judgment for that of the commission on a subject so peculiarly within its jurisdiction and justifiably based on the record before it. It also is not for the court to say that the commission was wrong in concluding that service with the substituted equipment may result in the benefits it has forecast and sought to achieve. The fact that the effect of the order of substitution is to a more or less degree experimental does not destroy it. If it does not work out as contemplated the commission has jurisdiction to entertain a future application concerning the same subject matter.

[7] The company further contends that the order of substitution unlawfully usurps the function of management. As statutory authority for the order the commission points to the provisions of Sections 730, 761, 762 and 763 above set out. That the language of those sections in terms specifically authorizes this kind of an order may not be questioned. They empower the commission to "determine the kind and character of facilities and the extent of the operation thereof, necessary reasonably and adequately to meet public requirements for service furnished by common carriers." § 730. By Section 761 it is provided that whenever the commission, after a hearing finds that the equipment of the utility is inadequate it shall determine and by order require the proper equipment to be employed. Section 762 contains language to similar effect. And Section 763 authorizes the commission, upon hearing and findings, to require adequate train service as to time schedules, equipment and transportation facilities.

In exercising the powers thus granted it may not be disputed that the commission to some extent invades the functions of management. But they are not necessarily unlawfully invaded. They are subjected to the exercise of the police power of the state in the regulation of the public utility. It is undoubtedly true that for the most part all lawful regulations of a public utility in the exercise of the police power are to some degree an invasion of the managerial functions of the utility. In the absence of such regulations the utility would be free to exercise all powers of management otherwise within the law. Without question the order of substitution of one equipment for another by a transportation company is within the field of management; but it does not follow that as such it is necessarily outside of the field of an appropriate regulatory order.

Probably the most conspicuous example of an asserted but rejected claim of "invasion of management" on the part of this commission was when it issued an order requiring the construction of a union passenger station and terminal in the City of Los Angeles. After an extensive investigation covering a period of years the commission issued an order described by this court in Atchison T. & S. F. Ry. Co. v. Railroad Comm., 209 Cal. 460, 464, 288 P. 775, 776, as an order directing The Atchison, Topeka and Santa Fe Railway Company, the Los Angeles & Salt Lake Railroad Company, and the petitioner herein, the Southern Pacific Company, "to make and construct a union passenger station within that portion of the city of Los Angeles [describing it] together with such tracks, connections and all other terminal facilities and additions, extensions, improvements and changes in the existing railroad facilities of [the railroads] as may be reasonably necessary and incidental to the use of said union passenger station, at a cost, as estimated or suggested in said order, of approximately $10,000,000 and in substantial compliance with the plans outlined by said commission."

A brief history of that proceeding is set forth in the opinion of this court, the judgment in which was affirmed by the Supreme Court of the United States in Atchison, Topeka & Santa Fe Railway Co. v. Railroad Commission of California, 1931, 283 U.S. 380, 51 S.Ct. 553, 75 L.Ed. 1128. There as here it was contended that the construction of a union station with the manifold details and specifications prescribed was "a matter of business policy and management, and not a proper subject for control under the police power of the state." [209 Cal. 460, 288 P. 780] That case involved the validity of an order of the commission requiring the abandonment of widely separated railway stations, terminals, tracks, and facilities, and the substitution of a centrally located union passenger terminal. The final decisions in that case are conclusive on the question of the power of the commission to order the substitution in the present matter.

From the foregoing it is concluded that in making the order contained in item 1 the commission has acted within constitutional bounds and has regularly pursued its authority.

In its petition for rehearing before the commission the company objected to item 2 of the order requiring a refurbishing of the trains "The Senator" and "The El Dorado" on the ground that it was void for lack of findings to support it and that if findings had been made the order would so completely invade the field of management in specifying "such details as the kind of seats and the type of floor covering" as to render it invalid. In its modification of the order in denying the petition for rehearing the commission supplied the findings. Although the petition for the writ includes this item in its prayer for annulment the company later indicated its compliance with the order. It therefore becomes unnecessary to discuss the question of its validity or do otherwise than to affirm it.

Item 3 is objected to on the ground that it is beyond the scope of the investigation instituted by the company and that the terminal facilities mentioned in the order are condemned as inadequate without notice or hearing. To repeat, this order requires that the company "shall make a study and prepare and submit to the commission a plan for establishment of automotive passenger service between San Francisco and its East Bay stations in Oakland and Berkeley to be operated in conjunction with its railway passenger train service."

[8, 9] If this order had the effect of requiring a substitution of bus service for ferry service between San Francisco and the company's East Bay terminal it would be void for lack of notice, hearing, and evidence to support it. That such an order was not within the original scope of the proceeding may not be disputed. That there was no notice or hearing on this subject may likewise not be disputed. It is also true that there is insufficient evidence in the record to support the finding of inadequacy and insufficiency of the service and present equipment. However widespread asserted general complaints may be concerning the inadequacy of the present equipment and service, those complaints may not serve as the basis for a finding of the commission on the subject, much less as support for an order of substitution of bus for ferry service. Notice and hearing, or an opportunity to be heard, are prerequisites to a finding on such a subject. So-called judicial notice on the part of the commission of conditions with respect to the necessity for such a regulatory order cannot take the place of evidence regularly received and the necessary findings to support it. But that is not to say that the commission may not of its own motion institute proceedings to investigate the subject matter based upon complaints, informal or otherwise, or its general knowledge of the conditions pertaining to the service of a utility under its jurisdiction. The company was justified in objecting to this item of the order as based upon a finding of inadequacy of present facilities made without notice and hearing.

But it is not necessary to annul item 3 because of the lack of support for the findings complained of. The order is not one of substitution of bus for ferry service. It is an order that the company make a study and prepare and submit a plan with the end in view that such substitution may be made if and when, after appropriate notice, hearing, and findings, some such a plan be put into effect. In its present form this item cannot be deemed a final order. It is plainly preliminary and as such is within the jurisdiction of the commission to make on its own motion. The findings required by the statute are not necessary to support it and the findings made on this subject should be disregarded.

The same conclusion applies to item 4 which requires the company "to make a study and prepare and submit to the commission a comprehensive plan for modernization of its Oakland Pier passenger terminal facilities." The purported findings of the commission on this subject made on consideration of the petition for rehearing were an obvious endeavor to support this item of the order. They were made without notice or hearing, are ineffective, and should be disregarded. This item of the order was also preliminary and needed no findings as required by the statute to support it.

As above considered and construed the order and each item thereof is affirmed.

GIBSON, C. J., and CARTER, TRAYNOR and SPENCE, JJ., concur.

EDMONDS, Justice (dissenting).

Under certain circumstances, the Public Utilities Commission may compel the continuation of operation of a segment of service at a loss, when justified by public convenience and necessity, and it has broad powers in regard to train schedules and deployment of equipment. However, I do not find in the record here presented any evidence to support that portion of the order requiring the extensive capital outlays which the railroad must make to comply with it.

The sole reference to the use of Budd Diesel cars to supplant the petitioner's present equipment appears in the reports of the commission's experts. There the new trains are suggested as one of several possible alternatives to the present service, all of which are characterized as unsatisfactory in reducing operational deficits. Although, as stated, "this court will not attempt to resolve conflicts in the evidence", there must be some evidence of public necessity and convenience to support an order which admittedly requires the expenditure of hundreds of thousands of dollars to establish a new type of service to be operated at a loss.

For these reasons, I would annul that portion of the order requiring the use of "modern self-propelled railway passenger cars" on the Sacramento midday runs.

Rehearing denied; EDMONDS and SCHAUER, JJ., dissenting.

120 Cal.App.2d 67

RARDIN LOGGING CO. v. BULLOK et al.

Civ. 15509.

District Court of Appeal, First District, Division 2, California.

Sept. 3, 1953.

Action for conspiracy to destroy plaintiff corporation's logging business and secure cancellation and termination of its logging and milling agreements. From an order of the Superior Court in and for Marin County, Thomas F. Keating, J., denying a motion by one of defendants to set aside a default judgment against him, he appealed. The District Court of Appeal, Dooling, J., held that an amendment of the complaint before the court clerk's entry of such defendant's default and rendition of the default judgment was not in a matter of substance, so that the default was good, though he was not served with the amended complaint.

Order affirmed.

1. Judgment ⚷102

Where amendment to complaint is not in a matter of substance, a default subsequently entered against a defendant is good, though he was not served with amended complaint.

2. Judgment ⚷102

In action for conspiracy to destroy plaintiff's logging business and secure cancellation and termination of its logging and milling agreements, amendment of complaint by adding allegations that defendants, after cancelling and terminating their logging contracts with plaintiff as culmination of alleged conspiracy, entered into logging contracts, covering same timber, with one another, was not in a matter of substance, so that a default subsequently entered against one of defendants was good, though he was not served with amended complaint.

3. Judgment ⚷144

A court rendering default judgment against a defendant not served with previous amendment to complaint has jurisdiction to determine whether matter added by such amendment is matter of substance, and court's determination of such question, even though erroneous, does not render default judgment void.

David B. Fyfe, San Rafael, for appellants.

Sefton & Anderson, San Francisco, for respondent.

DOOLING, Justice.

Defendant Barker appeals from an order denying his motion to set aside default judgment entered against him. The motion was based upon the ground that the judgment was void because the complaint had been amended before the entry of his default by the clerk and the subsequent rendition of the default judgment by the court and that the complaint as amended had not been served upon him.

The complaint was filed on July 17, 1950 and the return of service shows that the complaint and summons were served on appellant the same day. Appellant at no time filed any pleading.

It is shown by affidavit that on the hearing of the demurrer of another defendant the trial judge in open court ordered the complaint amended on its face in the manner hereafter shown. This was on September 8, 1950. Appellant's default was entered by the clerk on October 27, 1950. On November 1, 1950 the court heard evidence on behalf of the plaintiff and ordered the judgment against appellant which was filed two days later.

Two rules of law conjoin to bar appellant from the relief which he seeks.

[1] 1. If an amendment to a complaint is not in a matter of substance the default against a defendant is good even though he was not served with the amended complaint. Stack v. Welder, 3 Cal.2d 71, 73, 43 P.2d 270; San Diego Sav. Bank v. Goodsell, 137 Cal. 420, 70 P. 299; Woodward v. Brown, 119 Cal. 283, 304, 51 P. 542; Zierath v. Claggett, 46 Cal.App. 15, 23, 188 P. 837; cf. Donovan v. Superior Court, 39 Cal.2d 848, 852, 250 P.2d 246; Drotleff v. Renshaw, 34 Cal.2d 176, 181–182, 208 P.2d 969; Supreme Grand Lodge, etc. v. Smith, 7 Cal.2d 510, 514, 61 P.2d 449.

[2] The complaint charged that plaintiff was engaged in logging operations, that in December 1949 plaintiff had logging agreements with appellant Barker and others for the purchase of all merchantable timber on certain lands in the approximate amount of thirty-five million board feet and had established logging operations for the purpose of logging said timber; that defendants Bullok, individually and doing business as Matolle Lumber Company, had contracted to buy from plaintiff all timber delivered to their mill; that the defendants conspired together to destroy plaintiff's business and to secure the cancellation and termination of its logging and milling agreements by inducing certain of its creditors to repossess equipment, by inducing certain of its employees to bring criminal charges against it for labor claims, by inducing other creditors to demand immediate payment and to refuse to extend further credit, by withholding from plaintiff monies due it, and by wrongfully inducing parties with whom plaintiff had logging contracts to cancel said contracts. The complaint further alleges that by reason of the foregoing acts and conduct of defendants plaintiff was unable to continue its logging contracts under said logging agreements and said agreements were thereupon cancelled and terminated. The complaint then continues with the following allegations in which we have emphasized the words added by amendment:

> "That thereafter defendants, Alba E. Bullok and Carl Bullok individually and doing business as Matolle Lumber Company, entered into a logging agreement with the said Hattie Bomsel covering the same timber as was contained in her agreement with plaintiff; that thereafter O. O. Barker, W. L. Jaggers and Howard Martin and others entered into logging contracts with the purchasers; *covering the same timber as was contained in their agreements with plaintiff.*"

From the above recital it is clear that the cause of action was complete when as a culmination of their alleged conspiracy the various defendants cancelled and terminated their contracts with plaintiff. The fact that they afterwards entered into contracts with one another covering the same timber might have evidentiary value in proof of the charge of conspiracy, but the cause of action does not depend on this subsequent conduct, the damages claimed are not enhanced thereby, and the amendment for that reason cannot properly be said to be one of substance.

[3] 2. The default judgment having been entered by the court, and not by the clerk, was not void even though the amendment be considered one of substance. Where the court renders a default judgment after an amendment to the complaint which has not been served on the defendant, it has jurisdiction to determine whether or not the matter added by the amendment is matter of substance. Its determination of that question even though erroneous does not render its judgment void. Bley v. Dessin, 31 Cal.App.2d 338, 341–342, 87 P.2d 889; Zierath v. Superior Court, 35 Cal.App. 788, 171 P. 112.

Order affirmed.

NOURSE, P. J., and McCOMB, Justice assigned, concur.

119 Cal.App.2d 369

DENTON v. CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 15434.

District Court of Appeal, First District,
Division 2, California.
July 27, 1953.

As Corrected on Denial of Rehearing
Aug. 26, 1953.

Action for writ of mandate. The Superior Court, City and County of San Francisco, issued writ ordering reinstatement of city and county public utility employee to his position and payment of back wages and city and county appealed. The District Court of Appeal, Dooling, J., held that under the circumstances the civil service commission could modify to suspension the discharge of employee who had procured, but not within required time, the required medical authorization to live outside city and county, and that the withholding of wages during suspension for violation of procedural requirement as to time for filing authorization, while harsh, was within administrative discretion lodged in commission.

Affirmed as modified.

1. Municipal Corporations ⚷218(3)

The charter provision retaining employees of public utility acquired by city and county and allowing employees not engaged on utility work outside city and county a reasonable time after acquisition to become residents of city and county does not require employees engaged in utility work outside city and county to become residents of city and county in order to retain their positions.

2. Municipal Corporations ⚷218(3)

Employee of public utility acquired by city and county lost his privilege under charter of living outside city and county when he ceased to do utility work outside city and county, and in order to retain his position after he began to work entirely within city and county he had a reasonable time not exceeding one year to acquire residence in city and county or to procure necessary medical authorization to live outside city and county.

3. Mandamus ⚷187(9)

Where manager of city and county utilities discharged utility employee charged with insubordination and inattention to duties in that employee was not resident of city and county as required by charter, and on appeal the civil service commission modified penalty to suspension without pay, District Court of Appeal on appeal from Superior Court writ of mandate ordering reinstatement and payment of back pay would presume that commission found that employee has not violated residence requirement and would affirm such finding if finding was supported by any reasonable evidence.

4. Estoppel ⚷62(1)

Public bodies may be estopped from asserting mere procedural, as distinguished from substantive, provisions of law.

5. Estoppel ⚷62(8)

Where superiors of city and county public utility employee had knowledge of employee's residence outside city and county and acquiesced therein and but for such acquiescence the employee would have timely secured the required medical authorization to live outside city and county, city and county was estopped from asserting that employee's noncompliance with mere procedural requirement of filing authorization warranted discharge of employee.

6. Municipal Corporations ⚷218(3)

Order of civil service commission modifying to suspension without pay the discharge of city and county public utility employee filing after the required time the required medical authorization to live outside the city and county was such ratification as cured employee's noncompliance with procedural requirement as to filing of authorization.

7. Municipal Corporations ⚷218(3)

Suspension of city and county public utility employee from January 24 to June 8, 1951, for violation of procedural requirement of charter concerning time for filing medical authorization to live outside city and county was within administrative discretion lodged in civil service commission.

On Petition for Rehearing.

8. Municipal Corporations ⚷218(9)

Under charter of San Francisco providing that an appointing officer shall publicly hear and determine charges against public employees and may exonerate, suspend or dismiss accused and providing for appeal by accused to Civil Service Commission which "may, thereupon, make such decision as it deems just", power of Civil Service Commission on appeal is as broad as that of appointing officer and Commission may exonerate, suspend or dismiss accused

9. Municipal Corporations ⚷218(1, 9)

Provision of San Francisco charter that appointing officer may, for disciplinary purposes, suspend subordinate for a period not exceeding thirty days and that decision of appointing officer in all cases of suspension for disciplinary purposes shall be final, does not limit power of suspension in all cases to 30 days and does not make decision of appointing officer in all cases of suspension final in view of other provisions of charter.

10. Municipal Corporations ⚷216(1)

The Civil Service Commission, being a local board as distinguished from a board exercising statewide jurisdiction, the Superior Court has not the power of trial de novo and is limited to determining whether decision of Civil Service Commission is supported by substantial evidence.

◆

Dion R. Holm, City Atty., A. Dal Thomson, Public Utilities Counsel, Jack G. McBride, Deputy City Atty., San Francisco, for appellants.

John W. Broad, San Francisco, for respondent.

DOOLING, Justice.

Respondent Denton was a conductor with the Market Street Railway when that utility was acquired by the City and County of San Francisco in 1944, his employment with the acquired utility having been continuous since 1915. When the city and county acquired the utility respondent was working on the No. 40 line and continued to work on the same line thereafter. The cars on this line started their initial run from San Francisco and were returned to San Francisco at the conclusion of their final run but otherwise they were operated between Daly City and San Mateo in San Mateo County. Denton was at the time of the acquisition of the utility and has ever since been a resident of San Mateo County. The No. 40 line was discontinued by the City and County on January 15, 1949 and thereafter the respondent was employed on a line operated entirely within the limits of the City and County of San Francisco.

On January 8, 1951 respondent was suspended. He was returned to work on January 16 and again suspended on January 23. On February 16, 1951 he was given written notice by the manager of utilities that charges had been preferred against him of insubordination and inattention to duties in that "you have not been a resident of the City and County of San Francisco as defined by Section 7 of the Charter * * * and that you have not * * * until the 24th day of January, 1951, been in possession of authorization to reside outside the City and County * * * as required by said Charter section." A hearing on these charges was held on February 21, 1951 before the manager of utilities and on February 28 respondent received written notice signed by such manager which states: "I have decided that it is for the best interests of the Municipal Railway of San Francisco to discharge you from its service for insubordination and inattention to duties. You are, therefore, hereby discharged." The respondent was thereby faced with discharge after over 35 years of continuous service and when he was within a short time of retirement with the attendant retirement benefits conferred by the charter.

Respondent appealed this order to the civil service commission pursuant to section 154 of the charter and the civil service commission after considering the appeal filed its order in writing "that the penalty of dismissal be and is hereby modified to suspension without pay from January 24, 1951 to June 8, 1951."

Despite this order of the civil service commission the controller refused to issue his warrants to respondent and the municipal railway refused to reinstate him to his position. He brought this action in the Superior Court for a writ of mandate and that court issued its writ ordering his reinstatement and the payment to him of his accrued wages for the entire period.

The crux of the case lies in the proper interpretation of certain sections of the San Francisco charter. Section 7 of the charter requires all officers and employees of the City and County to be residents thereof and provides that any such officer or employee "upon ceasing to be such resident, shall be removed from such office or employment." It contains this proviso: "provided, however, that any officer or employee * * * may live outside the City and County of San Francisco upon the authorization of the director of health, filed in the office of the civil service commission, and granted on account of the ill health of said officer or employee or the ill health of a member of the immediate family of said officer or employee."

[1] Section 125 of the charter provides that employees of any public utility acquired by the City and County who have been employed by such utility for at least one year shall be continued in their respective positions. It contains the following provision: "All persons residing outside the City and County claiming the benefit of this provision and *who are not engaged on such utility work outside of the limits of the city and county* shall be allowed a reasonable time, not exceeding one year, to become residents of the City and County." (Emphasis ours.)

Respondent testified that because his run on the No. 40 line was in San Mateo County he believed that he was not required to live in the City and County after that line was acquired by the City and County. This belief was justified not only by the language of section 125 above emphasized but by the administrative construction placed upon that language by the civil service commission. In the record of the hearing before the manager of utilities is a letter from the secretary of the civil service commission containing this statement: "Following the consolidation, Herman Behlendorff, then a resident of Burlingame, was excused from the necessity of establishing a residence in San Francisco because of the fact that a portion of his duties were related to the operation of the No. 40 line which then had its terminus in San Mateo."

The only reasonable construction to be placed on the portion of section 125 which we have emphasized is that employees of an acquired utility engaged "on such utility work outside of the limits of the city and county" were not required to become residents of the city and county in order to retain their positions; and by the administrative construction above referred to this was the actual interpretation placed upon this language with specific reference to the No. 40 line on which respondent was engaged.

In 1945, at the request of a superior, respondent gave the municipal railway a San Francisco address but he actually continued to live in San Mateo and his superior was advised that the San Francisco address was only a mailing address and not his residence. He testified that in doing this he was just doing what he was told to do. In 1948 he removed his home from San Mateo to Burlingame and registered the Burlingame address with the municipal railway. He removed from San Mateo to Burlingame because: "My wife was very, very sick, very, very nervous; I had to move her to a quieter neighborhood. The doctor told her to get away from the noise and get a quieter neighborhood. She was very, very nervous, she didn't feel well and we had to move to a quieter neighborhood under the doctor's orders."

Thus when the operation of the No. 40 line was discontinued and respondent was put to work exclusively inside San Francisco he had a Burlingame residence address on file with the municipal railway. No one told him then that he was required to move to San Francisco by reason of the discontinuance of the No. 40 line, and he continued to get monthly bulletins from the municipal railway which were mailed to his Burlingame address and occasional telephone calls concerning his work from the office of the municipal railway to his home in Burlingame.

At the time of his suspension in January 1951 respondent was informed that it was because of his residence outside of San Francisco and was advised of the necessity of getting a health authorization if his living outside of San Francisco was justified for that reason. He procured a doctor's certificate that his wife's health required her to live outside San Francisco and presented it on January 15, 1951. The authorization of the director of health permitting respondent to live outside San Francisco on account of the ill health of his wife was filed with the civil service commission on January 24, 1951 and at the time of trial this authorization had been renewed (apparently in compliance with an administrative rule requiring such authorization to be renewed every six months).

[2] Thus the record of the administrative hearing before the manager of utilities and the civil service commission on appeal established that respondent's residence in San Mateo County was authorized by section 125 of the charter at least up to January 15, 1949 when the No. 40 line was discontinued, since up to that time in the language of that section he was "engaged in such utility work outside of the limits of the city and county." It may be conceded that when respondent ceased to work outside the city and county limits the privilege of living outside those limits conferred by section 125 ceased. Certainly he then had a reasonable time to comply with the provisions of section 7 and either acquire a residence in San Francisco or obtain the necessary authorization of the director of health which would entitle him to live outside those limits. By analogy such a reasonable time might properly be measured by the provision of section 125 "not exceeding one year." The record is equally clear that neither before nor after the expiration of one year was respondent's attention called to these requirements, although his Burlingame residence was a matter of known record with the municipal railway during all of that period, until after he had been summarily suspended on January 8, 1951. He then almost immediately procured the necessary authorization of the director of health permitting him to reside outside of San Francisco because of his wife's ill health.

[3] In passing upon the administrative action of the manager of utilities and the subsequent order of the civil service commission on appeal it is important to notice that under section 154 the civil service commission acts de novo on appeal and its order supersedes the order appealed from. Section 154 provides: "The civil service commission shall examine into the case and may require the appointing officer to furnish a record of the hearing and may require in writing any additional evidence it deems material, and may, thereupon make such decision as it deems just. The order or decision of the commission upon such appeal shall be final and shall forthwith be enforced by the appointing officer."

The superior court was therefore concerned with the order of the civil service commission in this case and not with the order of the manager of utilities. We stress this fact because the form of the two orders is important. While neither the manager of utilities nor the civil service commission made findings of fact in the true sense the order of the manager of utilities is consistent with a finding that respondent had violated the residence requirement of section 7 of the charter and the order of the civil service commission is inconsistent with a finding of such violation. This is so because there is only one penalty provided in section 7 for the violation of the residence requirement: the employee "upon ceasing to be such resident *shall be removed* from such office or employment." (Emphasis ours.)

Thus in support of the action of the civil service commission in ordering that respondent be not removed from his employment we must presume that the civil service commission found that respondent had not violated the residence requirement. If there is any substantial evidence in the record to support this implied finding of the civil service commission its conclusion in that regard must be affirmed.

[4, 5] Respondent suggests that this support may be found in the doctrine of estoppel. We are not prepared to hold that officials of the city and county could estop the city and county from insisting on compliance with a substantive provision of law requiring residence as a condition of employment. To so hold would be to permit such officials by indirection to accomplish what they could not do directly. However public bodies may be estopped from asserting mere procedural, as distinguished from substantive, provisions of law. Farrell v. County of Placer, 23 Cal.2d 624, 145 P.2d 570, 153 A.L.R. 323. From the record before it the civil service commission might reasonably conclude that the condition of ill health of respondent's wife would have supported the authorization of the director of health for respondent to live outside of San Francisco at all times after the operation of the No. 40 line was discontinued and that but for the acquiescence of respondent's superiors in the face of their knowledge of his residence in Burlingame he might have earlier secured such authorization as he did without difficulty secure it once the necessity was called to his attention. The condition of ill health is the substantive requirement justifying residence outside of San Francisco. The filing of the authorization is a mere procedural requirement.

[6] There is as well an alternative ground to support the implied finding of the civil service commission. The same result may be reached by applying the doctrine of ratification. In Mott v. Horstmann, 36 Cal.2d 388, 224 P.2d 11, the superintendent of parks of the City of Oakland had accepted an appointment as a member of the Planning Commission of Contra Costa County. In doing so he violated a provision of the Oakland charter that: "No person holding any office or position under the City Government * * * shall, *except as may be authorized by the Council,* hold any such office or position under the City government while holding any office, or position of profit, under the government of this State * * *." (Emphasis ours.) Over a year after the park superintendent had accepted appointment to the Contra Costa County Planning Commission the Oakland city council adopted a resolution consenting to the prior appointment of the park superintendent to the Contra Costa Planning Commission and ratifying the same. The supreme court said: "Unquestionably the city council had the power under section 38 of the city charter to consent to the appointment of the petitioner as a member of the Planning Commission of Contra Costa County. It is the general rule that a governmental body may effectively ratify what it could theretofore have lawfully authorized. * * *

"The doctrine of ratification is subject to the limitation that the subsequent ratification should be made with the same formalities required for the original exercise of the power. Restatement of Agency, section 93(2). As the city council could have originally exercised its power of approval by resolution, it could and did effectively ratify by the same means." 36 Cal.2d at page 391, 224 P.2d at page 12.

The analogy to the case in hand is close. The authorization provided for in section 7 of the charter may be accepted by the civil service commission in the same form retroactively as prospectively. This we must assume in support of its order the civil service commission elected to do.

Some point is attempted to be made of the fact that in its original order the civil service commission purported to confirm the findings of the manager of utilities. The original order read: "that the findings of the manager of utilities be and the same are hereby confirmed, but that the penalty of dismissal be and is hereby modified to suspension without pay from January 24, 1951 to June 8, 1951." By a subsequent order made one week later the commission deleted the words "the findings of the Manager of Utilities be and the same are hereby confirmed." Since the only "finding" of the manager of utilties found in the record is "I have decided that it is for the best interests of the Municipal Railway to discharge you for insubordination and inattention to duties" the civil service commission may well have considered that in confirming this finding it might be held that it was confirming the decision "to discharge you", and that its order as originally worded was inconsistent on its face. In any event there was no express finding by any one that respondent had violated the residence requirement and the penalty of the civil service commission's order is inconsistent with such a finding by it, as we have shown.

[7] It was a part of the charge "that you have not until the 24th day of January, 1951, been in possession of authorization to reside outside the City and County". This was true, and even in the face of a holding of estoppel to rely on this failure to show a violation of the substantive residence requirement or of ratification or both, it none the less constituted a violation of a procedural requirement of the charter. The penalty of suspension from January 24 to June 8 may seem somewhat harsh for this purely technical violation of the charter but the administrative discretion lodged in the civil service commission is wide and they may have concluded that respondent should have been more alert to the requirements of the basic law under which he was employed and deserved the punishment assessed for this "inattention to duty". It is our conclusion that the trial court should have affirmed and enforced the civil service commission's order in toto.

The judgment is modified by striking therefrom the portion ordering the payment of respondent's wages from January 24, 1951 to June 8, 1951 and as so modified it is affirmed, without costs to either party.

NOURSE, P. J., concurs.

On Petition for Rehearing.

NOURSE, Presiding Judge.

[8] In his petition for rehearing respondent argues that under section 154 of the San Francisco Charter the Civil Service Commission has no jurisdiction to impose suspension. In our judgment respondent misreads the section. It provides for charges and a hearing before the appointing officer and contains this authorization: "The appointing officer shall publicly hear and determine the charges, and may exonerate, *suspend* or dismiss the accused." (Emphasis ours.) It then provides for an appeal by the accused to the Civil Service Commission which "may, thereupon, make such decision as it deems just." We think it clear that the Civil Service Commission's power on appeal is as broad as that of the appointing officer and it, too, "may exonerate, *suspend* or dismiss the accused."

[9] In the final paragraph of section 154 an additional provision is made: "The appointing officer may, for disciplinary purposes, suspend a subordinate for a period not exceeding thirty days * * * The suspended employee shall be notified in writing of the reason for such suspension, and if the suspension be for more than five days the employee shall, at his request, be given a hearing by the appointing officer. The decision of the appointing officer in all cases of suspension for disciplinary purposes shall be final."

Respondent argues that this limits the power of suspension in all cases to thirty days and makes the decision of the appointing officer in all cases of suspension final. We do not so read the section.

The first portion of the section provides generally for written charges and a hearing as a result of which the appointing officer "may exonerate, *suspend* or dismiss." After such a hearing the employee is given the unqualified right of appeal to the Civil Service Commission. The last paragraph provides for a more summary disciplinary proceeding under which the appointing officer may suspend for not more than 30 days with no right to a hearing, unless demanded, and no right of appeal. The limit of 30 days is placed upon disciplinary suspensions imposed in this more summary fashion and not upon the suspensions provided for after the more formal procedure under which a hearing must be given and the right of appeal to the Civil Service Commission is allowed.

[10] The Civil Service Commission "being a 'local' board as distinguished from a board exercising statewide jurisdiction the superior court was not authorized to exercise its independent judgment on the evidence." The superior court had not the power of trial *de novo*, the limit of the court's power in this case being to deter-

mine whether the decision of the Civil Service Commission is supported by substantial evidence. Corcoran v. San Francisco etc. Retirement System, 114 Cal.App. 2d 738, 740–741, 251 P.2d 59.

The petition for rehearing is denied.

119 Cal.App.2d 657

PEOPLE v. FOWLER.

Cr. 4949.

District Court of Appeal, Second District, Division 1, California.
Aug. 11, 1953.

As Modified Aug. 12, 1953.

Defendant was convicted of abortion, and from judgments of the Superior Court of Los Angeles County, Kenneth C. Newell, J., defendant appealed. The District Court of Appeal, Doran, J., held that the evidence sustained the convictions.

Affirmed.

1. Abortion 🔑11

Abortion convictions were sustained by evidence.

2. Criminal Law 🔑406(3)

Reasonable and necessary force used in effecting arrest did not render inadmissible, in abortion prosecution, evidence that defendant had stated, in response to question by arresting officers as to whether he had used certain implements, "Well, you see them there, don't you?" U.S.C.A.Const. Amend. 14.

3. Criminal Law 🔑371(1)

It is not essential to admissibility of evidence of another crime, on intent issue, that other crime was, in manner of its accomplishment, identical in every detail with that on trial.

4. Criminal Law 🔑783(1)

In prosecution for abortion, it was not error to instruct that evidence as to other alleged offenses might be considered for limited purpose of establishing whether defendant had entertained intent which was a necessary element for the alleged crimes for which he was on trial.

5. Criminal Law 🔑808½

Where defendant's counsel had been permitted to ask witnesses whether they had any fear of being arrested for conduct in connection with charged abortions, it was not error for court to instruct jury, in statutory lauguage, to effect that witnesses called by People could not thereafter be prosecuted for any crime regarding which they were required to testify, since if jury had not been so instructed, they might erroneously have believed that immunity was within power of District Attorney and that the witnesses were under pressure to give testimony favorable to prosecution. Pen. Code, § 1325.

6. Constitutional Law 🔑250, 266
Statutes 🔑87
Witnesses 🔑304(2)

Statute granting immunity to witnesses in abortion prosecutions was not subject to claimed infirmities of violating due process and equal protection provisions of Constitution, nor was it an unconstitutional special law. Pen.Code, § 1325; U.S.C.A. Const. Amend. 14; Const. art. 1, § 21; art. 4, § 25(19).

Morris Lavine, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., George G. Grover, Deputy Atty. Gen., for respondent.

DORAN, Justice.

The defendant, a physiotherapist, after a consolidated trial of informations, was convicted of two crimes of abortion. In one information, defendant was charged with having on February 4, 1952, committed the crime by providing, supplying, using and employing an instrument upon the person of Barbara Ann MacIsaac with intent to procure a miscarriage. Another information charged that on November 10, 1951, the defendant had committed a similar crime by providing, supplying, using and employing "medication and an instrument upon the person of Mrs. Bonnie Ridgeway". Defendant, at the same trial, was acquitted of a similar crime involving the use of an instrument and medication upon one Mrs. Neva Kingsley, on or about November 1, 1951.

Viewing the evidence in the light most favorable to the verdict of conviction, it appears that Mrs. MacIsaac's husband visited the defendant's office in February, 1952, and talked with the defendant about terminating Mrs. MacIsaac's pregnancy, at which time Fowler said that it would cost $250, and made an appointment for February 4, 1952. On the latter day Mrs. MacIsaac with the husband, went to the office. The defendant and Mrs. MacIsaac went into a back room where the lady got on a stirrup table and thereafter felt an instrument being inserted into the vagina by the defendant; Mrs. MacIsaac also felt some pain described as a pulling or gnawing sensation. Defendant was then called away by the door buzzer, and immediately the law enforcement officers entered the office. As this occurred, Mrs. MacIsaac got up from the table and a speculum fell out of the vagina. The patient was then bleeding from the vagina and was taken to a hospital. Although Dr. Keiffer, who examined Mrs. MacIsaac at the hospital, was unable to testify whether or not a criminal abortion had been performed, in the doctor's written report the case was diagnosed as "attempted criminal abortion".

Other evidence includes a pan found at the table, which contained blood and placental tissue, and testimony that blood was seen on a uterine dilator and a curette found where the defendant had worked on Mrs. MacIsaac. When asked by officers whether a curette had been used on the patient, the defendant replied, "Well, you see them there don't you?". The officers had followed the MacIsaacs to defendant's office and a few minutes later entered and placed defendant under arrest. The premises were searched and no one was found save the defendant, the MacIsaacs, and the officers.

In reference to the Ridgeway information, it appears that Mrs. Ridgeway had missed one menstrual period; that Mrs. Kingsley, a sister-in-law, had telephoned the defendant who stated, "Yes, send her up", and made an appointment. On September 10, 1951, Mr. and Mrs. Ridgeway and children drove to defendant's office and Mrs. Ridgeway entered alone. There is evidence that defendant explained certain aspects of pregnancy to Mrs. Ridgeway, and said that the insertion of a capsule would cause a normal miscarriage. The defendant's fee was set at $250. Mrs. Ridgeway got up on the stirrup table and thereafter felt the defendant insert something into the vagina,—"a little pack of some sort". The patient also felt the insertion of a speculum. No one was present other than Mrs. Ridgeway and the defendant.

After the defendant had finished, Mrs. Ridgeway went home and that night suffered from cramps and bleeding. Mr. Ridgeway twice telephoned to the defendant and was advised that the patient's condition was unusual, that Mrs. Ridgeway should go to a hospital; that it would be unnecessary to pay the agreed fee, and that "you can forget about me altogether and just like you have never known me or anything like that". Mrs. Ridgeway was taken to a hospital, given a blood transfusion, and thereafter a Dr. Burns performed a curettement of the uterus, and testified to finding pregnancy tissue in the uterus and vagina.

The appellant contends that "The verdicts are contrary to the law and the evidence". In reference to the MacIsaac case, it is asserted that the evidence is insufficient to sustain the verdict, in that "There was no use of any instrument on Mrs. MacIsaacs to produce a miscarriage. A speculum cannot be used for that purpose"; further, that "There was no corroborative evidence of any use of any instrument to produce the miscarriage".

An examination of the record discloses substantial evidence in support of the verdict, and no merit in reference to the above contentions. In respect to the use of an instrument, it may be noted that there is no claim on the part of the respondent that an abortion was procured by the use of the speculum. As hereinbefore indicated, a pan was found containing blood and placental tissue; blood was also seen on a uterine dilator and a curette. It appears that the appellant, when asked if a curette had been used, said, "Well, you see them there don't you?".

The fact that there were other items of evidence, pointed out in appellant's brief, which might tend to indicate that the defendant was innocent of the charge, such as the doctor's testimony, "I couldn't state with any degree of authority one way or another", whether there "was any induced abortion in this case", cannot be considered ground for reversal. As in other cases, such testimony merely raises an issue of fact which the jury has resolved against appellant's contention.

[1] As stated in the respondent's brief, "evidence supplies ample corroboration of Mrs. MacIsaac's testimony. Further corroboration was provided by her husband, Mr. MacIsaac testified that he made arrangements with defendant for the abortion, agreeing to pay $250. * * * The conduct of defendant himself constitutes further corroboration. When told he was under arrest, he struck at the officers, and he tried to slam the door in an effort to keep them from the treatment room where he had left Mrs. MacIsaac. He never demanded payment of the fee for his services". It is clear that there was substantial evidence of the corpus delicti, and adequate corroborating evidence in support of the verdict of conviction.

The record, likewise, discloses evidence of a substantial nature sustaining the conviction in the Ridgeway prosecution. As in the MacIsaac case, there had been previous arrangements made with the appellant to perform an abortion; Mrs. Ridgeway felt "something inserted into her vagina—a little pack of some sort", following appellant's explanation that "by inserting this capsule it would 'cause a normal miscarriage'". The later conversation in which the appellant stated that the Ridgeways could "forget about me altogether", has already been referred to. As noted in respondent's brief, the victim could not observe what was being done by the appellant, and whether the "little pack" be regarded as an instrument or as a medicine, the conviction was nevertheless proper.

The jury listened to the appellant's version of what happened and in the face of the incriminating evidence saw fit to disbelieve in the defendant's innocence. Corroborative evidence was not wanting, and the weight of the evidence presented is a matter which cannot now be reargued.

[2] Appellant also complains of the admission in evidence of defendant's statement to arresting officers, "Well, you see them there, don't you?" referring to implements used in the MacIsaac case. It is alleged that "defendant had been beaten and shoved around and therefore any statements made by him were not free and voluntary and in violation of the Fourteenth Amendment". However, the record indicates that when the officers announced that defendant was under arrest, "he sought to slam the door and hit the officers", whereupon reasonable and necessary force was employed to effect the arrest, to afford protection from the attempted blows, and to prevent defendant from destroying or suppressing evidence. Defendant was merely forced to sit down in a chair. No violence was used to obtain any statements from the defendant nor was any inducement offered. Fowler's testimony was that "they broke in and grabbed me by the neck * * * and pushed me back into the chair * * * and said 'You are under arrest'". It cannot be said that the trial court committed prejudicial error in overruling defendant's objection to this testimony.

[3, 4] Nor is reversible error apparent in the giving of instructions that "While you must consider the evidence applicable to each alleged offense * * * as though it was the only accusation * * * such evidence may be considered by you, however, as to the other alleged offenses for a limited purpose only, viz., whether said evidence tends to show that the defendant entertained the intent which is a necessary element for the alleged crimes for which he is on trial". As said in People v. Clapp, 67 Cal.App.2d 197, 202, 153 P.2d 758, 761,

which involved evidence of abortions committed by means of injection of fluid, and by operation with instruments, "It is not necessary to prove that the prior crime was, in the manner of its accomplishment, identical in every detail with that on trial". Nor was there any serious time lapse between the different transactions, the Kingsley, Ridgeway and MacIsaac transactions having occurred between October, 1950 and February, 1952.

[5] Appellant complains that it was error to instruct the jury in the language of section 1325 of the Penal Code, to the effect that witnesses called by the People could not thereafter be prosecuted for any crime regarding which they were required to testify. The record discloses that in the early part of the trial defendant's counsel had argued vigorously for permission to ask certain witnesses whether they had any fear of being arrested, etc. for conduct in connection with the charged abortions. At first ruling against such contention, the trial court later, at the prosecutor's request, allowed such inquiry. Defendant's counsel stated, "I think it is proper" that the jury be instructed that such witnesses are by the statute given immunity. As said in respondent's brief, "If the jury had not been so instructed, they might erroneously have believed that immunity was within the power of the District Attorney and that these witnesses were under pressure to give testimony favorable to the prosecution". No prejudicial error is apparent in the giving or the refusing of any instructions.

[6] It is further argued that the above immunity statute "is unconstitutional as violative of Article IV, Section 25(19) of the California Constitution" which prohibits the passing of "local or special laws * * * granting * * * any special or exclusive right, privilege, or immunity", and Article I, Section 21, relating to the same matter; further that the statute "violates the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States".

Specifically, appellant's contention is that "The state may not single out half of the persons so connected and give them immunity if they testify and deny the other half immunity; nor may it base that immunity solely upon the fact that they are called as witnesses for the People, without giving the same right to the other defense". Appellant further claims that "No reason exists for the arbitrary classification and discrimination of a single crime, to-wit, abortion, and give anyone who is called by the prosecution immunity in order that he may be a witness in the case, even though unaccused".

The appellant's attack on the constitutionality of the immunity statute is untenable. Respondent's brief calls attention to the fact that "a criminal action is not an ordinary lawsuit between private parties"; that the District Attorney, as a public officer, "has extensive powers not given to private citizens"; that the classification based upon the difference between prosecution and defense, is, in the present instance, not unreasonable.

Nor is it objectionable that the immunity provision here involved is limited to abortion cases. As pointed out by the respondent, abortion prosecutions involve several features not common to other crimes, namely "the relative difficulty of detecting or proving the criminal conduct involved * * * for abortions are invariably committed in great secrecy and with the consent of the victim". Moreover, in abortion cases, "one of the violators is more culpable than another, or at least his conduct is more harmful to society", the latter distinction being recognized by the different penalties imposed upon a woman soliciting abortion and the person who actually provides the means of procuring a miscarriage. See People v. Buffum, 40 Cal.2d 709, 256 P.2d 317. "It is not unreasonable, therefore", says respondent's brief, "to permit the prosecutor to allow the lesser offender to go unpunished in order to convict the serious criminal".

The classification here employed cannot be deemed arbitrary or unreasonable; nor is there any merit in the contention that the immunity statute in question is unconstitutional on the ground that it violates the due process and equal protection provisions, or otherwise.

The record discloses that defendant was afforded a fair trial, that the convictions are supported by substantial evidence, and that no prejudicial error was committed.

The judgments are affirmed, and the orders denying defendant's motions for new trial, are likewise affirmed.

WHITE, P. J., and SCOTT, Justice pro tem., concur.

119 Cal.App.2d 754

HERTZ DRIV-UR-SELF STATIONS, Inc. v. SCHENLEY DISTILLERIES CORPORATION.

Civ. 15505.

District Court of Appeal, First District, Division 1, California.

Aug. 18, 1953.

Hearing Denied Oct. 15, 1953.

Action for breach of a contract to purchase trucks, tractors and trailers, leased by plaintiff to defendant, on defendant's cancellation of the lease agreement. From a judgment of the Superior Court, City and County of San Francisco, Preston Devine, J., for plaintiff, defendant appealed. The District Court of Appeal, Bray, J., held that the agreement required defendant corporation, on its cancellation thereof, to purchase leased vehicles then in use by it, except those listed in an added schedule providing that defendant should have no right to purchase such vehicles without plaintiff's consent in the event of such cancellation, and that plaintiff corporation's local manager's statement to defendant's assistant traffic manager that plaintiff would not continue to perform under the agreement beyond a specified date, unless a proposed new schedule of increased rental and mileage rates was accepted by defendant, did not constitute an anticipatory breach of contract or cancellation of contract by plaintiff, in the absence of written notice or announcement of such cancellation by plaintiff.

Judgment affirmed.

1. Bailment 🔑22

A provision of schedule, added after execution of written agreement for lease of trucks, tractors and trailers described in attached schedules, that lessee should not have right to purchase vehicles listed in such added schedule in event of cancellation of agreement, as provided therein was inapplicable to other vehicles listed in subsequent schedules, especially where such schedules did not provide for addition of vehicles listed therein to those in preceding schedule, but provided for addition of new schedules to previous schedules.

2. Contracts 🔑155

Any ambiguities in written contract must be construed most strongly against party who prepared contract.

3. Bailment 🔑1

A provision of written agreement for lease of trucks, tractors and trailers described in attached schedules that parties should be governed by provisions of main agreement and schedules subsequently attached thereto required that all such provisions be construed together.

4. Bailment 🔑22

A written agreement for lease of trucks, tractors and trailers described in attached schedules and subsequently added schedule providing that lessee corporation should have no right to purchase vehicles listed therein in event of cancellation of agreement, which provided that lessee, if it cancelled agreement, would purchase vehicles then covered thereby, were not repugnant nor unclear but taken as whole clearly required lessee, on its cancellation of agreement, to purchase vehicles then in use by it, except those listed in such schedule.

5. Bailment 🔑22

A statement to assistant traffic manager of corporate lessee of trucks, tractors and trailers by corporate lessor's local manager that lessor would not continue to perform under lease agreement beyond its next anniversary date, unless lessee accepted new schedule of increased rental and mileage rates submitted by lessor, did not constitute anticipatory breach of contract or cancellation thereof by lessor, in absence of written notice of cancellation, as required by agreement, or announcement of cancellation in lessor's vice-president's subsequent letter to lessee, and hence did not authorize lessee's subsequent cancellation of contract and refusal to purchase vehicles then covered by agreement, as required thereby if lessee cancelled agreement.

6. Contracts ⚷313(2)

Anticipatory breach of contract must appear only with clearest terms of repudiation of contractual obligation.

7. Bailment ⚷22

The fact that lessor of trucks, tractors and trailers might have terminated lease contract on anniversary date thereof under provision therein did not authorize lessee to terminate contract without purchasing vehicles then covered thereby, as required by contract if lessee cancelled it.

8. Contracts ⚷258

A party to contract cannot escape obligations thereof, as by cancelling it, merely because other party might exercise right given him by contract to terminate it.

9. Bailment ⚷22

The fact that corporate lessor of trucks, tractors and trailers described in schedules attached to lease agreement intended to exercise its legal right under agreement to cancel it on anniversary date, unless lessor accepted increased rental and mileage rates proposed by lessor, did not justify cancellation of agreement by lessee.

◆

Bronson, Bronson & McKinnon, San Francisco, for appellant.

J. Joseph Sullivan, San Francisco, for respondent.

BRAY, Justice.

From a judgment in favor of plaintiff in the sum of $11,379.80, defendant appeals.

Questions Presented.

1. By the 1945 and subsequent schedules, was the requirement of purchase by defendant abrogated?

2. Was there an anticipatory breach of the contract by plaintiff?

Facts.

In 1941 the parties entered into a written agreement by which plaintiff leased to defendant over a period of years, trucks, tractors and trailers "described in Schedule A, attached hereto, together with any additional Schedule A's attached hereto, which are made a part hereof by reference thereto the same as if rewritten at length herein. * * * Customer agrees to pay to Hertz the rental stipulated herein, and upon the terms and conditions in the said Schedule A, together with any other Schedule A's attached hereto, and upon the additional terms and conditions in this instrument contained." Schedules were to be added from time to time. Schedule A was to provide the fixed rental charge plus a mileage charge. Expressly recognizing that the cost of gasoline, license fees or taxes might fluctuate during the life of the agreement, it provided that if the average cost thereof during any month decreased or increased 20 per cent or more from the present cost, the amount of such increase would be charged defendant as increased rental while the amount of decrease would be credited defendant. Either party on notice could cancel the agreement on any anniversary date. If defendant cancelled then it agreed to purchase the vehicles then covered by the agreement upon the basis set forth. If plaintiff cancelled, defendant had the right to purchase.

The first Schedule A, executed on the same date as the agreement listed only one vehicle and provided: "In the event customer shall elect to cancel this agreement *with respect to the above listed vehicle,* the customer shall not be required, but shall have the right to purchase the vehicle *listed above.* * * *" (Emphasis added.) February 2, 1943, a new schedule was added "in addition to" the first, and referred to two vehicles different from the one in the first. February 6, 1945, there was added the schedule upon which defendant relies. It provided that it "shall supersede any previous Schedule A" and described four vehicles (three of which were those described in the first two schedules) and provided: *"With respect to the above listed vehicles"* that in the event of cancellation as provided in the agreement "Customer shall not have the right to purchase *said vehicles,* except by consent of Hertz. * * *" (Emphasis added.) March 18, 1946, another Schedule A referring to two vehicles (one of which was included in the previous schedule) was signed "in addition to" any previous schedule. October 23, 1946, with the same notation, another schedule was signed listing an additional vehicle. January 13, 1947, appears another schedule also "in addition to any previous Schedule." This lists six vehicles, none of which appear on any previous schedule. It is these six vehicles plus one listed in the schedule of March, 1946, which defendant was still using and which the court found defendant was required to buy. All schedules provided that insurance premiums and gasoline prices shall be as stated in the schedule rather than as stated in the contract.

In August, 1948, Jordan, plaintiff's San Francisco manager, presented defendant with a new schedule A to become effective September 1, 1948. This schedule added two trucks, increased the fixed weekly rental charge and the mileage rate for the six vehicles listed in the previous schedule. It also increased the "gasoline price including tax." Thereafter, defendant cancelled the contract and refused to purchase. The circumstances upon which defendant based its contention of an anticipatory breach of the contract by plaintiff will be discussed later.

1. Effect of Schedules.

[1-4] The court found that the purchase clause of the agreement was not modified by the schedule of February 6, 1945, as to the vehicles listed in the schedules of March 18, 1946, and January 13, 1947.

The first schedule merely purports to modify the purchase clause of the contract as to "the above listed vehicle." While the next schedule is "in addition to" the first, it does not include the vehicles therein listed within that modification. Again, the modification in the 1945 schedule which supersedes the preceding schedules applies "to the above listed vehicles." The three following "in addition" schedules make no effort to include the additional vehicles in this modification. The contract requires purchase at cancellation of "the vehicles then covered by this agreement." None of the vehicles at this time was included in "the above listed vehicles" in the exception to the contract provided by the 1945 schedule. Defendant contends that by an *additional* schedule, as distinguished from a *superseding* schedule, the vehicles therein are made subject to the release provision of the 1945 schedule. But the release provision is explicit in its terms, referring to the "above listed vehicles." Moreover, the later schedules do not provide that the *vehicles* are to be added to those in the preceding schedule but that the particular schedule is to be added to any previous schedule. Thus, the most reasonable interpretation is that it applies only to those vehicles and that had the parties intended it to apply to the additional vehicles in the later schedules they would have said so in those schedules. Nor is the reasonableness of this interpretation affected by the facts that the release clauses in the 1941 and 1945 schedules are typewritten while the purchase clause in the agreement is printed, and that since plaintiff prepared the contract, ambiguities, if any exist, are to be construed most strongly against it under the rule of Reid v. Johnson, 85 Cal.App.2d 112, 192 P.2d 106. The agreement provides that the parties are to be governed by the provisions of the main agreement and those of the schedules thereafter attached. Thus, they are to be construed together. Valley Const. Co. v. City of Calistoga, 72 Cal.App.2d 839, 165 P.2d 521. In so doing there is no repugnancy between the main agreement and the schedule, nor is their language unclear. Taken as a whole they provide simply and clearly that on cancellation defendant is required to purchase those vehicles then in use except those listed in the 1945 schedule.

2. Anticipatory Breach.

[5-8] Defendant contends that plaintiff demanded that defendant either sign the proposed 1948 schedule which it says in-

creased rates higher than required by the agreement, or plaintiff would cancel, and that thereby plaintiff committed an anticipatory breach. Horowitz, defendant's assistant traffic manager, testified that Phillips, plaintiff's vice president, told him that plaintiff would have to increase its rates on mileage and fixed rental or place its equipment where they could get better revenue for it. Phillips denied giving this ultimatum, stating that he was merely endeavoring to negotiate for increases, explaining to Horowitz that costs had gone up and defendant was giving the vehicles but limited operation. Phillips further explained that defendant had not operated for about 3½ months, due to the warehouse strike, that Phillips had gone over the increased expense items with other customers and they, without a single exception, had granted plaintiff reasonable increases in rates. Thereafter, Jordan, plaintiff's San Francisco manager, presented Horowitz with the proposed 1948 schedule and told him that if plaintiff could not get these rates it would have to cancel the contract. Shortly thereafter Phillips wrote Horowitz stating that he had received a report from Jordan concerning the conference which Jordan had just had with him in which Jordan stated that Horowitz did not feel justified in approving the increase in rates in the submitted schedule. Phillips then stated that he was certain Horowitz could appreciate that operating expenses had increased considerably and in about the same proportion as the new schedule proposed; that other customers have realized that such increases do prevail and have accordingly signed new schedules. "We feel certain that you and your executives want to be fair in this matter, and I will ask that you please reconsider this whole situation and approve the schedules. * * *" He then refers to a fire partially destroying two of the vehicles being operated by defendant, and the fact that plaintiff was awaiting insurance adjustment and in the meantime was not billing defendant for those vehicles. "I will ask that you please review this San Francisco operation with your management, and get them to approve these increases in rates, so that we will be able to get ourselves 'out of the red.'" Horowitz made written reply to this letter, stating that when Jordan showed him the new schedule he told Jordan that he did not believe defendant would accept the higher rates and that he would be glad to release the equipment if Jordan could place it. One tractor and trailer could be released immediately and the other tractor and two trailers could be released in about two months. He referred Jordan to a concern which might be able to use the equipment. To date he had not heard from Jordan as to whether he was able to contact the concern mentioned and whether he was not able to place the equipment by the anniversary date. "I would like to advise at this time that we wish to cancel our contract as of February 1, 1948, in accordance with Clause 18" of the agreement. This is the clause which provides for purchase if the customer cancels. Plaintiff thereupon accepted the cancellation and sought to enforce the purchase provision, defendant having refused to purchase any vehicles. The court found that defendant, acting in pursuance of its rights under Clause 18, by this letter notified plaintiff of its election to cancel, that at that time there were seven vehicles covered by the agreement and the 1946 and 1947 schedules, and that by such cancellation defendant became obligated to purchase said vehicles: further that plaintiff had fully performed and had in nowise breached or repudiated the agreement; that it is not true that a breach or repudiation occurred "when Plaintiff notified defendant that effective September 1, 1948, the rates for vehicles in question would be increased and that it is not true that Plaintiff in submitting to the Defendant a new Schedule 'A' for such proposed increased rates, stating to Defendant that Plaintiff would not continue to perform under said agreement beyond January 31, 1949, unless same was accepted by Defendant in anywise repudiated or breached said agreement."

The court found that it is not true that the proposed schedule included such increased rates as were in excess of the increased cost to plaintiff as provided in Clause 22 of the agreement. This finding is not supported by the evidence. The agreement contemplated that in the event of increase in gasoline, license fees or taxes, of more than 20 per cent from the cost at the date of the contract, such increase could be charged to defendant as additional rental. The rates in the proposed schedule increased "gasoline price including tax" far in excess of the actual increased cost.[1] Moreover, fixed rental charge and mileage rate were also increased. Thus, the proposed rates were in excess of what defendant could have been required to accept. This fact, however, would be important only if the schedule were submitted on the basis that unless accepted plaintiff would decline to perform its contract. The schedule was proposed to take effect September 1, 1948. The anniversary date of the contract was November 5. The evidence fails to disclose any intention on the part of plaintiff not to perform the contract at least until the anniversary date, at which time it had the right, under the contract, to cancel, whether defendant accepted the new schedule or not. Thus the finding "that it is not true that Plaintiff in submitting to the Defendant a new Schedule 'A' for such proposed increased rates, stating to Defendant that Plaintiff would not continue to perform under said agreement beyond January 31, 1949, unless same was accepted by Defendant in anywise repudiated or breached said agreement" is a correct finding. It constituted neither a breach, because it contemplated performance under the contract to the anniversary date, nor a cancellation, because such cancellation under the contract could only be accomplished by notice in writing, and there was none. Even Jordan's statement could not constitute a cancellation. Clause 18 of the agreement specifically requires a written notice of cancellation, and the Phillips letter did not announce a cancellation nor did it contain anything resembling a breach of contract. Anticipatory breach must appear only with the clearest terms of repudiation of the obligation of the contract. Atkinson v. District Bond Co., 5 Cal.App.2d 738, 43 P.2d 867; Gold Mining & Water Co. v. Swinerton, 23 Cal.2d 19, 142 P.2d 22; 4 Cal.Jur.Supp. 197. Even though plaintiff might have terminated the contract on the anniversary date, that fact did not authorize defendant to terminate it without purchasing. It was defendant, not plaintiff, who cancelled. One cannot escape the obligations of a contract merely because the other party might exercise his right to terminate the contract. Interestingly enough, in its letter of cancellation, defendant nowhere indicates that plaintiff was offering Schedule A "or else," nor does defendant suggest that it is cancelling because of any claimed anticipatory breach by plaintiff. The letter states that the cancellation is "in accordance with Clause 18" which expressly provides that if defendant cancels it must purchase the equipment.

[9] The form of the court's finding above mentioned is peculiar. If it is a direct finding that plaintiff so stated to defendant, still it does not help defendant Plaintiff had the right to cancel at the anniversary date with or without reason, provided it gave defendant 30 days' notice thereof. The fact that it intended to exercise its legal right to cancel unless defendant accepted the new rates, if it so intended, would in no wise justify defendant in cancelling. All defendant had to do was to refuse to accept the new rates and then upon cancellation by plaintiff, if it did so, defendant would have been under no obligation to purchase.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; TRAYNOR and SCHAUER, JJ., dissenting.

---

[1] It should be noted that in all schedules there was a statement that the insurance premiums and gasoline prices may have been substantially changed from those stated in Clause 22 of the agreement and that the parties mutually agree that, insofar as the motor vehicle equipment described in the particular schedule is concerned, the insurance premiums and gasoline prices shall be as stated in the respective schedule, instead of as stated in Clause 22. Apparently these increases were without regard to whether the basic cost increased 20 per cent or more as mentioned in Clause 22.

119 Cal.App.2d 674

DE ARYAN v. BUTLER, Mayor, et al.

Civ. 4527.

District Court of Appeal, Fourth District, California.

Aug. 13, 1953.

Rehearing Denied Aug. 31, 1953.

Hearing Denied Oct. 8, 1953.

Action by taxpayer and elector, and in claimed representative capacity to enjoin mayor, city council and city officials from adding fluoride compound to public water supply of city. From an order of the Superior Court, San Diego County, Dean Sherry, J., granting a nonsuit, the plaintiff appealed. The District Court of Appeal, Griffin, J., held that the resolution of the city council approving fluoridation of public water supply did not exceed the authority granted the city under its charter, and State Health and Safety Code, where State Board of Public Health had made finding that water to which fluoride was added complied with statutory standards for pure, wholesome, and potable water, and had issued city permit to add fluoride to city water supply.

Affirmed.

1. Constitutional Law 🔑81

The Legislature is possessed of the entire police power of the state, except as its power is limited by the provisions of the Constitution and other laws applicable thereto.

2. Constitutional Law 🔑81

The state police power is an indispensable prerogative of sovereignty and may not be legally limited even though at times its operation may seem harsh, so long as it is not unreasonably and arbitrarily invoked or applied.

3. Municipal Corporations 🔑595, 597

It is within the authority of the city to adopt regulations designed to promote the health and welfare of the people. Const. art. 11, §§ 6, 11.

4. Municipal Corporations 🔑597

Resolution of city council approving fluoridation of public water supply did not exceed authority granted city under its City Charter and State Health and Safety Code where State Board of Public Health had made finding that water to which fluoride is added was pure, wholesome, and potable, and did not endanger the lives or health of human beings, and had granted city permit to furnish such water for public purposes. Health and Safety Code, §§ 100, 101, 107, 4011, 4011.5, 4021, 4031; Const. art. 11, §§ 6, 11.

5. Constitutional Law 🔑70(3)

A determination by a legislative body that a particular regulation is necessary for protection and preservation of health is conclusive on courts unless it is unreasonable, an abuse of discretion, or infringes constitutional rights.

6. Municipal Corporations 🔑121

In absence of allegation in addition that city council had abused its discretion or had made unreasonable determination when passing resolution allowing addition of fluoride to public water supply, evidence of abuse of discretion or unreasonableness of council's resolution would not be considered.

7. Constitutional Law 🔑82, 278(4)
Municipal Corporations 🔑592(1)

City ordinance allowing fluoridation of public water supply was not invasion of rights secured by fundamental law and did not violate policy or laws of state or United States Constitution reserving to the people immunity of person and independent right to life and liberty, the matter being within the sound discretion of the city council under regulation of the State Board of Health. Health and Safety Code, §§ 21003, 26470.5; U.S.C.A.Const. Amends. 1, 10, 14.

8. Trial 🔑165

A motion for nonsuit assumes as true every fact which the evidence, and the presumptions fairly deducible therefrom, tend to prove, and on such motion the evidence will be taken most strongly against defendant, and contradictory evidence will be disregarded.

9. Municipal Corporations 🔑63(2)

Where petition did not allege, nor facts establish, that city council had acted arbitrarily or abused its discretion in passing resolution allowing addition of fluoride to public water supply, the court would acquire no jurisdiction to substitute its discretion for that of the city council.

◆

C. Leon DeAryan, in propria persona.

J. F. Du Paul, City Atty., Aaron W. Reese, Douglas D. Deaper, Deputy City Attys., San Diego, for respondent.

GRIFFIN, Justice.

Plaintiff and appellant individually, as taxpayer and elector, and in a claimed representative capacity, filed an action to enjoin the Mayor, City Council, and other City officials from adding a fluoride compound, in an amount sufficient to maintain one part of fluoride per one million parts of water to the water furnished to the consumers of water in the City of San Diego.

The action arose out of the adoption of a resolution of the City Council on October 30, 1951, as pleaded in the petition, reciting in part that:

> "Whereas, the San Diego County Medical Society, the San Diego County Dental Society, the Board of Directors and the Health Division of the Community Welfare Council, the Health Division of the Ninth District Congress of Parents and Teachers, and the Public Health Commission of The City of San Diego have recommended to this Council that it will be directly in the interests of the health of the people of The City of San Diego to furnish to water consumers in said City water which has been treated by adding to its contents fluorides, and that this Council should endorse the principle of artificial fluoridation with respect to the supplying of water to the people of The City of San Diego; and
>
> "Whereas, this Council is of the opinion that such recommendation should be followed, and that it will be in the interests of the public health and the dental health of the residents of San Diego and the water consumers of said City to treat the water served to consumers within said City by adding to it an approved fluoride compound * * *; Now, Therefore,
>
> "Be It Resolved * * *
>
> "That the City Manager be, and he is hereby authorized and directed to apply to the State Board of Health for an amendment of the water permit of said City to allow said City" so to do.

A temporary restraining order was issued. At the hearing it was stipulated that such a resolution, as worded, was adopted after receiving testimony "that the fluoridation of water will primarily act as a caries-preventive on children up to about the age of twelve years, and that said Resolution * * * was adopted by the Council primarily in the interest of the public health of said children up to about the twelfth year of age; * * * that pursuant to said Resolution * * * City Manager * * * did apply for and receive from the State of California Department of Public Health, pursuant to sections 4011–4038, inclusive, of the California Health and Safety Code, a permit to add fluoride compounds to all the water being served in The City of San Diego."

Thereafter, plaintiff offered certain exhibits and reports in evidence and produced certain witnesses who testified generally concerning the artificial fluoridation of water intended for human consumption, and as to its probable beneficial or detrimental effects in so using it.

The Sanitary Engineer for the City Water Department (appearing in his individual capacity) testified that although he was not qualified to testify as to the actual biochemistry of fluorides in the human body, he did know there were "two sides" to the question as to the detrimental or beneficial effect of fluoridation of water for human consumption. This study was based on such reports as those of the National Research Council, Division of Medical Sciences, pertaining to the Ad Hoc Committee on Fluoridation of Water Supplies, which commission was headed by Dr. Kenneth S. Maxcy, of Johns Hopkins University. He pointed out from the conclusions of that report, with which he said he agreed, that "The upper level of safety has been reached in the northern part of the United States in domestic water supplies containing approximately 1.0 to 1.5 p.

p. m. fluorine, in the southern part of the country approximately 0.7 p. p. m."; and that in his opinion the city of San Diego, "climatically would be in the lowest tolerance group in the United States"; that of its 375,000 inhabitants now being served by the City Water Department, about 25 per cent are of the age of 12 years or under; that the cost of the equipment and to run the contemplated program provided in the ordinance for the first six months would be $35,000, and in the subsequent years this would cost about $35,000 per year; that only about one-half of one per cent of the public water supply output is used for cooking and drinking; that if one starts out with one part per million concentration and boils one-half of it away he will end up with two parts per million, and if he boils another one-half away he will end up with four parts per million; that in such cases, although not necessarily dangerous "could possibly", or would probably, cause parents of children some concern and "perhaps involve the City", and that "moderate fluorosis is a probability".

Another witness testified that he operated a health food store and had studied nutrition for over twenty years; that he had studied pamphlets prepared by universities, doctors and chemists on the subject, and that they state that "sodium fluoride, such as used in our drinking water, is a toxic and poisonous chemical", and that fluoridation of water harms the human system more than it helps it.

Another witness, a graduate of West Coast Chiropractic College, testified he made a study of chemistry there; that he agreed with Taber's Cyclopedic Medical Dictionary defining sodium fluoride, as being a manufactured product, a "White crystalline power, saline in taste * * * Action and Uses: Epilepsy, tuberculosis, and malaria * * * Commercially, in etching glassware, for eradication of rats, insects, ants, and other pests, or as a food preservative"; that in his opinion it would not help in building up children's teeth; that when it came in contact with the stomach juices it would turn into hydrochloric acid, a substance used to etch glass; and that in his opinion it would, as to a certain class of people, have a cumulative effect and would injure organs of the human body. He admitted that current surveys made by the U. S. Public Health Service indicate a great difference of opinion as to the cumulative effect on the organs and as to what concentrations are necessary to produce the effects above noted; that a San Diego County Medical Society bulletin indicates that more than 140 cities have adopted fluoridation of water supplies; that it states that the councils are unaware of any evidence that fluoridation of water supplies, up to a concentration of one part per million, would lead to structural damage in the bones; that the only difficulty so far revealed is the possible increase in the mottling of the teeth enamel, but the use of it is safe. He did not agree in toto with them. He stated that he heard some of the arguments, pro and con, at a hearing before the City Council on the advisability of adopting the plan, but did not participate in the arguments.

Several dissertations by so-called experts on the subject, which involved tests claimed to have been made, were admitted in evidence, which reports resulted in the conclusion that sodium fluoride has a cumulative effect on the human body, and is harmful to anyone's teeth, regardless of his age, and that the fluorine content of the water supply should never be more than one-half part per million. These opinions were published in 1945, 1946, and 1949.

Petitioner offered in evidence a copy of a proposed bill to the State Legislature which in substance specifically authorized public and private utilities to treat water intended for public consumption and to introduce into it fluorine, if done under a permit in connection therewith. It also provided for exemption to municipalities, etc. for any damage that might result therefrom.

A resolution of the Southern California Water Works was received in evidence, without objection. It recites generally that it had made a painstaking investigation of the subject and that it was not "convinced" that the medical benefits or detriments, the legal responsibility of the distributors, and the economic aspects of such treatment have been sufficiently explored to warrant the general and unrestricted application of fluorine to domestic supplies.

It was agreed at the trial that the reports here in evidence were a part of the matters submitted and considered by the city council at the time of the hearing before it. Some of these reports contained the opinions and resolutions of the board of directors of the American Water Works Association, adopted at a convention in Illinois in 1949, covering fluoridation of public water supplies. It is to the effect that "in communities where strong public demand has been developed, and the procedure has the full approval of the local medical and dental societies, the local and state health authorities, and others responsible for the communal health, water departments or companies may properly participate in a program of fluoridation of public water supplies"; that "The water works man is not in a technical position to recommend fluoridation. Such recommendations are the prerogative of the dental, medical and public health groups. The association has stated, however, that the water works industry is willing and ready to follow through when the proper authorities recommend or approve the treatment."

The recommendations of the board of directors of the San Diego County Dental Society, in evidence, show that it went "on record approving fluoridation of the 'communal water supplies' in the San Diego water system after consultation with a three-man committee from the San Diego County Medical Society, and recommended one part per million of fluoride." A similar letter from the counsel of San Diego County Medical Society was received in evidence.

The testimony of other witnesses was to the effect that mass fluoridation of a water system would be dangerous to health; that it might be conceded that use of fluoride can cause a decrease in the existence of dental caries, although there are "responsible authorities" on each side of the question.

After presentation of this summarized evidence defendant's motion for a nonsuit was granted. Plaintiff appealed from an order based thereon. It is contended on this appeal that the trial court erred in granting a nonsuit when the evidence presented by petitioner, under the pleadings, presented a prima facie case for relief.

In disposing of the question we must first look to plaintiff's petition in which he alleges the claimed grounds for the issuance of the injunction. They are first, that the resolution pleaded "exceeds the authority granted the city council" by its charter and the "Health and Safety Code."

[1, 2] Sections 100 and 101 of that code have made the State Board of Public Health a part of the Department of Public Health, and it has power to formulate policies affecting public health, and to adopt, promulgate, repeal and amend rules and regulations consistent with law for the protection of the public health. Its membership must be composed of six licensed and practicing physicians of this state and one licensed and practicing dentist. The Director of Public Health must be fully qualified in this field. Sections 101 and 107. Sections 4011 and 4011.5 thereof prohibit any person from furnishing water for domestic purposes without first applying for and receiving a permit so to do from the State Board of Public Health, and provide for the modification of, addition to, or change in the source of supply or method of treatment of water for domestic purposes. Section 4021 then allows the Board to determine whether the water thus distributed is "pure, wholesome, and potable and does not endanger the lives or health of human beings", and when it so determines it shall grant such a permit. Such a permit was issued in the instant case. It therefore is apparent that the legislature has delegated to the State Board of Public Health the duty and powers necessary to control and regulate the purity, potability and wholesomeness of public waters in this state. The legislature is possessed of the entire police power of the State, except as its power is limited by the provisions of the Constitution and other laws applicable thereto. Such police power

is an indispensable prerogative of sovereignty and may not be legally limited even though at times its operation may seem harsh, so long as it is not *unreasonable and arbitrarily invoked and applied.* Justesen's Food Stores, Inc., v. City of Tulare, 12 Cal.2d 324, 329, 84 P.2d 140.

[3] Section 4031 thereof makes it unlawful for any person to furnish or supply to a user water used or intended to be used for human consumption or for domestic purposes which is impure, unwholesome, unpotable, polluted, or dangerous to health. The standards set by this section are the same as those set forth in section 4021. These are only statutory regulations as to the quality of water to be furnished to consumers in this state, and the State Board of Public Health has made a finding that the water to be furnished under the fluoridation program does comply with these statutory standards. It therefore appears that the City Council did not exceed the authority granted it under the Health and Safety Code. It is within the authority of a city to adopt regulations designed to promote the health and welfare of the people. Sections 6 and 11, Article XI, Constitution of California; Boyd v. City of Sierra Madre, 41 Cal.App. 520, 183 P. 230; Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A.L.R. 1479.

[4] Section 1 of the City Charter of San Diego grants authority to the City of San Diego to exercise such municipal powers as are authorized to be granted to municipal corporations by the Constitution and laws of this State. See Section 11, Art. XI, Constitution of California.

[5] We therefore conclude that the addition of fluoride to the water supply, as directed by resolution of the City Council, was a valid exercise of the police power of the City of San Diego, so long as it was not unreasonable or an abuse of discretion so to do. Laurel Hill Cemetery v. San Francisco, 216 U.S. 358, 30 S.Ct. 301, 54 L.Ed. 515; Roussey v. City of Burlingame, 100 Cal.App.2d 321, 223 P.2d 517. The determination by the legislative body that a particular regulation is necessary for the protection or preservation of health is conclusive on the courts except only to the limitation that it must be a reasonable determination, not an abuse of discretion, and must not infringe rights secured by the Constitution. Powell v. Commonwealth of Pennsylvania, 127 U.S. 678, 8 S.Ct. 992, 1257, 32 L.Ed. 253; Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643; In re Lowenthal, 92 Cal.App. 200, 267 P. 886.

[6] It is to be noted that there is no allegation in the petition that the City Council of the City of San Diego abused its discretion, or that the determination made by it was unreasonable. Accordingly, the evidence to which petitioner points may not be considered in determining this fact. Fuentes v. Tucker, 31 Cal.2d 1, 187 P.2d 752.

The only possible question remaining is whether or not the fluoridation of the water supply, under the evidence produced, was a plain, palpable invasion of the rights secured by fundamental law.

In this connection it is alleged that the "Resolution introduces the thin end of the wedge of Socialized Medicine in violation of the Tenth Amendment to the U. S. Constitution, which reserves to the people the immunity of person"; that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The argument in this connection is that this State, through its legislature, has declared its policy in reference to matters of religious objection to medical treatment, citing Section 21003 of the Health and Safety Code; First Amendment to the Constitution of the United States; Thomas v. Collins, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430; and Cantwell v. State of Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213; that the State, through its legislature, has only permitted fluoridation of *privately sold* waters, Section 26470.5 Health and Safety Code, leaving to the consumers a choice which is denied them by the instant resolution; that in refusing to pass the proffered legislation above mentioned, the legislature has, in effect, refused such fluoridation as a public policy; that the consumers contracted for a particular water, and the substitute here made breaches that contract; that petitioner's independent right to life and liberty secured by the Fourteenth Amendment to the United States Constitution has been violated, citing Tomlinson v. Armour & Co., 75 N.J. L. 748, 70 A. 314, 19 L.R.A.,N.S., 923; and that accordingly, even under a general grant of power, a municipality cannot adopt ordinances which are unconstitutional or inconsistent with the public policy of the state, as declared in its legislation, citing 5 McQuillin, Municipal Corporations, p. 100, Sec. 15.21; 7 McQuillin, Municipal Corporations, p. 51, Sec. 24.222; 6 McQuillin, Municipal Corporations, p. 126, Sec. 20.51; Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643.

[7] It does not clearly appear from the evidence produced that the ordinance is a plain, palpable invasion of the rights secured to petitioner by the fundamental law, nor does it appear that it violates any policy or laws of the State of California or that by reason of the facts established the ordinance is in the respects indicated unconstitutional. The matter was one within the sound discretion of the City Council. Failure of the legislature to pass any particular measure is not conclusive evidence of its policy on the subject especially where, as here, the bill as proposed contained a provision granting immunity from liability in case of damage suits arising from the addition of fluoridation to water supplies. By the granting of the authority to the State Board of Health to issue a permit under the conditions stated, the legislature has delegated to that board the duty to determine whether the water to be used is pure, wholesome and not dangerous to life and health and its authority cannot, in this proceeding, be questioned.

The United States Supreme Court, in establishing and clarifying the Constitutional right of religious and other freedoms, has distinguished between the direct compulsions imposed upon individuals, with penalties for violations, and those which are indirect or reasonably incidental to a furnished service or facility. Hamilton v. Regents of University of California, 293 U.S. 245, 55 S.Ct. 197, 79 L.Ed. 343; West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L. Ed. 1628; Cantwell v. State of Connecticut, 310 U.S. 296, 303, 60 S.Ct. 900, 84 L. Ed. 1213.

[8, 9] It is true, as pointed out by appellant, that a motion for a nonsuit assumes as true every fact which the evidence, and presumptions fairly deducible therefrom, tend to prove, and on such motion the evidence must be taken most strongly against the defendant, and contradictory evidence must be disregarded. Since the petition does not allege and the facts established do not show that the City Council acted arbitrarily or abused its discretion, the court could acquire no jurisdiction to substitute its discretion for that of the determining body. It here affirmatively appears that a hearing was had before the City Council and practically all of the contentions here made as to the advisability of fluoridation of the City waters, was considered by that body, and it made the determination indicated by the resolution. Since the City Council had jurisdiction to act and make such a determination, and such determination being neither unreasonable nor an abuse of discretion, the trial court properly determined that it was unauthorized to review the advisability of such determination by the City Council, and an order for an injunction predicated on such a ground could not be sustained.

Upon the showing made before the City Council it might well have determined that it was not advisable to fluoridate the City waters. However, this was a matter for the determination by that body and the court's judgment could not be substituted for that of the City Council. The City Council still retains the right to abandon the project if, at any time, it may so determine. Likewise, a remedy by petition to that body for the repeal of the resolution or submission of the matter of its repeal to the electorate is provided. Section 23, Charter of the City of San Diego, Stats.

1931, p. 2838, at p. 2858, as amended, Stats. 1941, Chap. 78, p. 3429, at p. 3434.

Order affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

Hearing denied; EDMONDS, J., dissenting.

119 Cal.App.2d 690

ROSS v. FRANK W. DUNNE CO.

Civ. 8169.

District Court of Appeal, Third District, California.

Aug. 14, 1953.

Action by distributor against paint manufacturer for breach of exclusive distributorship agreement wherein defendant cross-complained alleging certain amount was owing from plaintiff for products sold. The Superior Court, Butte County, Dudley G. McGregor, J., entered judgment granting recovery sought by both parties, and defendant appealed. The District Court of Appeal, Schottky, J., held, inter alia, that the award of damages for plaintiff was proper.

Affirmed.

1. Appeal and Error 🔑931(1)

On appeal, all conflicts in evidence would be resolved in favor of respondent and all reasonable inferences would be drawn to uphold the judgment.

2. Sales 🔑52(5)

In action for manufacturer's alleged breach of distributorship contract, evidence in explanation of term "distributor's cost" showed that parties had agreed upon a price which was definite and certain.

3. Evidence 🔑457

Where words having technical or local significance appear in contract, evidence explanatory of them is admissible, not for purpose of adding to or qualifying, or contradicting, the contract, but for purpose of ascertaining it, so as to enable court to interpret it according to actual intention of parties and law and usage of place where it is to be performed. Civ.Code, § 1645.

4. Contracts 🔑10(4)
Sales 🔑21

A purported contract which reserves in either party an option to deliver or to accept personal property, or contracts for future delivery thereof, the quantity of which delivery is dependent upon the will, wish, want or desire of the other party, is void for lack of consideration and mutuality.

5. Sales 🔑1(1), 71(4)

Where buyer agrees to buy what he needs of a certain product, and seller absolutely promises to sell, there is a binding contract under which buyer must buy his requirements from seller and seller must sell to buyer at contract price.

6. Contracts 🔑10(4)
Sales 🔑21

Distributorship contract providing that manufacturer would supply such products as distributor might require, and that distributor was to cover a designated territory was a binding agreement and gave distributor exclusive right to market and distribute product in question in territory designated and bound distributor to buy from manufacturer all such products distributor required, and was not void for lack of consideration or mutuality.

7. Appeal and Error 🔑1010(1)

The question of whether a contract has been canceled, rescinded or abandoned is a mixed question of law and fact which is addressed to trial court, and finding of trial court will be upheld if it is supported by substantial evidence.

8. Contracts 🔑252, 256

Where contracting parties terminated their dealings, but one party did so only because the other had failed and refused to live up to the agreement, there was not mutual cancellation, rescission or abandonment.

9. Contracts 🔑350(3)

Evidence in action for breach of contract sustained trial court's determination that contract had not been canceled, rescinded or abandoned.

10. Contracts 🔑322(3)

In action by distributor against paint manufacturer for manufacturer's breach of contract in refusing to sign formal agreement, in refusing to send map designating distributor's territory, in selling to other dealers within distributor's territory, and in refusing to fill distributor's orders on terms called for by the contract, evidence supported trial court's finding that manufacturer had committed such a material breach as warranted termination of contract and award of damages. Civ.Code, § 3300.

11. Damages 🔑8

Nominal damages are presumed to follow breach of contract as conclusion of law. Civ.Code, § 3300.

12. Damages 🔑117

Generally, rule as to measure of damages for breach of contract is the actual loss sustained. Civ.Code, § 3300.

13. Damages 🔑45

Paint manufacturer's breach of distributorship contract in refusing to allow distributor exclusive distributorship proximately caused distributor to pick up and cancel back orders, to repack, retabulate, and ship back to manufacturer paint distributor had on hand at its dealers' places of business, and the expense thus entailed by distributor was proper element of damages for breach of contract. Civ.Code, § 3300.

14. Damages 🔑6, 189

Damages for breach of contract must be capable of being ascertained with some reasonable certainty, and must not be based on pure speculation or conjecture, but in case of services of nontechnical nature, trial judge may fix value from description of services performed bringing to bear his own general knowledge, and he is not necessarily bound by express evidence of value of services performed. Civ.Code, §§ 3300, 3301.

15. Damages 🔑140

In action by distributor against paint manufacturer for breach of distributorship agreement, trial judge, in assessing sum of $250 for picking up and taking back orders of paint and for repacking and retabulating the same and shipping the paint back to manufacturer did not abuse his discretion or make an unreasonable award of damages. Civ.Code, §§ 3300, 3301.

16. Damages 🔑40(2)

Loss of profits, present or future, are recoverable upon breach of contract where it can be shown that they are the direct and natural consequences of the breach. Civ.Code, §§ 3300, 3301.

17. Damages 🔑140

In distributor's action against paint manufacturer for breach of distributorship agreement wherein damages were sought for loss of profits resulting from distributor's inability to fulfill contract to furnish paint to paint nine houses, which inability was caused by manufacturer's breach, evidence supported award of $382 for such item of damages. Civ.Code, §§ 3300, 3301.

18. Damages 🔑36

Loss of good will is proper element of damages for breach of contract. Civ.Code, §§ 3300, 3301.

19. Damages 🔑6

One whose wrongful conduct has rendered difficult the ascertainment of damages cannot escape liability because damages cannot be measured with exactness. Civ.Code, §§ 3300, 3301.

20. Damages 🔑140

In action by distributor against paint manufacturer for breach of distributorship agreement wherein damages were sought for loss of effort and time in setting up dealership and in promoting sale of the paint, and loss of customers and good will, evidence sustained award of $300 for such items. Civ.Code, §§ 3300, 3301.

◆

Brace & McDonald and Lewis P. May, Oakland, for appellant.

Robert Laughlin, Chico, for respondent.

SCHOTTKY, Justice.

Plaintiff and respondent commenced an action against defendant and appellant for damages for alleged breach of contract. The complaint alleged that defendant had granted plaintiff an exclusive distributorship for the sale of its "Color Suited System" in the territory extending from Marysville to the Oregon border, excluding Oroville; that in reliance on this, plaintiff ordered products costing approximately $2,000 from defendant which he distributed to his dealers, and took orders for the product from other customers in the territory; that contrary to the terms of the agreement defendant has failed and refused to enter into a formal distribution agreement with plaintiff, and failed and refused to fill further orders by plaintiff; that defendant has failed and refused in every respect to comply with the terms of the agreement. The complaint further alleged and prayed for damages as follows:

$150 for picking up and taking back orders of paint sold to dealers in the territory;

$100 for repacking and returning the products to defendant;

$450 for loss of profit caused from having to cancel a contract to supply the product to Mobilhomes Company to be used in painting nine houses;

$500 for loss of customers, business prestige and good will caused from his inability to distribute the product to them, as agreed.

Defendant and appellant filed an answer denying the material allegations of the complaint and also filed a cross-complaint alleging that $921.90 was owing from plaintiff to defendant for products sold.

Following a trial by the court without a jury, the court found substantially in accordance with the allegations of the complaint and judgment was rendered in favor of plaintiff for $930 damages, and for defendant on its cross-complaint for $921.90, leaving plaintiff a balance of $8.10. Defendant has appealed from said judgment.

[1] Before discussing the contentions urged by appellant for a reversal of the judgment, we shall summarize briefly the factual situation as shown by the record, bearing in mind the familiar rule that all conflicts must be resolved in favor of the respondent and all reasonable inferences must be drawn to uphold the judgment.

Respondent was a distributor of Pabco paints and allied items. He served a territory from Marysville north to the Oregon border, his office being in Chico.

Appellant was a manufacturer of paints and produced a product known as the "Color Suited System". This system consisted of a set of color cards with tubes of paint dyes, plus two base paints. When a given shade was desired the tube specified on the color card was mixed with a base paint, there being only two base paints needed to produce any color.

On March 21, 1950, a salesman of appellant called upon respondent for the purpose of inducing him to handle this "Color Suited System". After preliminary negotiations were had the following contract was dictated by appellant's salesman to an employee of respondent, and signed by the salesman and respondent:

> "March 21, 1950
>
> "The following is an agreement between the Dunne Paint Company and Ross Distributing Company. It is agreed that the Dunne Paint Company will supply the Color Suited System and other products that Ross Distributing Company may require at a distributors cost. It is further agreed that Dunne Paint Company will not interfere in the present set up of Pabco distribution. That the products ordered are solely up to the discretion of the Ross Distributing Company.
>
> "The Ross Distributing Company is to cover a territory extending from Marysville north to the Oregon border with the exclusion of the Oroville territory already serviced by a Dunne dealer.
>
> "The Dunne Company agrees to cooperate in the promotion of sales, advertising and the supplying of all sales ammunition for the furtherance of sales for the Ross Distributing Company.
>
> "The Dunne Company will forward their distributorship agreement stating terms, discount, advertising and termination policy.
>
> "Frank P. Ross (Signed)
> "Ross Distributing Company
> "Gerald S. Berry (Signed)
> "Dunne Paint Company"

At the time of the signing of the contract Pabco did not have a "Color Suited System" or anything like it. Pabco and appellant, however, were competitors in the area in respect to some of their other products. Apparently respondent forwarded notice to Pabco that he was entering into this contract, since if he carried a product of another company which was manufactured by Pabco, Pabco would take away his distributorship.

Pursuant to the signing of the contract respondent ordered four or five sets of the system. These were subsequently sold to respondent's dealers who were already carrying a Pabco line of other products. In further reliance upon the agreement respondent set up five dealerships for the "Color Suited System" and generally promoted the sales of the product.

At the time of the signing of the contract discussion was had about the discount referred to in the contract, the distributorship agreement, and the territory to be given respondent. The distributor's discount caused some dispute between the parties subsequent to the signing of the contract, but apparently was settled to the satisfaction of all involved. The appellant, however, did not present the distributorship agreement to respondent, so it was never executed by the parties. Neither did appellant provide respondent with a map specifically outlining the territory allotted to respondent, although a map was used by the parties to mark on subsequent to the making of the agreement.

During the period following the execution of the above contract, appellant itself made a direct sale to a dealer within the territory allotted respondent. This sale was to the Topsol Company.

During the first four months following the signing of the above contract the parties apparently had minor disagreements over their deal. On July 18, 1950, a conference was had between respondent and appellant's agents wherein it was made clear that the appellant was not going to proceed on the basis of a distributorship agreement with respondent. It was determined by the parties at the conference that respondent would bring in all the unsold paints in his warehouse and dealers' hands, and pack and ship them back to appellant. At this time respondent admittedly owed appellant $930 for materials furnished by appellant to respondent.

Additional facts will be detailed in the course of this opinion.

Appellant's first contention is that the writing hereinbefore set forth was not a valid, binding contract because it was merely an agreement to agree, a "will, wish, want, or desire" arrangement. Appellant argues that such writings "are lacking in mutuality and therefore are not binding so long as they remain executory", citing California Refining Co. v. Producers R. Corp., 25 Cal.App.2d 104, at page 107, 76 P.2d 553, 555 in which this Court said:

> "* * * It is uniformly held that a contract which reserves in either party an option to deliver or to accept personal property, or which contracts for future delivery of personal property, the quantity of which delivery is dependent upon the will, wish, want, or desire of the other party, is void for lack of consideration and mutuality. Gordon v. Emerson Shoe Co., Tex.Civ. App., 242 S.W. 791.
>
> "In the case of Foley v. Euless, 214 Cal. 506, 6 P.2d 956, 957, a contract for processing, boxing, and marketing of Thompson seedless grapes, very similar to the present agreement chiefly because of the omission of a direct promise to deliver the property, was held to be void for lack of consideration because it was not mutually binding on the respective parties."

Respondent in reply argues that the agreement constitutes and was intended to constitute a present and existing agreement, and not merely an agreement to agree in the future; that it contains the essential terms and conditions of a distributorship contract, from which can be ascertained the contemplated territory, the price, the materials to be furnished, and cooperation by appellant in sales promotion, and that it is apparent that the parties intended the agreement to be binding, since respondent made a substantial order for merchandise on the strength of the agreement, which was accepted by appellant.

[2, 3] The trial court was of the opinion, and so found, that the contract was a valid, binding contract and we believe that the record supports such finding.

By the terms of this contract the parties are clear—definite and certain. The subject matter appears to be definite and certain, to wit, a distributorship for the "Color Suited System" and allied paint products. The price of the products to respondent is stated to be "at a distributors cost." There apparently was a conflict over what was "distributors cost". While on the face of the contract the price appeared to be clear, appellant maintains the phrase "distributors cost" did not mean what it appeared to signify. This phrase may be considered "technical", and technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense. Civil Code, section 1645; 6 Cal.Jur., Contracts, section 176. When words having a technical or local significance appear, evidence explanatory of them is admissible, not for the purpose of adding to or qualifying, or contradicting the contract, but for the purpose of ascertaining it, so as to enable the court to interpret it according to the actual intention of the parties, and law and usage of the place where it is to be performed. (6 Cal.Jur., Contracts, sec. 176.) The trial court heard the testimony explaining the phrase, and held that the contract was valid—necessarily implying that the price was definite and certain, or at least capable of being made definite and certain. We should not disturb this determination, since the record supports it.

[4–6] The "quantity" called for by the contract was "products that Ross Distributing Company may require * * *." The contract further provided: "That the products ordered are solely up to the discretion of the Ross Distributing Company." Appellant contends that this wording constituted the contract a "wish, want or desire" arrangement, and therefore the contract was lacking in mutuality because of this illusory obligation on respondent. It is true that a contract which reserves in either party an option to deliver or to accept personal property, or contracts for future delivery thereof, the quantity of which delivery is dependent upon the will, wish, want or desire of the other party, is void for lack of consideration and mutuality. 4 Cal.Jur. 10-Yr. Supp., Contracts, sec. 139; California Refining Co. v. Producers Refining Corp., supra, per Thompson, J. However, when a vendee agrees to buy what he needs (requires) of a certain product, and the vendor absolutely promises to sell, a binding contract is made. Such a contract imposes upon the vendee the duty of buying what he requires from the vendor and upon the latter the obligation to sell to him at the contract price. 4 Cal.Jur. 10-Yr. Supp., Contracts, sec. 139; Andersen v. La Rinconada Country Club, 4 Cal.App.2d 197, 40 P.2d 571. The contract states: "It is agreed that the Dunne Paint Company [vendor] will supply the Color Suited System and other products that Ross Distributing Company may require," and that "the Ross Distributing Company is to cover a territory extending from Marysville north to the Oregon border with the exclusion of the Oroville territory already serviced by a Dunne dealer."

We believe that taking the agreement as a whole, it was properly construed by the court as one in which appellant agreed to give respondent the exclusive right to market and distribute appellant's Color Suited System in the territory mentioned in the agreement and as one which also bound respondent to purchase from appellant all of said products required by it as a distributor in said territory.

[7] Appellant next contends that the contract was cancelled, mutually rescinded or abandoned on either May 5, 1950, or July 28, 1950. The question of whether a contract has been cancelled, rescinded or abandoned is a mixed question of law and fact, Jones v. Noble, 3 Cal.App.2d 316, 39 P.2d 486; Thompson v. Municipal Bond Co., 23 Cal.App.2d 402, 73 P.2d 274, which is addressed to the trial court, Sessions v. Meadows, 13 Cal.App.2d 748, 57 P.2d 548; Lohn v. Fletcher Oil Co., Inc., 38 Cal.App.2d 26, 100 P.2d 505, and the finding of the

trial court will be upheld if it is supported by substantial evidence.

[8] In the instant case there was conflicting evidence upon this issue. The record shows that the parties carried on their dealings after May 5, 1950, the first alleged date of cancellation or rescission. This being the case, there could hardly be said to have been a cancellation or rescission. In regard to the events on July 28, 1950, the record shows that the parties did terminate their dealings, but respondent did so only because appellant failed and refused to live up to the agreement. This does not appear to amount to a mutual cancellation, rescission or abandonment.

[9] As stated in Katzenbach & Bullock v. Breslauer, 51 Cal.App. 756, 757, 197 P. 967:

> "Some point was made by appellant that it had been mutually agreed between the parties that the contract should be canceled, abandoned, and rescinded. The trial court found, upon conflicting evidence, that it was not so agreed and that said contract was never canceled, abandoned, and rescinded. We are therefore not at liberty to go into this question of fact."

[10] Appellant next contends that even assuming that there was a valid contract, and that appellant violated its terms by the sale to another distributor within respondent's territory, still there was not a sufficient breach to justify a termination of the contract or the court's consequent finding of damages. However, there is evidence to show that appellant failed and refused to forward and execute the formal distributorship agreement, failed and refused to furnish a map specifying the territory, and sold its products to Topsol Co. within the territory allotted to respondent. However, respondent himself admits that appellant never refused to ship paint to him so that he could fill his orders. But appellant would fill them only on terms different from those called for by the contract. There is also evidence showing that the products were taken back from respondent at appellant's request, not respondent's. Appellant admits it refused to sign the formal agreement, send the map, desist from selling to other dealers within respondent's territory, and that it offered to take back the unsold products. Appellant's conduct indicates that it was not going to live up to this "exclusive agreement," so from the evidence in the record it can be said that the findings of the trial court on the materiality of the breach as warranting a termination of the contract and an award of damages are substantially supported by the foregoing cited testimony.

Appellant also contends that the court's findings on the various items of damages are not supported by the evidence or the law.

[11, 12] Once a breach of contract has been proven, nominal damages are presumed to follow as a conclusion of law. (8 Cal.Jur., Damages, sec. 7.) Generally, the rule as to the measure of damages for breach of contract is the actual loss sustained. (8 Cal.Jur., Damages, sec. 78.) The Civil Code, Section 3300, provides more specifically for the measure of damages for breach of contract:

> "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."

[13] Appellant first attacks the award of $250 given respondent "for picking up and taking back orders of said paint and products and for repacking and retabulating the same." First, damages for this type of item seem to be allowed by law. By refusing to allow respondent the exclusive distributorship, respondent had no alternative but to pick up orders of its dealers for the products, and return all of the products for credit. But for this breach respondent would not have been put to the expense of picking up and cancelling back orders, and repacking, retabulating, and shipping back to appellant the products it had on hand at its dealers' places of business. The expense entailed in this procedure would, therefore, seem to be a detri-

ment proximately caused by the breach. Respondent should, under Civil Code Section 3300 be compensated for this detriment.

[14] Appellant contends that the award of $250 damages for this item was arbitrary and that there was no evidence to support it. While it is true that damages must be capable of being ascertained with some reasonable certainty, and must not be based on pure speculation or conjecture, 8 Cal. Jur., Damages, section 23; Civil Code, § 3301, it is also true, as stated in Estate of Reinhertz, 82 Cal.App.2d 156, at page 160, 185 P.2d 858, 860, 186 P.2d 755, that "In the case of services of a non-technical nature, such as here involved, the judge may fix the value from a description of the services performed bringing to bear his own general knowledge and is not necessarily bound by express evidence of the value of the services performed. [Citing cases.]" And as stated in Johnson v. Snyder, 99 Cal.App.2d 86, at page 90, 221 P.2d 164, 167; "There is no express testimony of the cost of removing the fixtures but for services of a commonplace or nontechnical character the trial judge can call on his own general knowledge of their value. Estate of Reinhertz, 82 Cal.App.2d 156, 160, 185 P.2d 858, 186 P.2d 755, and cases cited." See, also, Parmarlee v. Bartolomei, 106 Cal.App.2d 68, 73, 234 P.2d 1019.

[15] Here the trial court had before it evidence of the size of respondent's territory, and the effort required to render this nontechnical service. It also had before it evidence of the part time salary of one of respondent's employees, who at the time in question was working for respondent full time and undoubtedly earning a larger salary. Under these circumstances it cannot be said that the trial judge, in assessing the sum of $250 for this item of damage, abused his discretion or made an unreasonable award of damages for this nontechnical service based upon the evidence and his own general knowledge of its value.

[16, 17] Appellant next attacks the court's award of $382 to respondent for loss of profits that would have been earned by a sale of the products to Mobilhomes as unsupported by the evidence. Loss of profits, present or future, are recoverable upon a breach of contract if it can be shown that they are the direct and natural consequences of the breach. (8 Cal.Jur., Damages, sec. 36.) Here respondent proved that it had a contract with Mobilhomes to furnish it appellant's product to paint nine houses. There was testimony to the effect that respondent's profits would be between $45 and $50 per house. The testimony further showed that this particular product, the Color Suited System, was placed in the Mobilhomes office, and that buyers of the homes selected the paint colors from the color charts and chips pertaining to the Color Suited System. This product could not apparently be duplicated since the colors of other paints would vary from the colors selected by the Mobilhomes Corporation. Figuring 9 houses at $45, a total of $405 is reached; the court awarded $382. Thus the evidence is sufficient to support the amount awarded.

[18] Appellant finally attacks the item of $300 awarded by the trial court as damages sustained by respondent for loss of effort and time in setting up dealerships and promoting the sale of appellant's product, and loss of customers and good will. That the loss of good will is a proper element of damages is not to be doubted. Landon v. Hill, 136 Cal.App. 560, 29 P.2d 281; Beckett v. City of Paris Dry Goods Co., 14 Cal.2d 633, 96 P.2d 122. However, appellant asserts that there is no evidence to support the finding of the amount of $300 for loss of good will, etc. The court in Schuler v. Bordelon, 78 Cal.App.2d 581, at page 586, 177 P.2d 959, 962, answered a similar contention by stating:

> "* * * In the instant case it is true, as contended by appellant, that plaintiffs' profit during the remainder of the term from the Coast Van Lines' contract could not be determined with any accuracy, * * *. Nevertheless, there was substantial evidence that the loss of this contract was a proximate result of the wrong committed by appellant. It was within the province of the triers of fact to determine the loss suffered by respondents not only because of the cancellation of the Coast

Van Lines contract, but the damage resulting to their business and the good will thereof * * *.

"In determining the amount of damages that should be assessed against appellant herein, the jury was entitled to estimate as best they could from the evidence before them, the loss sustained by respondents in the cancellation of the Coast Van Lines contract, the loss of other business, as well as the good will thereof. Undoubtedly, in cases like this entire accuracy is impossible, and some difficulty is encountered in accurately assessing the damages * * * but it must not be forgotten that such difficulty would have been avoided had appellant taken care that no occasion should arise through his tort requiring such assessing of damages."

[19, 20] Again, "One whose wrongful conduct has rendered difficult the ascertainment of the damages cannot escape liability because the damages could not be measured with exactness." Zinn v. Ex-Cell-O Corp., 24 Cal.2d 290, 297, 149 P.2d 177, 181. Here the trial judge had before him evidence of the efforts expended by respondent in promoting the sale of appellant's product. The trial judge also had before him the number of units of the Color Suited System sold by respondent and his gross profit thereon. Taking the $139 gross profit made by respondent from the sale of appellant's product while respondent was in business, plus the $300 award by the trial judge for loss of effort and good will, it cannot be said that such award was unreasonable under the evidence of the case or amounted to an abuse of discretion under the wide latitude of discretion vested in the trier of fact to assess damages in this type of case. The total award would be slightly more than $100 per month for the four months respondent considered the contract in force, not to mention the loss that would be sustained in the future, since it was over one year before respondent was able to replace a product similar to appellant's in his customers' places of business.

No other points raised require discussion. The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

---

119 Cal.App.2d 592

In re RUTAN'S ESTATE.

FARMERS & MERCHANTS NAT. BANK OF LOS ANGELES v. UNITED STATES NAT. BANK OF DENVER et al.

Civ. 19219.

District Court of Appeal, Second District,
Division 1, California.

Aug. 10, 1953.

Rehearing Denied Aug. 31, 1953.

Hearing Denied Oct. 8, 1953.

Proceeding by testamentary trustee for instructions concerning the administration of a trust. From an order of the Superior Court of Los Angeles County the trustee and others named in the will appealed. The District Court of Appeal, Drapeau, J., held that the provision of will giving one-third of the income of the trust, upon the happening of a contingency, to testatrix' brother-in-law, but to testatrix' heirs at law if brother-in-law died before the happening of the contingency, and brother-in-law did die before the happening of the contingency, created an interest in testatrix' heirs at law who were to be determined as of the time of the occurrence of the contingency.

Reversed with exception of order to trustee to pay certain emergency expenses and not to pay funeral expenses of primary beneficiary of trust.

1. Wills 🔑439

A will is to be construed according to the intention of the testator, and to be given effect as far as possible.

2. Wills 🔑457

Where a will is drawn by a lawyer whose competence is beyond question, the presumption that legal terms embodied in will are used in their legal sense is all but conclusive.

3. Wills 🔑439, 455

The court must examine the testamentary document to discover the dominant testamentary scheme or general intention of decedent, and in that connection the apparent meaning of particular words, phrases, or provisions must be subordinated to such scheme, plan or dominant purpose.

4. Wills 🔑775

Where will provided for payment of trust income to testatrix' granddaughter, and upon her death without children for payment of one-third of the income to brother-in-law, and brother-in-law died before granddaughter, the bequest to brother-in-law lapsed.

5. Wills 🔑524(6)

Where will provided that corpus of trust should go to "my heirs at law" should the principal beneficiary of income of the trust die childless during the existence of the trust, if certain other secondary beneficiaries were not living at that time, the heirs were to be determined as of the time of death of the primary beneficiary.

6. Wills 🔑452

If the provisions of a will are capable of two interpretations, under one of which those of the blood of testator will take, while under the other the property will go to strangers, the interpretation by which the property goes to those of the blood of the testator is preferred.

7. Wills 🔑524(6)

Where testatrix created trust with income to granddaughter and upon granddaughter's death before 50 to granddaughter's children, or one-third of trust's income to testatrix' brother-in-law if granddaughter died childless, but, if brother-in-law predeceased granddaughter, then to "my heirs at law", and brother-in-law did predecease granddaughter, brother-in-law's share would be properly distributed to heirs of testatrix as determined at death of granddaughter and not to granddaughter's estate.

8. Wills 🔑686(1)

Under will establishing trust with income to granddaughter, and upon granddaughter's death before 50 to granddaughter's children, or two-thirds of the income to testatrix' daughter-in-law if granddaughter died childless, and upon daughter-in-law's decease to "my heirs at law", granddaughter's death without issue before reaching age 50 entitled daughter-in-law to two-thirds of the income of the estate, but not to a termination of the trust and distribution of corpus to her.

9. Wills 🔑684(2)

Provision of will giving trustee power to invade trust corpus to make available funds in event of illness, accident, or unusual condition occurring in life of beneficiary allowed payment of emergency expenses of last illness of beneficiary, but did not include payment for mortuary, funeral and burial services of beneficiary.

Chandler P. Ward, Los Angeles, for appellant testamentary trustee.

Larwill & Wolfe, Thomas A. Wood and Stevens Weller, Jr., Los Angeles, for appellant executor of estate of Wm. Thos. Chambers, deceased.

Gibson, Dunn & Crutcher, E. H. Conley and Robert F. Schwarz, Los Angeles, for appellant administrators of estates of Mathis and Mertz, deceased.

Combs & Hoose, Lee Combs, Beverly Hills, Thomas J. Kelley, Los Angeles, and Harned Pettus Hoose, Beverly Hills, for respondent.

DRAPEAU, Justice.

Anna C. Rutan, a widow, executed her last will on August 26, 1937. After her death on July 24, 1941, it was duly admitted to probate and its terms were incorporated in decrees of distribution entered on April 20, 1942 and July 27, 1943, respectively.

The dispositive provisions of the will may be summarized as follows:

By article second, testatrix gave her clothing, jewelry, personal effects and real estate "to my granddaughter Donna Rutan."

By article third, she gave her residuary estate to Farmers and Merchants National Bank of Los Angeles in trust, conditioned as follows:

(a) To pay the entire net income in monthly installments "to my granddaughter Donna Rutan." If the income be insufficient to pay $200 per month, to invade the corpus for that purpose, but in that event to deduct the advancement of corpus from the bequest of $5,000 under paragraph (b).

(b) Two years after testatrix' death to pay "to my granddaughter Donna Rutan" $1,000 from corpus. Ten years thereafter to pay to said Donna $5,000. These bequests to lapse in the event of distribution of the trust estate "under the terms as hereinafter provided prior to the date upon which either or both of these bequests shall become due."

(c) "Upon my granddaughter Donna Rutan reaching the age of fifty (50) years, I direct my Trustee herein named to distribute all of the corpus of my trust estate then remaining in its hands, to her."

(d) "Should my granddaughter Donna Rutan predecease me or die before reaching the age of fifty * * * to pay the net income of my trust estate to her children living at the time of my demise. Upon the youngest of said children reaching the age of twenty-one years, I direct my Trustee to distribute the corpus of my trust estate then existent, share and share alike, to said children."

(e) "* * * Should my granddaughter Donna Rutan predecease me or die during the existence of this trust, leaving no children, I direct that my Trustee continue to administer my trust estate for the time and in the manner as follows:"

(1) To distribute two-thirds of the income monthly for the remainder of her life to Emily Clarke Rutan.

(2) To distribute one-third of the income monthly to C. A. Rutan during his natural life.

(3) Upon the demise of Emily Rutan, "to distribute two-thirds of the corpus of my trust estate to my heirs-at-law, in the manner and amounts, as provided by the laws of the State of California."

(4) "Upon the demise of the survivor of the remaining two beneficiaries under this paragraph of my will to distribute the remainder of the corpus of my trust estate to my heirs-at-law" in the same manner.

(5) "Should any of the beneficiaries named in this paragraph of my will predecease me or be deceased at the time when this paragraph of my will would become operative for their benefit were they living, I direct that portion of the corpus of my trust estate, the income on which would have gone to them were they living, be distributed to my heirs-at-law" in like manner.

(i) "The duration of this trust shall in no event nor by any possibility, extend beyond the death of the last surviving of the following persons: Donna Rutan, Emily Clarke Rutan, C. A. Rutan, and the children of Donna Rutan, living at the time of my demise."

The trust was declared to be one for maintenance; spendthrift and disinheritance clauses were included, as well as other provisions not material at this point.

A stipulation of facts discloses that testatrix, a widow, died July 24, 1941; that her only child, Roscoe C. Rutan, predeceased her; that said son was married to Emily Clarke Rutan, and that Donna Rutan was their sole issue.

When testatrix died, her nearest surviving relatives were:

Donna Rutan	Granddaughter
Dr. William Thomas Chambers	Brother
Anna Kepner Mertz	Maternal first cousin
Edith Kepner Mathis	Maternal first cousin.

Mr. C. A. Rutan, one of the beneficiaries of the trust, and the brother-in-law of testatrix, died in April, 1942.

Dr. Chambers, brother of testatrix, died March 29, 1949, without issue and the United States National Bank of Denver is executor of his estate.

Donna Rutan died January 5, 1951, during the existence of the trust and prior to attaining the age of fifty years; unmarried and without issue.

Anna Kepner Mertz died January 18, 1951, and George J. Arblaster is administrator of her estate.

Edith Kepner Mathis died during the pendency of this appeal, i. e., October 3, 1952, and Ben H. Brown, Public Administrator, as administrator of her estate, has been substituted in her place.

Emily Clarke Rutan, the mother of Donna, is the sole heir at law and next of kin of Donna Rutan, and is the duly appointed administratrix of Donna's estate.

It was stipulated in open court that Donna Rutan was thirty-seven years of age when she died.

On July 26, 1951, Farmers and Merchants National Bank, as testamentary trustee, filed a petition for instructions regarding administration of the trust.

The questions there posed with respect to distribution of income and corpus of the trust estate, among others, required an interpretation of the words used in the will and the decrees of distribution: "to my heirs-at-law in the manner and amounts as provided by the laws of the State of California." Specifically, whether those words "in the light of other provisions of said will and decree(s) of distribution", referred to Donna Rutan (who was the sole heir at law of testatrix at the latter's death), or referred to persons who were heirs at law of testatrix at the time of the death of Donna Rutan.

The family tree, which forms part of the record on appeals, reveals that when Anna C. Rutan died, Donna Rutan, her granddaughter, was her sole heir at law. When Donna died, Anna's sole heirs were her maternal first cousins Mertz and Mathis, now deceased.

Among other things, the trial court found:

"VI. That it is true that the testamentary trust wholly terminated upon the death of Donna Rutan on January 5, 1951.

"VII. That it is true that Donna Rutan was the sole heir at law of the decedent herein who died July 24, 1941, and that C. A. Rutan having died in April, 1942, before the Testamentary Trust became operative for his benefit and upon the death of Donna Rutan as herein found, the entire trust estate became on January 5, 1951, and now is, distributable to Emily Clarke Rutan, as Administratrix of the Estate of Donna Rutan, deceased, under and pursuant to the intent expressed and manifest in the Last Will and Testament of Anna C. Rutan.

"VIII. That it is true that Testatrix when she used the words heirs at law in her will, used an intended to use the same in the ordinary and legal meaning and referred to her heirs at law living at the time of her demise; that it is true that the only heir at law of Anna C. Rutan living at the time of her demise was Donna Rutan; that it is true that Donna Rutan died leaving no children and having as her sole heir at law her mother, Emily Clarke Rutan."

From the order which followed, the testamentary trustee, the executor of the estate of William Thomas Chambers, deceased, and the administrators of the estates of Anna Kepner Mertz and Edith Kepner Mathis have appealed.

The order appealed from reads in part as follows:

"The Trustee is instructed, and it is hereby determined that the testatrix in using the words 'heirs-in-law' in her last will and testament, including Paragraph (e) (5) of said will, intended to refer and did refer solely to the heirs-at-law of Anna C. Rutan living at the time of her demise; that the only heir-at-law of Anna C. Rutan living at the time of her demise was Donna Rutan; that said Donna Rutan having died without issue, and C. A. Rutan having previously died, Emily Clarke Rutan, as administratrix of the estate of Donna Rutan, deceased, is entitled to 1/3rd of the corpus and of undistributed income under Paragraph (e) (5) of said will; that upon the death of Donna Rutan without issue, following the death of C. A. Rutan, followed by distribution of 1/3rd of the corpus and undistributed income of said trust, as hereinabove specified, the purposes for which said trust was created as to the remaining 2/3rds thereof ceased to exist and the same terminated as to said remaining 2/3rds of corpus and undistributed income and Emily Clarke Rutan, as administratrix of the estate of Donna Rutan is entitled to receive such ⅔rds; that the Trustee forthwith prepare and file its Final Account and Petition for Distribution accordingly."

In support of the order, respondent urges that in the absence of a clear and unqualified expression to the contrary, the testatrix meant by the words "my heirs at law" those persons who met that qualification at her death, citing Estate of Newman, 68 Cal.App. 420, 229 P. 898.

Appellant executor of the brother's estate agrees with respondent that by the use of the words "my heirs at law", testatrix meant her heirs as determined at date of her death. But it argues that the express terms of the will clearly manifest an intention to exclude Donna Rutan from the general class of testatrix' heirs at law; and likewise clearly create conditions precedent to Donna Rutan taking any part of the remainder trust corpus.

Appellant administrators of the two cousins' estates also urge that the terms of the will demonstrate a clear intent to exclude Donna from the persons designated as "my heirs at law", and that those words meant and were intended to mean testatrix' heirs determined as of the time the respective trust interests terminate.

Appellant testamentary trustee's appeal is in defense of the trust and against its termination as to the two-thirds interest of Emily Rutan. Appellant executor and appellant administrators likewise assert that the trust has terminated only as to one-third and must continue until the death of the remaining life tenant as to the other two-thirds.

The questions presented are:

1. To whom did testatrix refer when she used the words "my heirs-at-law"?

2. Do the terms of the will indicate an intention on the part of testatrix to exclude her granddaughter Donna from the general class of "my heirs-at-law"?

3. May the trust be terminated?

[1] "In the construction of wills the paramount rule, to which all others must yield, is that a will is to be construed according to the intention of the testator, as expressed therein, and this intention must be given effect as far as possible. [In re] Estate of Wilson, 184 Cal. 63, 66, 67, 193 P. 581; [In re] Estate of Newman, 68 Cal. App. 420, 423, 229 P. 898; [In re] Estate of McCurdy, 197 Cal. 276, 282, 240 P. 498; [In re] Estate of Phelps, 182 Cal. 752, 756, 190 P. 17; [In re] Estate of Ritzman, 186 Cal. 567, 568, 569, 199 P. 783." In re Estate of Lawrence, 17 Cal.2d 1, 6, 108 P.2d 893, 896.

[2] Where a will is drawn by a lawyer whose competence is beyond question, the presumption that legal terms embodied in a will are used in their legal sense is all but conclusive. In re Estate of Welsh, 89 Cal.App.2d 43, 50, 200 P.2d 139.

[3] Moreover, "It is also axiomatic that we must stand by the words of the will, and we cannot attribute to the testator any intention which cannot reasonably be drawn from the language of the testamentary document itself; but it is also the rule that in examining a testamentary document we must do so with a view to discovering the dominant testamentary scheme or general intention of the decedent; and in this connection the apparent meaning of particular words, phrases or provisions must be subordinated to such scheme, plan or dominent purpose." In re Estate of Kruger, 55 Cal.App.2d 619, 622, 131 P.2d 619, 621.

And, as stated in 49 A.L.R. 177, 178, et seq.: "It is a general rule of testamentary construction, so universally recognized as to render superfluous a full citation of the cases which support it, that, in the absence of clear and unambiguous indications of a different intention to be derived from the context of the will, read in the light of the surrounding circumstances, the class described as testator's heirs, or next of kin, or relations, or such persons as would take his estate by the rules of law as if he had died intestate, to whom a remainder or executory interest is given by the will, is to be ascertained at the death of the testator. * * *

"The rule above stated is not a rule of substantive law, but a rule of interpretation which has been adopted by the courts as one means of ascertaining the intention of the testator, as expressed in his will; and it never should be used to defeat what, from the whole will, appears with reasonable certainty to have been his intention. (P.180.) * * *

"The expression of a contrary intention which will preclude the application of the rule must be clear and unambiguous; and it is not sufficient that there is in the will that which raises a doubt, ever so serious, as to whether the testator intended that the next of kin should be ascertained at some future time. (P.181.) * * *

"* * * the circumstance that the first taker will be one of a class to whom the limitation over is made is generally held not to be incongruous with the ascertainment of the membership of the class as of the time of testator's death; even where the first taker is given an absolute interest subject to be defeated by condition subsequent, or a defeasible fee. (P.182.)

"Some of the cases appear to have taken the view that, where the person taking the particular estate is, at testator's death, the sole member of the class to whom the limitation over is made, it is a necessary inference that the gift over shall vest in the persons answering the description at the termination of the particular estate. But the great weight of authority is to the effect that the fact that at the time of the making of the will, the person to whom a particular estate is given will presumably be, at the testator's death, the sole member of the class to whom the same property is limited, is not of itself sufficient to overcome the presumption that the membership of the class is to be ascertained at testator's death. (P.183.) * * *

"Slighter indications will, in the case of a gift to a single heir, suffice to take a gift out of the general rule, than would be required in the case of a gift for life to one of several heirs, followed by a gift of the corpus to the heirs generally. (P.184.)"

By the terms of the will, it is clear that the trust was to terminate when Donna reached the age of fifty years, under the direction to distribute the entire corpus of the trust to her at that time.

She died before reaching that age, unmarried and childless. As a result Paragraph Third (e) 1, 2, 3, 4, 5, became effective. By this paragraph, in the event that Donna predecease testatrix or die during the existence of the trust, leaving no children, the trustee is directed (1) to distribute ⅔ of the income to Emily for the remainder of her life; (2) to distribute ⅓ of the income to C. A. Rutan for his life; (3) upon the death of Emily to distribute ⅔ of the corpus to "my heirs-at-law"; (4) upon the death of the survivor of "the two remaining beneficaries under this paragraph of my will", i. e., Emily and C. A. Rutan, "to distribute the remainder of the corpus of trust estate to my heirs-at-law."

[4] Since C. A. Rutan died in April, 1942, the month in which rateable distribution of the corpus was made to the testamentary trustee, the bequest of income to him lapsed. This for the reason that he had to survive Donna to get it. During the interim all income from the trust estate was payable to Donna. And upon her death one-third of the corpus became subject to Paragraph Third (e) (5) of the will, to wit:

"Should any of the beneficiaries named in this paragraph of my will predecease me or be deceased at the time when this paragraph of my will would become operative for their benefit were they living (to wit: the death of Donna), I direct that portion of the corpus of my trust estate, the income on which would have gone to them were they living, be distributed to my heirs-at-law in the manner and amounts as provided by the laws of the State of California."

In other words, this one-third interest in the corpus became distributable upon Donna's death to testatrix' heirs at law.

With the utmost precision, testatrix designated her granddaughter by name throughout the entire document by which she conferred many benefits upon her:

all the income from the trust estate; an assured monthly payment; payments from the corpus at two and ten year intervals; payments from corpus in case of illness or emergency; and finally the right to the entire trust estate when she reached the age of fifty years.

All of these provisions had reference to Donna living or reaching the age of fifty years. They conferred no benefits on her if she died before fifty years. Because, when testatrix undertook to dispose of her estate in the event of Donna's death before age fifty, she provided not for Donna, but for Donna's children; for life incomes for Donna's mother and for Donna's uncle. Eventually, she provided not for Donna or Donna's heirs, but for "my heirs-at-law."

These provisions are consistent with an intent to give the corpus of the trust to Donna only if she reached fifty years. They are utterly inconsistent with an intent to give the corpus to Donna before that age, or to embrace her within the class "my heirs-at-law."

When the will was written, Donna was the sole heir of testatrix, and Emily was Donna's only heir at law. By inserting paragraph (e) in her will, testatrix contemplated that before it could become effective, Donna must have died before reaching the age of fifty leaving no children.

The very fact that testatrix then directed distribution of income to Emily for the remainder of her life, is a very strong indication that testatrix did not intend that Donna should be included within the class "my heirs-at-law."

Had testatrix intended that Donna's heirs should take the corpus, if Donna died after testatrix, leaving no children, it is reasonable to believe that she would have said "to the heirs of my granddaughter Donna Rutan", following the general tenor of the document, instead of "to *my* heir-at-law."

The leading case of In re Estate of Wilson, 184 Cal. 63, 65, 68, 193 P. 581, appears to be decisive here. In that case the will provided: "'All the real property * * I give and devise unto my said son, to have and to hold the same for and during the term of his life; * * * it being my intention to devise unto him a life estate * * * with remainder over at his death, to his then living children; and if he leave no issue, then upon his death, all such real property shall be distributed among my heirs, as provided by the laws of the state of California, the same as if I had died intestate.'"

Testatrix Wilson had only one son. He survived testatrix. Said son died without living issue. His sole heir was his widow, who claimed that the son took under the limitation to heirs, and that she took through him. Other claimants were various nieces and nephews of testatrix who survived the son.

The supreme court upheld the claim of the latter group in the following language: "* * * It is self-evident that while the son, who was in the strict technical sense the sole heir apparent of this widow of widow 60 years of age, was an heir, he could not be 'heirs,' nor could the real property be disturbed 'among' him, the term 'distributed among' necesarily referring 'to a gift to more than two' heirs. See In re Hildebrant's Estate, [268 Pa. 132], 110 A. 760. It is almost impossible to conceive that the testatrix, knowing, as she must be held to have known, that her son was her sole heir at law, taking the word 'heir' in the technical sense, would have used this language, 'distributed among my heirs,' etc., to indicate a gift to him.

"Especially is this true in view of the fact that wherever before or after these words she referred to her son in the will she designated him as 'my son, Thaddeus McConnell,' or 'my said son,' or 'my said son, Thaddeus McConnell,' indicating that in every case where she intended to provide for or refer to him, she thus described him. * * * It seems clear that in so far as her son was concerned, the provisions specifically made for him were intended to be the sole provisions in his behalf, and that by the term 'my heirs' who were to take in default of issue of her son surviving him was meant *her* next of kin other than her son."

The court then held that the son's widow was not entitled to take, stating, 184 Cal. at page 71, 193 P. at page 584: "* * * we think it clear that the intention was that they [the heirs] should be determined as of the date of the termination of the life estate."

[5] Likewise here it is clear that testatrix intended that "my heirs-at-law" should be determined at the death of Donna "during the existence of the trust, leaving no children."

[6] Moreover, as said in Re Estate of Boyd, 24 Cal.App.2d 287, 289–290, 74 P.2d 1049, at page 1050: "It is well settled that where the provisions of a will are capable of two interpretations, under one of which those of blood of the testator will take, while under the other the property will go to strangers, the interpretation by which the property goes to those of blood of the testator is preferred. In re Estate of Hartson, 218 Cal. 536, 24 P.2d 171; In re Estate of Wilson, 65 Cal.App. 680, 225 P. 283."

All of this leads to the conclusion that by the terms of her will, testatrix clearly indicated her intention to exclude Donna from the general class of heirs at law. And that by use of the words "my heirs-at-law", testatrix had reference to those persons answering that description at the termination of the respective interests in the trust estate.

[7] It follows that the one-third interest, hereinbefore referred to, is distributable to the heirs at law of testatrix as determined at the death of Donna Rutan.

[8] With respect to the two-thirds interest remaining in the hands of the testamentary trustee, testatrix did not intend that Emily during her own lifetime should receive any portion of the corpus of the trust estate. The *first condition* (Donna's death, leaving no children) having been met, testatrix then directs trustee to continue administering the trust as long as Emily shall live and not until the death of Emily "to distribute two-thirds of the corpus of my trust estate to my heirs-at-law." The *second condition* to distribution of the remaining two-thirds of the corpus was the prior death of Emily.

In addition to the direct grant of income to Emily for life, the will declares: "This is a trust for maintenance"; and also contains a so-called spendthrift clause, to-wit:

"(f) Each beneficiary hereunder is hereby restrained from anticipating, encumbering, alienating, or in any other manner assigning his or her interest or estate in either principal or income, and is without power so to do, nor shall such interest or estate be subject to his or her liabilities or obligations, nor to judgment or other legal process, bankruptcy proceedings or claims of creditors or others. All income and/or principal shall be payable and deliverable only and personally to the respective beneficiaries entitled thereto."

Testatrix also provided that duration of the trust was not to extend beyond the death of the survivor of the following: Donna Rutan, Emily Clarke Rutan, C. A. Rutan, and the children of Donna Rutan living at testatrix' death.

In the circumstances, taking into consideration the fact that the trustee is given no power to invade the corpus of the trust for the benefit of Emily Clarke Rutan, termination of the trust would clearly be improper during her life.

Appropriate here is the following excerpt from In re Estate of Easterday, 45 Cal.App.2d 598, 604, 114 P.2d 669, 672: "It is the law in a majority of American jurisdictions that where a trust is established with the object of placing the trust property beyond the control of the beneficiary, effect may be given to this intention and termination of the trust denied, although all persons who will have an interest in the trust upon its termination are in being and *sui juris* and assign their interest to the sole life beneficiary, or otherwise consent to termination of the trust. This rule applies even though there is no spendthrift provision in the trust."

[9] The order appealed from instructs the trustee that "pursuant to paragraph (g)

of the will it should exercise its discretion in favor of payment from corpus of the sum of $2,220.98 of emergency expenses of the last illness of Donna Rutan, specified in the Findings of Fact."

Paragraph (g) reads as follows: "In the event of illness, accident, or any unusual condition occurring in the life of Donna Rutan, to her, making it necessary for her to have more funds than her income provides at said time, I direct that my Trustee may, in its discretion, invade the corpus of my trust estate to provide for Donna Rutan and the children of Donna Rutan living at the time of my demise, in such exigency."

Appellant administrators object to payment of such expenses which were unpaid at the time of Donna's death, for the reason that such payment would deprive the beneficiary properly entitled to the trust fund of the amount thereof.

Since the expense was incurred because of illness of Donna Rutan during her lifetime, we are of the opinion that the instruction above recited was proper, pursuant to the provisions of paragraph (g) of the will.

This court is also of the opinion that the trial court properly instructed the trustee not to pay any part of "the obligation of $3,248.65 to Forest Lawn Memorial Park Association, for mortuary, funeral and burial services of Donna Rutan" for the reason that such payment "is not contemplated or permitted by Paragraph (g) of the will of decedent."

For the reasons stated, that portion of the order appealed from instructing the testamentary trustee respecting payment of emergency expenses and nonpayment of funeral expenses is affirmed. In all other respects, the order is reversed, with directions to the trial court to proceed in accordance with the views herein expressed. Costs on appeal are to be borne by the trust estate.

WHITE, P. J., and DORAN, J., concur.

Hearing denied; EDMONDS, J., dissenting.

---

119 Cal.App.2d 645

SAPP v. SUPERIOR COURT OF STATE, IN AND FOR LOS ANGELES COUNTY.

SAPP et al. v. SUPERIOR COURT OF STATE, IN AND FOR LOS ANGELES COUNTY.

Civ. 19583, 19690.

District Court of Appeal, Second District, Division 1, California.

Aug. 11, 1953.

Rehearing Denied Aug. 28, 1953.

Hearing Denied Oct. 8, 1953.

Petitions for writs of prohibition and mandate. The District Court of Appeal, Scott, J., pro tem., held that Superior Court had no authority, express or implied, to enter order six months after interlocutory decree of divorce was entered setting aside interlocutory decree on ground that husband had made false representations at trial which had induced wife to enter into community property settlement stipulation.

Petition for mandate granted conditionally, and petition for writ of prohibition denied and alternative writ discharged.

1. Marriage ⚷1

Marriage is a personal relation arising out of a civil contract, but persons who are married and desire to end that relationship must come into court to secure divorce instead of ending it by mutual agreement. Civ.Code, §§ 55 to 181.

2. Divorce ⚷165(4)

In divorce proceeding, Superior Court had no authority, express or implied, to enter order six months after interlocutory decree of divorce was entered setting aside interlocutory decree on ground that husband had made false representations at trial which had induced wife to enter into community property settlement stipulation. Civ.Code, §§ 55 to 181; Code Civ.Proc. § 473.

3. Judgment ⚷444

Failure to perform duty to speak or make disclosures which rests upon one because of a trust or confidential relation is a "fraud" for which equity may relieve from a judgment thereby obtained, even though the breach of duty occurs during a judicial proceeding and involves false testimony, whether such fraud be regarded as extrinsic or as an exception to the extrinsic fraud rule.

See publication Words and Phrases, for other judicial constructions and definitions of "Fraud".

4. Divorce ⚿254

If husband had induced wife through fraudulent representations at trial of divorce proceeding to enter into property settlement stipulation, wife's right, if any, after interlocutory decree had become final, should be adjudicated in an independent action in equity, rights should be determinable as of date of interlocutory decree, and it is unnecessary to set aside decree in whole or in part.

5. Husband and Wife ⚿271, 278(1)

Husband, as manager of community property, occupies position of trust which is not terminated as to assets remaining in his hands when spouses separate, and as part of his fiduciary duties husband must account to wife for community property when spouses are negotiating a property settlement agreement. Civ.Code, §§ 158, 172–173.

6. Divorce ⚿254

Concealment of community property assets by husband from wife in connection with property settlement agreement is breach of fiduciary duty of husband that deprives wife of opportunity to protect her rights in the concealed assets and thus warrants equitable relief from judgment approving such agreement. Civ.Code, §§ 158, 172–173.

7. Mandamus ⚿51

Mandate is an appropriate remedy to compel the entry of a final decree where court's duty is plain and unmixed with exercise of discretionary powers.

8. Mandamus ⚿51, 176

Where no appeal was pending from interlocutory decree of divorce which had been entered more than one year earlier, husband was entitled to writ of mandate to require Superior Court to enter final divorce decree, on condition that husband drop appeal from Superior Court order purporting to vacate decree on ground that husband had made false representations at trial which had induced wife to enter into community property settlement stipulation. Civ.Code, §§ 132, 133.

* * *

N. E. Youngblood, Beverly Hills, for petitioner-respondent Gertrude Sapp.

Lester M. Roth, Cohen & Roth, Beverly Hills, for petitioners Maxwell Sapp, David Sapp and Eva Sapp.

SCOTT, Justice pro tem.

Two proceedings herein are considered together. Although each is directed to the Superior Court as respondent, the real parties in interest are Gertrude Sapp and Maxwell Sapp. Gertrude Sapp seeks a writ of prohibition and Maxwell Sapp seeks a writ of mandate, both petitions relating to one case in the Superior Court which is the divorce case beween the parties, being numbered No. 396,535 in that court.

From the record of the case, it appears that the parties had married in October, 1948, and had separated in December, 1949, after a little more than fourteen months of marriage. On April 5, 1950, Maxwell Sapp as plaintiff filed suit for divorce against Gertrude Sapp as defendant, charging mental cruelty in general terms. An amended complaint was later filed particularizing the conduct upon which the charge was based. Mrs. Sapp filed an answer to the amended complaint and filed a cross-complaint and later filed an amended cross-complaint against her husband seeking separate maintenance. She filed a further amendment later. David Sapp, the brother of Maxwell Sapp, and Eva Sapp, his mother, were joined as parties cross-defendant and are named in these proceedings because of some interest in property of the principal parties. They answered the amended cross-complaint.

The trial of the case started on November 26, 1951, upon the limited issue concerning the nature, extent and value of community assets. On December 5, 1951, the parties announced that they were prepared to enter into a stipulated judgment which gave the wife $7,500 for her interest in the community property and $2,500 attorneys fees and costs. Thereupon, the husband withdrew his amended complaint and his answer to the amended cross-complaint. The wife further amended her cross-complaint for separate maintenance so as to seek divorce and introduced evidence in support of her cause of action for termination of the marriage. An interlocutory decree of divorce was granted to Gertrude Sapp, embodying the above provisions of the stipulation concerning property. This interlocutory decree was entered December 28, 1951.

On June 23, 1952, Gertrude Sapp filed a notice of motion for an order vacating and setting aside the interlocutory judgment of divorce therein and reopening said cause for further hearing. The notice stated that the motion would be made on July 11, 1952. In the meantime no motion for a new trial had been made and no notice of appeal had been filed.

In affidavits of Gertrude Sapp and her attorney filed in support of her motion it was claimed that her husband, through his attorney, had made false representations at the trial which had induced her to enter into the stipulated judgment and she asked that the judgment be set aside and the case reopened because of alleged extrinsic fraud on the part of her husband. More than six months had elapsed between the entry of the interlocutory judgment on December 28, 1951, and the date of the motion on July 11, 1952.

On November 14, 1952, Gertrude Sapp's motion was granted. On January 7, 1953, Maxwell Sapp, together with his brother and mother, filed notice of appeal from the order of November 14, 1952, granting Gertrude Sapp's motion to set aside the judgment and reopen the case. The record of this appeal has not been filed in the reviewing court. Appellants have indicated their readiness to abandon this appeal which they can do under Rule 19a, Rules on Appeal, by filing a written abandonment of the appeal in the office of the clerk of the superior court. This will operate to dismiss the appeal and to restore the jurisdiction of the superior court.

On January 13, 1953, Gertrude Sapp obtained and served on Maxwell Sapp an order to show cause for support and attorneys fees and costs on appeal, to be heard on January 23, 1953.

On January 21, 1953, Maxwell Sapp and David Sapp served and filed in the trial court notice of motions to vacate the order of November 14, 1952 and to enter final judgment, said motions to be heard on January 23, 1953. Gertrude Sapp appeared specially for the purpose of objecting to the court's jurisdiction to consider the motions because of the earlier notice of appeal. Hearing on the motions was postponed and waits determination of proceedings now before this court.

Gertrude Sapp now seeks a writ of prohibition which would preclude consideration by the trial court of the motions last mentioned and would restrain further proceedings therein until the appeal has been decided.

Maxwell Sapp, David Sapp and Eva Sapp ask that the trial court be ordered to enter the final decree nunc pro tunc as of January 23, 1953, and be restrained from doing acts inconsistent therewith.

We have concluded (1) that the trial court was without legal authority to make its order of November 14, 1952 undertaking to set aside the interlocutory judgment and to reopen the case; (2) that Maxwell Sapp is entitled to have a final decree of divorce entered nunc pro tunc as of January 23, 1953; and (3) that Gertrude Sapp by the foregoing determinations is not precluded if she be so advised from instituting an action in equity seeking to be relieved of the effect of the stipulated judgment on the ground of extrinsic fraud, and asking that she have her rights as to the property only determined in the light of the facts as they existed on the date of the granting of the interlocutory decree.

The order of November 14, 1952 was not an order granting a new trial. It was not an order made in response to a motion made within the six months of the interlocutory decree, so it could not be regarded as having been made under powers granted by Section 473 of the Code of Civil Procedure.

It is suggested that the trial court had "inherent power" to make such an order because of alleged extrinsic fraud of the husband. The case of King v. Superior Court, 12 Cal.App.2d 501, 506, 56 P.2d 268, relied on by appellant does not in our opinion furnish adequate support for this suggestion.

At the trial of the case now before us there were two separate issues presented for determination by the court: (1) the marital status of the parties; (2) their respective property rights.

[1, 2] As to the determination of the issue of marital status we find that Gertrude Sapp was the one to whom the divorce was granted, on testimony which she gave and produced. She makes no claim that it was fraudulent or incorrect on the issue of whether she should continue to be the wife of Maxwell Sapp. Both parties agreed in effect that if the mutual love, confidence and respect had once given vitality to their marriage it no longer existed. Gertrude Sapp asked for a judicial recognition of the fact that the marriage was dead, and Maxwell Sapp acquiesced. Although marriage is a personal relation arising out of a civil contract, section 55, Civ.Code, persons who are married and who desire to end that relationship must come into court to secure a divorce instead of being permitted to end it by mutual agreement. The laws relative to marriage and divorce, sections 55 to 181, Civ.Code, have been enacted because of the profound concern of our organized society for the dignity and stability of the marriage relationship. This concern relates primarily to the status of the parties as husband and wife. The concern of society as to the property rights of the parties is secondary and incidental to its concern as to their status. In the case before us there were no children and no problem of custody is involved.

The decision of the trial court granting the interlocutory decree had become final before the order was made purporting to set aside the decree and reopen the case. Bancroft v. Bancroft, 178 Cal. 367, 368, 173 P. 582; Deyl v. Deyl, 88 Cal.App.2d 536, 539, 199 P.2d 424; 9 Cal.Jur. 762. This order setting aside the decree and reopening the case was not sought because of any claim that vitality had been restored to the marriage, or because any fraud or error had clouded the evidence relating to the change of status of the parties. It was asked for only because the wife asserted that the husband had fraudulently concealed property in which she had a community interest and that she is entitled to a larger share than was awarded to her under the judgment to which she had stipulated.

Her notice of motion to set aside the interlocutory judgment and to reopen the case stated that it was upon the ground that the judgment resulted from a stipulation after approximately seven days of trial as a contested matter, that Maxwell Sapp had fraudulently concealed valuable community property, which he knew about and she did not, and that she relied upon his statements, representations and testimony that all community property had been disclosed and otherwise she would not have entered into the stipulation and "that said stipulation occurred through her mistake, inadvertence, surprise or excusable neglect." Affidavits in support of the motion were filed by Gertrude Sapp and by her attorney. The latter's affidavit disclosed that about two months before the trial he had spent eight and one-half hours continuous time taking depositions of Maxwell Sapp and David Sapp concerning their property and business. It further declared that these men at the trial produced a cash receipt book which they had previously denied to be in existence.

It is thus readily apparent that the trial of the divorce case between the parties was an adversary proceeding in which the parties and their attorneys placed little if any trust or confidence in the other side. It is claimed by Gertrude Sapp that there was perjury or concealment by her husband, and that it was such extrinsic fraud as to vest the trial court with inherent power to vacate the interlocutory judgment and reopen the case.

The case of Aldrich v. Aldrich, 203 Cal. 433, 264 P. 754, is brought to our attention with the suggestion that it is authority for the order of November 14, 1952, in this case. In the cited case the trial court's refusal to grant a motion by an aggrieved wife to set aside a decree of divorce granted to her husband was reversed on appeal. The husband had committed a fraud on the court by filing a false affidavit in publication of summons giving an erroneous address for defendant wife, although he knew where she was living, and since there was no personal service and defendant received no notice of the action she was prevented from protecting her interests. In the cited case the court held, 203 Cal. at page 437, 264 P. at page 755: "The limitation of time prescribed by section 473, Code of Civil Procedure is inapplicable here. In the case of McGuinness v. Superior Court, 196 Cal. 222, 237 P. 42, 40 A.L.R. 1110, it was held that a trial court has inherent power to set aside a judgment obtained through a fraud committed upon it, and its right so to do is not derived from section 473 of the Code of Civil Procedure nor limited to the time therein specified."

But that factual situation is substantially different from the instant case in which we find that the spouse asserting the fraud is the one who prevailed in the determination of the principal issue, and that she now complains of conduct of the cross-defendants concerning the secondary issue of property. She had been in court with her lawyer for seven days, and if what she received was less than that to which she now believes she is entitled it is not because she was denied her day in court or because the trial court decided against her on controverted issues of fact, but because she entered into a stipulation for a judgment with her adversaries. She now asserts that they had not freely and fully disclosed all the information which she sought to obtain from them.

[3] The terms "intrinsic" and "extrinsic" fraud or mistake are generally accepted as appropriate to describe two different categories of cases. It is necessary to examine the facts in each case in the light of the policy that a party who failed to assemble all her evidence at the trial should not be privileged to relitigate a case, as well as the policy permitting a party to seek relief from a judgment entered in a proceeding in which she was deprived of a fair opportunity fully to present her case. The latter policy applies when a party's adversary, in violation of a duty arising from a trust or confidential relation, has concealed from her facts essential to the protection of her rights, even though such facts concerned issues involved in the case in which the judgment was entered. The failure to perform the duty to speak or make disclosures which rests upon one because of a trust or confidential relation is obviously a fraud, for which equity may relieve from a judgment thereby obtained, even though the breach of duty occurs during a judicial proceeding and involves false testimony, and this is true whether *such fraud be regarded as extrinsic or as an exception to the extrinsic fraud rule*. (Emphasis added). Jorgensen v. Jorgensen, 32 Cal.2d 13, 19, 193 P.2d 728.

To set the interlocutory judgment in this case aside would be manifestly inequitable for the further reason that it would raise the questions of (1) how much, if any, additional community interest Gertrude Sapp might have in property acquired by Maxwell Sapp between the date of the original interlocutory judgment which was thus vacated and some future date when a new interlocutory judgment might be granted, and (2) how much support, and additional attorneys fees and costs might be required of Maxwell Sapp for his wife's benefit, and (3) how much of an obstacle to free and successful enterprise on the part of Maxwell Sapp it would be if he were thus restored to the status of a man married to a hostile spouse.

[4] Whatever rights Gertrude Sapp may have it would seem that they should be determinable as of the date of the interlocutory judgment already granted. It may be that she can have them adjudicated in an independent action in equity. Scott v. Dilks, 47 Cal.App.2d 207, 209, 117 P.2d 700. It is not necessary that the divorce decree be set aside in whole or in part. Milekovich v. Quinn, 40 Cal.App.

537, 545, 181 P. 256; Taylor v. Taylor, 192 Cal. 71, 218 P. 756, 51 A.L.R. 1074.

The cases of Westphal v. Westphal, 20 Cal.2d 393, 126 P.2d 105, and Gale v. Witt, 31 Cal.2d 362, 188 P.2d 755, and the earlier cases of Flood v. Templeton, 152 Cal. 148, 92 P. 78, 13 L.R.A.,N.S., 579, and Caldwell v. Taylor, 218 Cal. 471, 23 P.2d 758, 88 A.L.R. 1194, distinguish between intrinsic and extrinsic fraud, and it might be considered that they cast a doubt on Gertrude Sapp's right to relief even in such an independent action in equity. The cases cited and many others must be considered in deciding whether she is entitled to the relief which she seeks. But the language above emphasized in the case of Jorgensen v. Jorgensen, supra, and written by the same justice who was the author of the opinion in the case of Westphal v. Westphal, supra, supports our conclusion that although Gertrude Sapp is not entitled to have the divorce decree set aside and Maxwell Sapp is entitled to have a final decree entered in the divorce case our adjudication of the matters now before us is not intended to and does not preclude an independent suit in equity brought by her seeking to assert any right she may claim to have in additional property.

[5, 6] In the case of Jorgensen v. Jorgensen, supra, 32 Cal.2d 13, at page 21, 193 P.2d 728, at page 733, the court further says: "As the manager of the community property the husband occupies a position of trust (Civ.Code, secs. 172–173, 158), which is not terminated as to assets remaining in his hands when the spouses separate. It is part of his fiduciary duties to account to the wife for the community property when the spouses are negotiating a property settlement agreement. The concealment of community property assets by the husband from the wife in connection with such an agreement is therefore a breach of a fiduciary duty of the husband that deprives the wife of an opportunity to protect her rights in the concealed assets and thus warrants equitable relief from a judgment approving such agreement. * * * It is immaterial whether the husband or the wife has submitted the property settlement to the court for approval; the fraud of one spouse in concealing the assets, if not discovered by the other, precludes the latter from protecting his or her rights as to the concealed assets in the divorce proceeding."

The outcome of such an independent action in equity by Gertrude Sapp would of course be dependent upon the facts which she might be able to establish, considered in the light of the law as set out in the many cases dealing with the subject, including, among others, the case of Cameron v. Cameron, 88 Cal.App.2d 585, 199 P.2d 443.

A judgment in an equitable action of that nature does not set aside the judgment or order attacked but has the effect of holding the one who fraudulently secured the property under it as a trustee for the person defrauded, Purinton v. Dyson, 8 Cal.2d 322, 327, 65 P.2d 777, 113 A.L.R. 1230. See also Boullester v. Superior Court, 137 Cal.App. 193, 30 P.2d 59.

[7, 8] Mandate is an appropriate remedy to compel the entry of a final decree where the court's duty is plain and unmixed with the exercise of discretionary powers. Stewart v. Superior Court, 3 Cal.App.2d 702, 704, 40 P.2d 529. The date of January 23, 1953 is more than one year after the date of the entry of the interlocutory decree and under sections 132 and 133, Civil Code, Maxwell Sapp is entitled to ask for the entry of the final decree and to have it entered nunc pro tunc as of that date.

To effectuate our determination on the matters above considered we have concluded that the following orders should be and are hereby made, conditioned upon abandonment under Rule 19a, Rules on Appeal, by cross-defendants Maxwell Sapp and David Sapp of their appeal in the divorce case in conformity with their indication of readiness to do so:

Petitioner Gertrude Sapp's petition for a peremptory writ of prohibition is denied, and the alternative writ issued is discharged;

Petitioners Maxwell Sapp, David Sapp and Eva Sapp's petition for writ of mandate is granted as follows: Upon receipt of a certificate of the clerk of the trial court that the appeal has been abandoned, a peremptory writ of mandate will issue directing the trial court to vacate its order of November 14, 1952, hereinabove referred to; further ordering it to ascertain whether payments have been made to Gertrude Sapp and others as required by the interlocutory judgment; and further ordering that when the trial court has determined that the payments have been made, it shall enter the final judgment of divorce nunc pro tunc as of January 23, 1953.

WHITE, P. J., and DORAN, J., concur.

---

119 Cal.App.2d 714

REAMS et al. v. IMPERIAL HORSEMEN'S ASS'N.

Civ. 4595.

District Court of Appeal
Fourth District, California.

Aug. 14, 1953.

Proceeding on motion for order compelling entry of satisfaction of judgment. The Superior Court of Imperial County, Heald, J., entered order directing entry of satisfaction, and plaintiffs appealed. The District Court of Appeal, Mussell, J., held that suspension of defendant's corporate powers did not bar its motion to compel plaintiffs to acknowledge satisfaction of judgment when second motion was made after revival of corporation's suspended corporate powers.

Order affirmed.

1. Abatement and Revival 🔑35

Where hearing on motion to compel acknowledgment of satisfaction of judgment was continued and during continuance corporation was relieved from suspension of corporate powers by certificate of revivor and thereafter made second motion, prior suspension was not bar to relief.

2. Judgment 🔑894

Where judgment creditor's assignee used a judgment and assignment in an attempt to redeem property of judgment debtor sold at sheriff's sale in another action against debtor, but there was no sale of debtor's property under judgment involved and judgment had not been satisfied of record at time debtor's motion to compel acknowledgment of satisfaction of judgment was submitted, with sufficient deposit, debtor was entitled to entry of satisfaction of judgment.

◆

Sturdevant & Kimball, El Centro, for appellant C. C. Cuin.

Dickenson & Sattinger, El Centro, for respondent.

MUSSELL, Justice.

This is an appeal from an order of the Superior Court of Imperial county directing the clerk thereof to enter satisfaction in full of a judgment in the sum of $571.25, plus interest and costs, obtained by plaintiff Lee Reams against the defendant corporation. The judgment was dated April 10, 1951, and was assigned to one C. C. Cuin. Thereafter, on October 18, 1951, a tender in the amount of $707. 38 was made to Cuin as payment of the principal, interest and costs due on the judgment. No objection to the form or amount of the tender was made by Cuin. However, he refused to accept it and the amount thereof was deposited in Cuin's bank account by C. W. Dickenson, an attorney who represents the defendant in the instant action, and notice of the deposit was sent to Cuin.

On December 29, 1951, defendant filed a motion for an order compelling the plaintiff or his assignee of record, C. C. Cuin, to give an acknowledgment of satisfaction of judgment in the instant action and to compel Cuin to make an endorsement of satisfaction on the face or margin of the judgment. The motion was made on the grounds that the judgment had been satisfied by payment thereof and that the said C. C. Cuin had refused to give an acknowledgment of satisfaction thereof or make an endorsement on the record of such payment.

A hearing was had on January 4, 1952, at which time the attorneys for appellant opposed the motion on the grounds that the corporate powers of the defendant corporation had been suspended and the judgment had been used by Cuin in redeeming property of the corporation sold under a prior judgment against it. At this hearing the attorneys for appellants requested a continuance of the matter to enable them to obtain a certified copy of an order suspending the corporate rights and powers of the defendant corporation. The trial court, however, decided to hear the testimony of the witnesses then present so that they would not have to attend another hearing, and after their testimony was introduced, continued the matter to January 24, 1952. On this date a notice of suspension of the corporate powers of the defendant was filed in opposition to defendant's motion and defendant then put in evidence a certificate of revivor of defendant's corporate powers, which certificate was issued by the Franchise Tax Board. Counsel for defendant then made an oral motion for a satisfaction of judgment and asked the court to consider the evidence which had been theretofore presented in connection with the motion. This request was granted and the matter was submitted for decision.

On August 29, 1952, the trial court ordered the clerk to enter satisfaction in full of the judgment. Plaintiff and C. C. Cuin appeal from the said order.

[1] Appellant's first argument that the suspension of the corporate powers of the defendant corporation was a bar to the motion is without merit. While the corporate powers of defendant were apparently suspended when the motion to enter satisfaction of the judgment was first made, the corporation was relieved from the suspension by the certificate of revivor before the second motion was made and the matter was finally submitted for decision. Under the circumstances presented by the record, the prior suspension was not a bar to the motion. Hall v. Citizens Nat. Trust & Savings Bank, 53 Cal.App.2d 625, 630, 128 P.2d 545.

[2] Appellant's argument that the use of the judgment by appellant C. C. Cuin in the redemption proceedings referred to was a defense to defendant's motion is likewise untenable. Apparently Cuin used the judgment here involved, together with the assignment thereof, to attempt to effect a redemption of property of defendant corporation sold at a sheriff's sale in another action against the corporation. It is unnecessary to pass upon the question of whether a redemption was effected in that action as there was no sale of defendant's property under the judgment here involved and it had not been satisfied of record at the time defendant's motion was submitted to the court for decision.

Order affirmed.

BARNARD, P. J., concurs.

119 Cal.App.2d 432

H. MOFFAT CO. v. ROSASCO.

Civ. 8246.

District Court of Appeal, Third District, California.

July 29, 1953.

Rehearing Denied Aug. 24, 1953.

Hearing Denied Sept. 24, 1953.

Cattle buyer's action for breach of sales agreement resulting from seller's failure to deliver full amount of cattle agreed upon, wherein seller sought reformation of contract. The Superior Court, Merced County, Gregory P. Maushart, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Schottky, J., held, inter alia, that the evidence failed to show that it was the common intention of the parties to buy and sell only so many steers as defendant may have owned, or to buy and sell 726 steers, the number delivered, rather than 800 head, as called for by the written contract, but, on the contrary, showed that the oral understanding was the same as the written agreement.

Affirmed.

1. Appeal and Error 🔑173(2)

Where cattle seller did not at trial of breach of contract suit against him raise issue that title to cattle had passed at earlier date and did not raise issue of impossibility of performance, such issues could not be raised on appeal.

2. Sales 🔑197

Title to cattle under sales contract providing for future delivery did not pass at time of contract.

3. Reformation of Instruments 🔑19(1)

In order to justify reformation of written contract, it must be shown that, through mutual mistake of parties, or mistake made by one party and known or suspected by other party, the written agreement fails to express terms of oral agreement previously made by parties. Civ.Code, § 3399.

4. Reformation of Instruments 🔑45(15)

In cattle buyer's action against seller for failure to provide full amount of cattle called for by written contract, wherein buyer sought reformation, evidence failed to show that it was common intention of parties to buy and sell only so many steers as seller may have owned, or that they agreed to buy and sell 726 steers, the number delivered, instead of 800 head as called for by written contract, but showed that oral understanding was the same as the written agreement. Civ.Code, § 3399.

5. Appeal and Error 🔑1011(1)
Reformation of Instruments 🔑45(2)

To reform contract, evidence must be clear and convincing to trial court, and on appeal, its decision upon conflict of evidence is conclusive. Civ.Code, § 3399.

6. Appeal and Error 🔑989

Where judgment is attacked as being unsupported by evidence, power of appellate court begins and ends with its determination as to whether there is substantial evidence which will support judgment.

7. Sales 🔑87(3)

In cattle buyer's action for breach of sales contract because seller delivered 74 head of steers less than that required by contract, wherein seller complained of damages awarded based upon average weight of steers delivered contending that the shortage consisted of yearlings and there was no evidence as to the market value of yearlings, evidence sustained finding that heavy yearlings were included within term "steers" as used by contract.

8. Appeal and Error 🔑768

Failure of party to deny statement of fact in his adversary's brief may result in acceptance of its truth by court where record does not show the contrary.

9. Appeal and Error 🔑882(19)

Where appellant in closing brief did not deny sending to trial court letter, which suggested that judgment be modified by computing damages for breach of cattle sales contract upon average weight of long yearlings rather than upon average weight of steers delivered, which fixed market value of yearlings, and which was set out in respondent's brief, and judgment was modified by reducing it to amount suggested in letter, appellant could not successfully complain that there was no evidence as to market value of long yearlings.

10. Appeal and Error 🔑1033(9)

Appellant could not successfully complain of judgment against him for an amount less than that which evidence would have supported

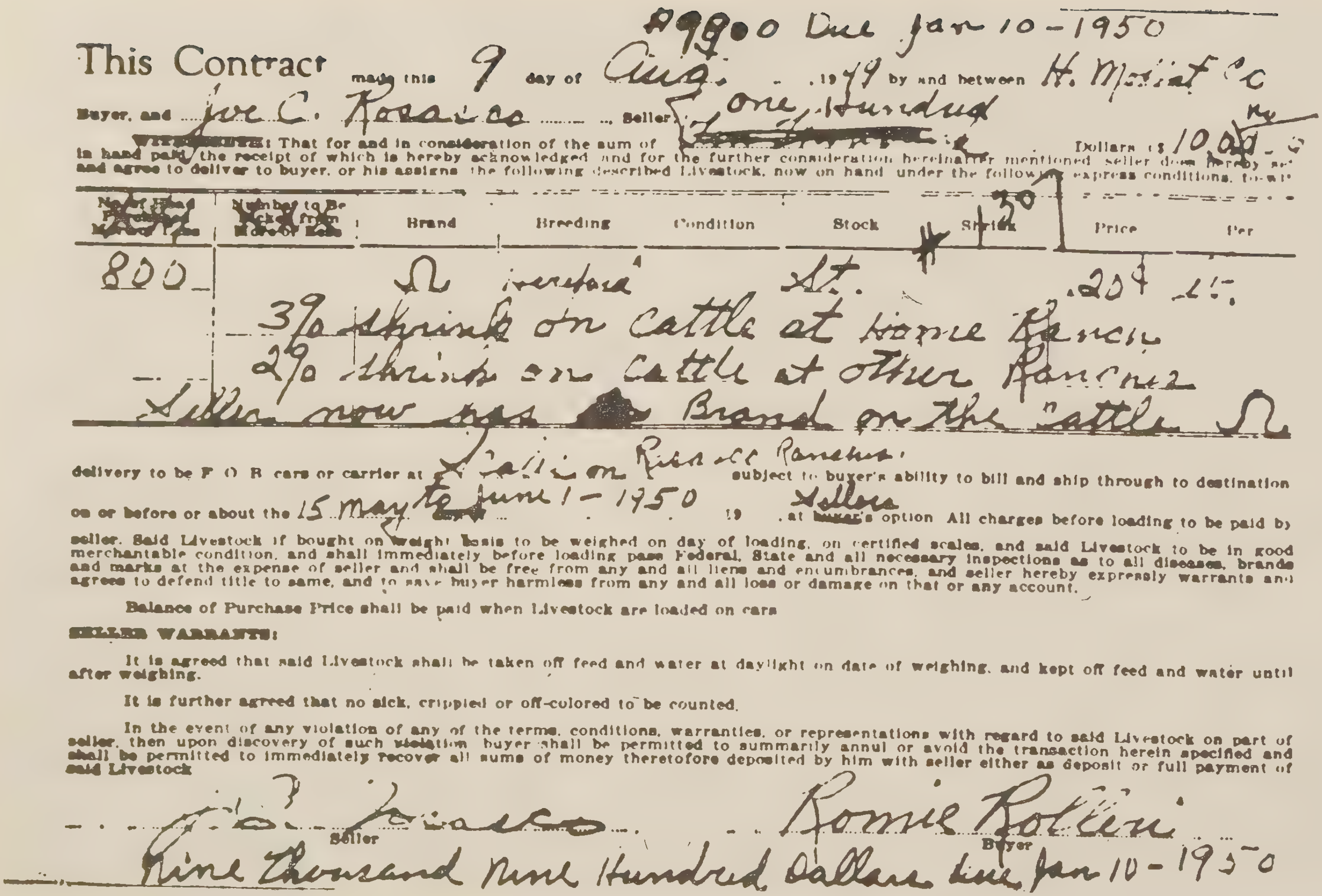
◆

Vernon F. Gant, Modesto, for appellant.

C. Ray Robinson, Merced, Orville R. Vaughn, San Francisco, W. E. Craven, William B. Boone, Merced, Morrison, Hohfeld, Foerster, Shuman & Clark, San Francisco, F. C. Hutchens and R. C. Foerster, San Francisco, for respondent.

SCHOTTKY, Justice.

Respondent corporation commenced an action against appellant to recover damages for alleged breach of contract. It alleged in substance that the parties entered into a written agreement whereby defendant agreed to deliver to plaintiff, between May 15, 1950, and June 1, 1950, at defendant's ranches, 800 head of cattle at 20¢ per pound, payment to be made by $100 at the time of the making of the agreement, $9,900 on the 10th day of January, 1950, and any balance as the cattle were loaded; that plaintiff performed all of the conditions precedent and was ready, able and willing to receive and to pay for the cattle, but that defendant failed and refused to deliver 800 head of cattle, but instead has delivered only 726 head, and that as a result of this breach plaintiff has been damaged $7,999.40, and also $269 in addition, which amount was overpaid said defendant on the purchase price through advances. A facsimile of the contract was appended to the complaint as an exhibit and is as follows:



$9900 Due Jan 10-1950

This Contract made this 9 day of Aug. 1949 by and between H. Moffat Co Buyer, and Joe C. Rosasco Seller

~~WITNESSETH~~: That for and in consideration of the sum of One Hundred ~~[illegible]~~ Dollars ($100.00) in hand paid, the receipt of which is hereby acknowledged and for the further consideration hereinafter mentioned seller does hereby sell and agree to deliver to buyer, or his assigns the following described Livestock, now on hand under the following express conditions, to-wit:

~~Number of Head More or Less~~	~~Number to Be Picked from More or Less~~	Brand	Breeding	Condition	Stock	Shrink	Price	Per
800		Ω	Hereford		St.		.20¢	lb.

3% shrink on cattle at home Ranch
2% shrink on cattle at other Ranches
Seller now has [illegible] Brand on the cattle Ω

delivery to be F O B cars or carrier at Station on Russell Ranches subject to buyer's ability to bill and ship through to destination on or before or about the 15 May to June 1-1950 19 , at ~~buyer's~~ Sellers option All charges before loading to be paid by seller. Said Livestock if bought on weight basis to be weighed on day of loading, on certified scales, and said Livestock to be in good merchantable condition, and shall immediately before loading pass Federal, State and all necessary inspections as to all diseases, brands and marks at the expense of seller and shall be free from any and all liens and encumbrances, and seller hereby expressly warrants and agrees to defend title to same, and to save buyer harmless from any and all loss or damage on that or any account.

Balance of Purchase Price shall be paid when Livestock are loaded on cars

SELLER WARRANTS:

It is agreed that said Livestock shall be taken off feed and water at daylight on date of weighing, and kept off feed and water until after weighing.

It is further agreed that no sick, crippled or off-colored to be counted.

In the event of any violation of any of the terms, conditions, warranties, or representations with regard to said Livestock on part of seller, then upon discovery of such violation buyer shall be permitted to summarily annul or avoid the transaction herein specified and shall be permitted to immediately recover all sums of money theretofore deposited by him with seller either as deposit or full payment of said Livestock

J. C. Rosasco Seller

Romie Rollini Buyer

Nine Thousand Nine Hundred Dollars due Jan 10-1950

Defendant and appellant filed an answer and cross-complaint in which he admitted the signing of the contract; admitted that he delivered only 726 head of cattle; denied that he refused to deliver 800 head or that plaintiff had been damaged by his failure to deliver any cattle. In his cross-complaint defendant and appellant prayed that the court reform the contract in accordance with the actual intention of the parties, and that the court determine and decree that the defendant has fully performed said contract, as reformed. He alleged that by mutual mistake the parties set the number of cattle to be sold at 800, both believing defendant had this number, when in fact the lot consisted of approximately 750 head; that, in truth, at the time of the making of the contract there were only 748 head, and between the time of the making of the contract and the time of the roundup 10 head were lost and 8 head died; that when the steers were finally rounded up only 726 head were found; that it was never the intention of the plaintiff to buy, nor of the defendant to sell any definite or specific number of steers, rather plaintiff intended to buy and defendant intended to sell all the steers of a certain breeding and brand then owned by defendant, and ranging in the state of Nevada; and that, according to the true intentions of the parties the defendant has fully performed in accordance with the terms of the contract.

Following a trial before the court without a jury the court found in favor of plaintiff on its complaint and against the defendant on his affirmative defense and cross-complaint for reformation, and found specifically "that the common intention, understanding and agreement of both plaintiff and defendant was correctly, accurately, truly and fully reduced to writing and was correctly, accurately, truly and fully incorporated in said agreement in writing."

In accordance with said findings judgment was entered in favor of plaintiff in the sum of $3,876.50, and this appeal is from said judgment.

Before discussing the contentions made by appellant we shall summarize briefly the testimony given at the trial, all of which came from two witnesses, Romie Rolleri and appellant.

Rolleri, a cattle buyer and agent for respondent, met appellant in Winnemucca, Nevada, in the afternoon of August 8, 1949, and during the afternoon and evening Rolleri had a conversation with appellant in which appellant offered to sell his steers to respondent for May delivery at 20¢ per pound, and after some discussion Rolleri agreed to buy them for that price. They wrote "the deal" on a napkin that night, and the contract as hereinbefore set forth was made and signed the next morning. The contract was written on a printed form. The printed words "No. of Head Purchased More or Less" were crossed out and the figure "800" was inserted in the space below those words. The words "No. to Be Picked from More or Less" were also crossed out, and no figures were placed in the space below those words. Under the word "Stock" appears the abbreviation "St." Rolleri testified that the word "St." was an abbreviation for steers. During the preliminary negotiations Rolleri asked appellant how many steers he had to sell and appellant said "I have got 800 steers to sell." According to Rolleri it was understood from the beginning of the discussions that appellant had 800 steers to sell and that the sale was of 800 steers. Appellant himself testified that he told Rolleri that he had about 800 steers, and that they talked about 800 steers and that he glanced at the written contract and saw the price and the steers but paid no particular attention to the figure 800. On the morning of August 9, 1949, when the contract was signed appellant told Rolleri that he had 800 steers to sell and stated, according to Rolleri, "I will fill in with my heavy yearlings if I don't have the big steers, I will fill in with the heavy yearlings."

Appellant delivered only 726 steers to respondent, the deliveries being made between May 25, 1950, and June 1, 1950. After appellant had delivered 726 steers to plaintiff, Rolleri testified that he told appellant he was 74 steers short and that the company wanted the steers, and that appellant said, "I have not got them." Appellant testified that in October, 1949, after the making of the contract and after he had determined the number of steers he had, he told Rolleri he would be short of 800 head. He also testified that in August, 1950, he told Mr. Moffat, the respondent, the same thing and that Mr. Moffat said, "Forget about the cattle, just tear the ticket up."

At the time the contract was made appellant told Rolleri that some of the cattle were in Nevada and some were on two different ranches in California. The steers in Nevada were on the so-called Bill Wright ranch. Appellant claimed that he had 735 steers in Nevada which were yearlings and "twos" on August 9, 1949, and that he had about 125 yearling steers in Nevada on that date and 9 or 10 yearling steers, together with 5 or 6 older steers, in California at that time. Defendant stated that he also had 400 to 500 stock cattle in California on August 9, 1949, and that he had about 250 calves in California on that date. He also testified that he had about 125 yearling steers on June 1, 1950, which had been weaned the previous fall, and that these yearling steers were about 18 months old in June, 1950, and weighed about 650 to 700 pounds at that time. None of these yearling steers were shipped to respondent. Rolleri testified that a steer calf that was 8 to 10 months old in October, 1949, would be a steer in May and June in 1950; that a steer is a yearling until it is a year and a half old and then it is a short two; that it is a steer calf until it turns one year of age, and then it becomes a yearling steer. Rolleri further testified that he saw some steers on appellant's ranch in California after the last delivery to respondent, but appellant testified that these steers were purchased in Wyoming after the contract with respondent was made.

Rolleri testified that he had been engaged in the business of buying cattle for about thirty years; that he devoted his entire time to buying and selling cattle. He testified further that he bought about 15,000 head of cattle during the year 1950 and that the market or current price for steers in late May and early June of 1950 was 27½¢ for steers of an age, weight and quality similar to the steers that were purchased from appellant for respondent, and that the average weight of the steers sold by appellant at the time of delivery was 1080 pounds.

Additional testimony will be referred to in the course of this opinion.

Appellant contends that the findings of the court are not supported by the evidence, and in arguing for a reversal of the judgment relies on the following points:

1. That under the terms of the contract, the title to said steers passed to the buyer on August 9, 1949.

2. That the buyer having prepared the contract, any ambiguity or uncertainty therein must be resolved against him.

3. That the buyer intended to buy and the seller intended to sell *the steers* then (*on August 9, 1949*) owned by seller ("on hand") and bearing a specifically designated brand and that the seller could not go on the open market and make up any shortage.

4. That there was a mutual mistake as to the number of said steers, if the figure 800 is to be considered as referring to the number of head and that said contract should have been reformed.

5. That appellant has fully performed said contract by delivering all the steers of the kind described by him and "*on hand*" on August 9, 1949, except those that were lost or died and that further or more complete performance of the contract by him was and is impossible.

6. That the plaintiff proved no damage.

Appellant devotes a considerable portion of his briefs to the contentions (1) that the title to the steers passed to respondent on August 9, 1949, and that the respondent must bear the loss of the 10 head of steers that appellant testified died or were lost in Nevada and the 8 head on his other ranches, and (2) that because of the death or loss of said steers further or more complete performance of the contract was impossible. Respondent in reply contends that these points were not presented to the trial court and that therefore they cannot be raised upon appeal.

A careful reading of the entire record makes it clear that appellant did not rely on these contentions in the trial court and that he did not urge them at any stage of the proceedings in the trial court. Indeed, when the case was called for trial, appellant's counsel sought permission to amend his answer so as to specifically deny that respondent had been damaged, and when this was opposed by respondent's counsel, appellant's counsel stated that it was through an inadvertence that the amount of damages was not denied, and added: "The basic question is whether or not there was a breach of the contract, and if a breach of contract, of course, as I say, it is obvious that the plaintiffs would be entitled to some damages, but the question is how much, and we don't want to concede that the amount claimed is the correct amount. All we want to do, of course, is put in issue the amount of damages." The court granted appellant permission to so amend his answer, and the amended answer and cross-complaint was filed after the trial. At no time in the trial court did appellant assert that the title to the steers passed at the time the contract was signed. In fact, appellant's counsel made a motion for a nonsuit on the ground that no damage had been proved, and stated: "The general rule is, of course, that where there is a contract to deliver and delivery is not made, that the party is required to go out on the open market and meet his requirements, and that if the other party is liable at all, he is liable for the difference," indicating clearly that he regarded the contract as a contract to deliver.

The record shows that the case was submitted to the trial court upon briefs and it is clear from the able memorandum opinion of the trial court (which discusses the evidence and issues in considerable detail), that no such issues as passage of title to the steers at the time the contract was signed, and impossibility of performance, were presented to the trial court.

In MacKenzie v. Angle, 82 Cal.App.2d 254, at page 263, 186 P.2d 30, 35, this court said: "A rule, early established and long adhered to in the courts of this state, is that questions not raised in a lower court will not be considered on appeal. [Citing cases.]" As stated in 3 Cal.Jur.2d, Appeal and Error, section 140: "The rule is founded upon considerations of practical necessity in the orderly administration of the law and of fairness to the court and the opposite party, and upon the principles underlying the doctrines of waiver and estoppel."

And as this court said in Munfrey v. Cleary, 75 Cal.App.2d 779, at page 785, 171 P.2d 750, at page 753: "Also as a general rule where a case has been tried upon one theory that theory must be adhered to on appeal, and a party who has tried his case wholly or in part on a certain theory, which theory was acted upon by the trial court, cannot, on appeal, change his position and adopt a different theory, since to do so would be unfair to the trial court and to opposing counsel. [Citing cases.]"

[1, 2] In view of the foregoing authorities we are of the opinion that respondent is correct in his contention that the issue of the passage of title at the time the contract was signed and the issue of impossibility of performance were not presented to the trial court, and that they cannot be raised upon appeal. It would, therefore, serve no useful purpose to prolong this opinion by discussing these contentions and would but serve to encourage presenting in the appellate court issues which were not presented to the trial court. We will state, however, that we have considered the said contentions and believe that upon the record here they are without substantial merit.

After the filing of the briefs in the instant appeal respondent made a motion to augment the record on appeal by having appellant's brief in the trial court made a part of the record on appeal to show what issues were raised in the trial court. Respondent contended that this trial brief would show that appellant did not raise in the trial court either of the points just discussed. Appellant opposed this motion but did not concede that said points were not raised. From what we have hereinbefore set forth we are satisfied that the record shows that these issues were not urged in the trial court and that it is unnecessary to augment the record.

The principal contention of appellant at the trial and upon this appeal is: "That there was a mutual mistake as to the number of said steers—if the figure 800 is to be considered as referring to the number of head and that said contract should have been reformed."

[3, 4] We believe that the following quotation from the memorandum opinion of the learned trial judge is fully supported by the record and the authorities:

"The Court is of the opinion that the defendant is not entitled to a reformation of the contract. The evidence does not establish that, by a mutual mistake of the parties, the written contract failed to embody any terms orally agreed upon prior to its execution. The testimony is that on August 8, 1949, defendant told Mr. Rolleri that he had 800 steers, and the contract provided for the sale of 800 steers. In order to justify the revision or reformation of a written contract, it must be shown that, through a mutual mistake of the parties or a mistake made by one party and known or suspected by the other party, the written agreement fails to express the terms of an oral agreement previously made by the parties. The rules governing reformation of written contracts are set forth by the Supreme Court of California in the case of Bailard v. Marden, 1951, 36 Cal.2d 703, at pages 708–709, 227 P.2d 10, at page 13, in the following terms:

"'Section 3399 of the Civil Code provides that when, because of fraud or mistake, "* * * a written contract does not truly express the intention of the parties, it may be revised * * * so as to express that intention * * *." The purpose of reformation is to effectuate the common intention of both parties which was incorrectly reduced to writing. To obtain the benefit of this statute, it is necessary that the parties shall have had a complete mutual understanding of all the essential terms of their bargain; if no agreement was reached, there would be no standard to which the writing could be reformed.

"'Otherwise stated, "(I)nasmuch as the relief sought in reforming a written instrument is to make it conform to the real agreement or intention of the parties, a definite intention or agreement on which the minds of the parties had met must have pre-existed the instrument in question." (Citations.) Our statute adopts the principle of law in terms of a single intention which is entertained by both of the parties. "Courts of equity have no power to make new contracts for the parties, * * * (N)or can they reform an instrument according to the terms in which one of the parties understood it, unless it appears that the other party also had the same understanding." (22 Cal.Jur. § 2, p. 710.) If this were not the rule, the purpose of reformation would be thwarted.'

"The evidence herein does not establish that the parties ever orally agreed, or intended to enter into a contract, to buy and sell anything other than 800 head of steers. It is not shown that it was the common intention of both parties to buy and sell only as many steers as defendant may have owned, or that they ever agreed to buy and sell 726 steers instead of 800 head. There is no proof that the common intention of the parties was incorrectly reduced to writing. On the contrary, the evidence shows that the oral understanding was the same as the written agreement. The words 'more or less' above the figure '800' were stricken from the written agreement and there is no testimony that this was done by mistake or inadvertence or that the common intention of the parties was to buy and sell 800 cattle, 'more or less.' There is no evidence that defendant and Mr. Rolleri agreed to limit the steers to any specific lot or herd, but, on the contrary, it seems to have been contemplated from the beginning that the steers would come from three different ranches of the defendant.

"Under the circumstances, the Court believes that any revision or reformation of the written agreement would be the creation of a new contract—one never agreed to by the plaintiff—and that, therefore, the relief sought by defendant should be denied."

We agree with this analysis and are convinced that the findings of the trial court that "it is true that the common intention, understanding and agreement of both plaintiff and defendant was correctly, accurately, truly and fully reduced to writing and was correctly, accurately, truly and fully incorporated in said agreement in writing," and that "it is true that the figure '800' as inserted in said agreement was not inserted in said agreement as a result of any mistake of plaintiff and defendant or of plaintiff or defendant," are supported by substantial evidence.

[5, 6] The following language from Bisno v. Herzberg, 75 Cal.App.2d 235, 237, 170 P.2d 973, at page 974, is applicable:

"But the rule with reference to the reformation of a written contract is that the evidence must be clear and convincing to the trial court, and on appeal its decision upon a conflict of evidence is conclusive. Sullivan v. Moorhead, 99 Cal. 157, 161, 33 P. 796. When a judgment is attacked as being unsupported the power of the appellate court begins and ends with its determination as to whether there is substantial evidence which will support the judgment of the trial court. [Citing numerous cases.]"

[7–9] Appellant's final contention is that the respondent proved no damage. The trial court found that, by reason of appellant's failure to deliver 74 head of cattle, respondent was damaged in the sum of $3,607.50 and that respondent was also entitled to recover the sum of $269 overpaid to appellant for cattle delivered, making a total judgment of $3,876.50.

Appellant states: "There is no proof whatever to support this finding. The evidence shows that the average weight of steers delivered by appellant was 1080 pounds per head. The testimony as to market price was limited and directed entirely to good to choice steers weighing around 1000 to 1100 pounds. There is no testimony whatever as to the market value of yearlings weighing 650 pounds." Appellant apparently bases his contention on the fact that in computing the damages the trial judge did so on the basis of heavy yearling steers weighing 650 pounds, and not the average weight of the 726 steers actually delivered, which was 1080 pounds.

However, in view of the fact that the court determined upon sufficient evidence that appellant breached the contract by his failure to deliver 74 head of steers, the court could have awarded damages in a much larger amount. If the damages were computed on the average weight of the steers actually delivered they would show a total sum of $5,794.20. (74 x 1080 x 27¼¢ minus 74 x 1080 x 20¢.) Adding to this the admittedly owed sum of $269, we get the sum total of $6,063.20. The damages actually awarded in this case were $3,876.50. The basis of appellant's complaint is that "heavy yearlings" weren't included with the term "steers" ("St.") as used by the contract. However, the trial court found to the contrary upon conflicting evidence, and we must accept this finding.

It is interesting to note from the clerk's transcript that the court filed its memorandum opinion on December 7, 1951, in which it ordered judgment for respondent in the sum of $6,063.20, and that on January 7, 1952, the court filed an order modifying its former opinion by ordering judgment for $3,876.50. It is also interesting to note that in respondent's brief is set out a letter from appellant's counsel to the trial court, written after the memorandum opinion was filed, in which appellant's counsel stated:

"Instead of using the average weight of the steers delivered, it seems to us that you should have used the average weight of the long yearlings amounting to 650 pounds per head. If my figures are correct, this would amount to $48.75 per head or an aggregate sum of $3,607.50.

"If you agree with the writer, you will no doubt wish to modify or amend your Opinion before findings have been prepared and judgment submitted."

While this letter is not a part of the record, appellant in his closing brief does not deny sending it to the trial court. And as stated in 4 Cal.Jur.2d, Appeal and Error, section 485, "the failure of a party to deny a statement of fact in his adversary's brief may result in the acceptance of its truth by the court where the record does not show the contrary. [Citing cases.]" It is apparent that the court followed appellant's suggestion and request and modified its opinion by reducing the amount of damage accordingly. Under such circumstances appellant is hardly in a position to complain that there was no evidence as to the market value of long yearlings when he himself fixed their market value at 27½ cents per pound in his said letter to the court.

[10] Furthermore, it is clear from the record that the evidence would sustain a judgment against appellant far in excess of the amount awarded by the court. As stated in Orfanos v. California Insurance Co., 29 Cal.App.2d 75, at page 82, 84 P.2d 233, 237, appellant "cannot complain of a judgment against it for an amount less than that which the evidence would have supported."

We conclude, therefore, that appellant's contention that the evidence does not support the amount of damages awarded cannot be sustained.

No other points raised require discussion.

The motion to augment the record is denied. The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

---

120 Cal.App.2d 58

BEAN v. WILSON.

Civ. 8192.

District Court of Appeal, Third District, California.

Sept. 1, 1953.

Action against administratrix of decedent's estate to recover compensation for services rendered and money advanced by decedent's wife's sister. The Superior Court, Butte County, Harry Deirup, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Peek, J., held that the evidence sustained conclusion that plaintiff had agreed to stay on ranch and assist brother-in-law with work and that he had agreed to pay plaintiff the reasonable value of such services upon termination of employment.

Judgment affirmed.

1. Work and Labor 🔑1

Intention to pay and expectation of compensation for services rendered may be inferred from conduct, where equity and justices require compensation, as well as from direct communications between the parties.

2. Work and Labor 🔑7(1)

Intention to pay and expectation of compensation are essential elements of "implied contract" to pay for services rendered by a relative, but such elements may be inferred from relation and situation of parties, nature and character of services rendered, and any other facts or circumstances which may reasonably be said to throw any light upon the question at issue.

See publication Words and Phrases, for other judicial constructions and definitions of "Implied Contract".

3. Executors and Administrators 🔑206(1)

The right and justice of a claim for compensation for services rendered by decedent's sister-in-law may be considered, but only as tending to aid in ascertaining intention and expectation of parties in relation to question of compensation for services in controversy.

4. Executors and Administrators 🔑256(6)

In action against decedent's estate to recover reasonable value of services rendered by decedent's wife's sister, whether facts and circumstances shown were sufficient to rebut presumption that such services were rendered gratuitously was a question for trial court.

5. Executors and Administrators 🔑221(5)

In action against decedent's estate to recover reasonable value of services rendered by decedent's wife's sister, evidence sustained conclusion that plaintiff had agreed to stay on ranch and assist brother-in-law with work and that he had agreed to pay plaintiff the reasonable value of her services upon termination of employment.

6. Limitation of Actions 🔑46(5)

Where services were rendered continuously until death of recipient upon his implied promise to pay the reasonable value of such services upon termination of employment, statute of limitations did not begin to run against claim for compensation for such services until death of recipient and action commenced the following year against deceased recipient's estate to recover reasonable value of services was not barred by limitations.

7. Executors and Administrators ⚷221(5), 449

Where complaint in action against decedent's estate to recover compensation for services rendered decedent during his lifetime contained allegations as to reasonable value of services rendered in addition to alleging express agreement of employment, failure to prove express agreement did not constitute fatal variance between pleading and proof, and court could fix value of alleged services on basis of its own general knowledge without aid of expert testimony.

◆

James Wm. Morgan and John W. Finley, Chico, Lopez and Hyde, Fresno, for appellant.

Clewe, McClarrinon, Martin and Blade, Oroville, for respondent.

PEEK, Justice.

This is an appeal by defendant administratrix from an adverse judgment in an action brought by plaintiff to recover for personal services alleged to have been performed by plaintiff at the request of decedent, and for the recovery of money advanced to him by plaintiff.

The record shows that plaintiff and the wife of decedent were sisters. In December 1927 plaintiff took up residence at the Marsh ranch and except for a short period in 1937 when she was away and a period of approximately two years during the second World War when the Marshs were away, she and the Marshs lived there continuously until after his death in 1949. Marsh survived his wife by two years. Following his death plaintiff filed a claim against his estate and upon its rejection filed the present action in which she prayed for judgment for the reasonable value of the services rendered and money loaned to him during his lifetime. Defendant denied generally the allegations of the complaint and affirmatively alleged that the claim was barred by the statute of limitation.

Following the entry of judgment in favor of plaintiff, defendant appealed, contending (1) that there is no evidence to support the finding of the trial court of an express agreement on the part of the decedent to pay for the services as alleged; (2) that the evidence shows as a matter of law that the statute of limitation has barred plaintiff's action, both for alleged services rendered and for the monies advanced, and (3) that there is a variance between the pleading and proof.

[1–3] No benefit could be had from a protracted discussion of the numerous facets of defendant's first contention. Text writers have written at length and the cases on the subject are legion (see 7 A.L.R. 2d 12). However, in this state the rule appears to be settled. In the case of Winder v. Winder, 18 Cal.2d 123, 128, 114 P.2d 347, 350, 144 A.L.R. 935, where the services were performed by a son for his father, as in this case, the court, in sustaining a judgment for the son, held that "'The intention to pay and the expectation of compensation may be inferred from conduct where equity and justice require compensation, as well as from direct communications between the parties. * * * [The] expectation of compensation may co-exist with higher motives prompted by affection or the sense of duty, and * * * the existence of the latter does not necessarily exclude the idea of pecuniary compensation. * * * To warrant the finding of such contract, the elements of intention to pay on the one hand, and expectation of compensation on the other, must be found to exist; but such elements, like other ultimate facts, may be inferred from the relation and situation of the parties, the nature and character of the services rendered, and any other facts or circumstances which may reasonably be said to throw any light upon the question at issue.

"'The right and justice of the claim for compensation, or the wrong and injustice, if any, attending such claim, may be considered, but only as tending to aid in ascertaining the intention and expectation of the parties in relation to the question of compensation for the services in controversy. 9 Cyc., pp. 242–243. * * *

" 'In this case it was a question for the trial court to determine from the evidence whether the facts and circumstances shown thereby were sufficient to rebut the presumption that the services of appellee were rendered gratuitously.' "

[4] So in the present case under the facts and circumstances appearing in the record it was for the trial court to "determine from the evidence whether the facts and circumstances shown thereby were sufficient to rebut the presumption that the services of appellee were rendered gratuitously." Winder v. Winder, 18 Cal.2d 123, 128, 114 P.2d 350.

Here the record shows that plaintiff did not live merely as a visitor at the Marsh home but to the contrary performed all types of chores around the ranch, such as milking the cows, herding sheep, planting and cultivating the garden, together with the general housework such as cooking the meals, cleaning the house and doing the laundry. Also there was testimony to admissions made by the decedent that he had borrowed money from the plaintiff, that he admitted owing money to her although there is no specific testimony as to the exact amount; that he would pay "when he got it" and that he was going "to kick her off the place" when he "got her paid." There was further testimony that he also admitted that plaintiff paid for some of the household appliances. Upon such evidence the court found that during the month of December, 1927, plaintiff and decedent entered into an agreement whereby she agreed to stay on the ranch, assist him with the work, and perform such duties as he might direct, for which he agreed to pay upon the termination thereof and before his death. The court further found that it was understood and agreed between the parties that decedent would pay plaintiff the reasonable value of her services upon termination of the employment.

[5] Although the evidence is not as specific as might be desired, nevertheless this court cannot say that it was not sufficient to sustain the conclusion of the trial court.

[6] Defendant's second contention is likewise without merit. As previously noted the trial court found that it was the understanding of the parties that decedent would pay plaintiff the reasonable value of her services upon the termination of the employment. Where, as in the present case, there is an implied promise to pay upon the termination of services and those services are rendered continuously up until the death of the recipient thereof, the employment did not terminate until his death and hence the statute of limitation did not begin to run until that time. Wescoatt v. Meeker, 63 Cal.App.2d 618, 147 P.2d 41. The record here shows that Marsh died in 1949 and the present action was instituted in March, 1950; therefore it was well within the statute.

[7] Appellant's final contention is also without merit. Conceding that the evidence does not disclose an express agreement, it cannot be said that there has been a fatal variance between the pleading and the proof for the reason that the complaint can properly be construed as being based on the theory of the reasonable value of the services rather than upon an express agreement. Where, as here, a complaint contains "apt allegations of the reasonable value of services rendered, and also alleges a special contract of employment, failure to prove the special contract is not fatal." 27 Cal.Jur. 227–28. Under such circumstances the court may fix the value of the alleged special services by drawing upon its own general knowledge without the use of expert testimony. Stiles v. Nunes, 98 Cal.App.2d 739, 220 P.2d 792.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

119 Cal.App.2d 753

PEOPLE v. MANICAP et al.

Cr. 4992.

District Court of Appeal, Second District,
Division 1, California.

Aug. 17, 1953.

Defendants were convicted in a criminal case and they appealed from an order of Clement D. Nye, J., denying their motion for new trial and from an order granting probation. The District Court of Appeal, Doran, J., held that conviction for participating in act of copulating mouth of one person with sexual organ of another was sustained by evidence.

Affirmed.

Sodomy 🔑6

Conviction for participating in act of copulating mouth of one person with sexual organ of another was sustained by evidence. Pen.Code, § 288a.

◆

Bernay, Leader & Bass and William W. Larsen, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondents.

DORAN, Justice.

This is an appeal from the order denying a motion for a new trial "and from the order granting probation".

The defendants are accused by information with the violation of section 288a of the Penal Code. A jury was duly waived and by stipulation the people's case was submitted on the preliminary transcript. The defendants testified.

The record reveals that the defendants and another woman were seen by the officers to enter a motel room. Officer Slagle "went to the rear of the apartment and stepped on the window sill, pushed the blind aside and observed the two defendants and another woman lying on a bed naked." The repulsive details of what the officer witnessed need not be recited.

It is contended on appeal that "The finding of the Court is contrary to the evidence". It is argued in this connection that, "Appellant argues that the officer stands completely uncorroborated" but concedes that "the law requires no corroboration".

Respondents reply "that there is no merit in the appellants' contention on this appeal", is supported by the record.

The orders are affirmed.

WHITE, P. J., and ROBERT H. SCOTT, J. pro tem, concur.

---

119 Cal.App.2d 766

PEOPLE v. BURROWS.

Cr. 4979.

District Court of Appeal, Second District,
Division 1, California.

Aug. 18, 1953.

Hearing Denied Sept. 17, 1953.

Defendant was convicted of arson. The Superior Court, Los Angeles County, Edwin L. Jefferson, J., entered judgment, and defendant appealed. The District Court of Appeal, Doran, J., held that evidence sustained conviction.

Judgment affirmed.

Arson 🔑37(1)

Evidence sustained conviction for arson.

◆

Rafter & Fredricks, Hermosa Beach, Hamilton & Perry, San Diego, Thomas W. Fredricks, Hermosa Beach, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

DORAN, Justice.

This is an appeal from the judgment.

Defendant was accused of arson and following a trial by the court without a jury was adjudged guilty.

Briefly, the record reveals that the property burned was the home of defendant. Appellant's brief recites that, "Mrs. Burrows was the sole owner of the real property located at 2019 Waltonia Drive. She was separated from her husband, and had signed a property agreement giving her this piece of property. The property was purchased in 1948 for $11,000.00. It was insured for only $8,000.00." There were two insurance policies on the personal property of $5,000 each. It appears that defendant who was home when the fire started, which was between 2 and 4 a. m., did not call the fire department but drove to the sheriff's office, some distance away and notified the deputy. Meanwhile, the neighbors had 'phoned the fire department.

It appears from the record that the fire had started in three different points, one in the living room, one in the doorway leading to the middle bedroom from the hall, and the other on the kitchen floor at the back of the house. As recited in respondent's brief, "The floor was burned completely through at each of the points of origin. Captain Bittle saw burned and charred paper debris around the hole in the living room. Sergeant Hatcher observed those papers, and also found charred paper debris in the bottom of all three holes. Both the Captain and the Sergeant were of the opinion that the fire in the living room had started first. Sergeant Hatcher believed that it had been burning for about two hours, and not less than an hour and a half, before it was extinguished. There was evidence that it was extinguished shortly after the firemen arrived at 4:13 a. m., which would place the time when Sergeant Hatcher believed it had started at some time from shortly after 2:13 a. m. to some time shortly after 2:43 a. m."

Defendant's automobile contained numerous personal effects and records.

The foregoing is not a complete summary of the evidence but a substantial outline.

Appellant's brief recites, "a resume of the prosecution's case would show the basis of their case to be on the following facts:

"First: There was a fire, which in the opinion of their witnesses, was incendiary in nature because there were three alleged origin points;

"Second: There was insurance on the premises in the amount of $8,000.00, and two $5,000.00 insurance policies on the personal property with the Farmer's Fire Exchange;

"Third: The behavior of the defendant at the time, or shortly after, the fire started. This would seem to be that she did not telephone the fire department right away; that she had some personal articles in her car, and in her purse was a partial list of the furnishings in the house."

Respondent's argument, which is amply supported by the record, is as follows:

"We submit that from the above evidence it could reasonably be found that there were three separate fires in the house, and charred papers in the holes created by each; that the fires were started by igniting papers on the floor and were incendiary in nature; that one of the fires had burned for an hour and a half or two hours before it was extinguished; and that much of the household and personal furnishings had been removed from the house on that night before the fire. We submit further, that such facts amply justify an inference that the fire was incendiary, and was neither accidental nor natural. From them the trier of fact could reasonably infer that the fire was wilfully and maliciously set for the purpose of burning the house. Clearly, therefore, the corpus delicti of the crime was sufficiently established here.

* * * * * *

"Thus, to identify the appellant as the perpetrator of the crime, and to support the evidence of the corpus delicti already established, we have evidence not only of her motive and conduct which tended to connect her with the crime, but also her inconsistent statements showing a consciousness of guilt."

For the foregoing reasons, the judgment is affirmed.

WHITE, P. J., and ROBT. H. SCOTT, J. pro tem., concur.

HAUGER et ux. v. GATES et al.*

Civ. 8292.

Sac. 6326.

District Court of Appeal, Third District, California.

Aug. 18, 1953.

Rehearing Denied Sept. 15, 1953.

Hearing Granted Oct. 15, 1953.

Action to set aside an extrajudicial sale of realty under a deed of trust and for damages and an accounting. The Superior Court, Sonoma County, Hilliard Comstock, J., after allowing plaintiffs to amend their complaint once, sustained defendants' demurrer to pleadings without leave to amend, and plaintiffs appealed. The District Court of Appeal, Schottky, J., held that trustors were not entitled to have sale of realty set aside on ground that trust beneficiaries were indebted to trustors in an amount greater than the amount of trustors' default, but that trustors stated a cause of action against the beneficiaries for breach of contract.

Affirmed as to trustee and reversed as to beneficiaries.

1. Mortgages 🔑335, 415(3)

A mortgagor may assert a counterclaim or set-off in a foreclosure action where a deficiency judgment is sought, but such rule cannot be applied to extrajudicial sale of realty under a deed of trust.

2. Mortgages 🔑369(2)

Where grantee gave deed of trust, and upon default trustee sold the property in extrajudicial sale, the grantee had no right to have the sale set aside for the failure of the grantor-beneficiary to deliver certain personal property alleged to be worth $987.50, which was part of the contract for sale and which had value greater than grantee's default.

3. Mortgages 🔑338
Sales 🔑405

Although grantor of realty and beneficiary of a subsequent deed of trust may have failed to deliver certain items of personal property covered by the contract, the remedy of grantee, who claimed that he was not in default notwithstanding nonpayment of sum less than value of nondelivered personalty, was injunction to prevent sale under the deed of trust, and then action for breach of contract.

4. Sales 🔑411

Complaint seeking $987.50 damages for breach of contract for failure to deliver certain items of personal property stated cause of action.

Joseph E. Isaacs, Alan H. Critcher, and Donald M. Haet, San Francisco, for appellant.

Edward T. Koford, Santa Rosa, for respondents Gates.

Bryce Swartfager, Santa Rosa, for respondent Chalmers.

SCHOTTKY, Justice.

Appellants commenced an action against respondents to set aside an extrajudicial sale under and by virtue of a claimed default of an obligation secured by a deed of trust, and for damages and an accounting. After sustaining demurrers to the first complaint and amended complaint, and granting a motion to strike certain allegations from the amended complaint, the trial court sustained demurrers without leave to amend to the second amended complaint. The trial court in so sustaining the demurrers without leave to amend stated, "It appears from the subject matter of said second amended complaint and from the failure of counsel for plaintiffs to cure the defects of his pleadings that to allow further amendments would be fruitless." This appeal is from the judgment entered after the demurrer was sustained.

The second amended complaint alleges, in substance, as follows: That the plaintiffs are husband and wife and that the defendants Charles E. Gates and Ruby J. Gates are husband and wife and that Sonoma County Abstract Bureau is a California corporation; that the defendants Gates owned certain described real property in the County of Sonoma, and that the plaintiff, Carson J. Hauger, agreed to purchase for the sum of $16,000 the real property mentioned and described, together with the improvements thereon and certain personal property, namely, lug boxes, fruit trays, ladders and chicken equipment and that in pursuance of such agreement and not otherwise the defendants Gates made, executed and delivered to plaintiffs a deed conveying the real property; that the deed was recorded and so forth and that plaintiffs made, executed and delivered a promissory note and second deed of trust to secure the unpaid portion of the purchase price of $16,000; that plaintiffs were the first parties and trustors under the deed of trust, that defendant, Sonoma County Abstract Bureau, was second party-trustee, and defendants Gates were third parties-beneficiaries, and that the deed of trust was duly recorded. That thereafter, a notice of breach and election to sell was recorded by the defendants Gates and defendant, Sonoma County Abstract Bureau. This notice of breach and election to sell was recorded on the 11th day of December, 1950.

---

* Subsequent opinion 269 P.2d 609.

Paragraph VIII alleges that the plaintiffs were not indebted to defendants Charles E. Gates and/or Ruby J. Gates in any sum of money whatsoever on the 11th day of December, 1950, i. e., at the time of filing the notice of breach by reason of the fact that the defendants Gates in breach of their contract had failed to deliver to plaintiffs personal property of the reasonable value of $987.50 and that the said sum, to wit: $987.50, exceeded the amount of installments due and unpaid under and by virtue of said promissory note and deed of trust.

Paragraph IX sets forth in detail and particular the property which was not delivered, including some gas pipe which was removed from the premises by the defendants and some roof sheeting which was removed from the pear dryer.

Paragraph X states that this failure to deliver was in breach of the contract.

Paragraph XI alleges that because of the failure and refusal of defendants Gates to perform their said contract and by reason of the breaches thereof the plaintiffs refused to make the payments becoming due under the deed of trust and that they frequently told the defendants Gates they would make said payments if the personal property was returned to them but the defendants Gates did not return the same or any part thereof and proceeded to cause notice of default to be filed and to sell the real property for an alleged breach of the terms of said note and that the defendant Sonoma County Abstract Bureau sold the property to defendant Chalmers and upon information and belief allege that defendant Chalmers was the dummy of defendants Gates and that defendant Chalmers had full knowledge of all matters and facts set forth and that defendant Chalmers was not a purchaser in good faith or for value and that she holds the property in trust for defendants Gates and that an alleged and purported sale of said property was held on the 12th day of April, 1951.

Paragraph XIII alleges that the highest price bid was $5,025 bid by defendant Chalmers and that the defendant Sonoma County Abstract Bureau caused a deed to be made purporting to convey the property to defendant Chalmers and that the deed is recorded; that the Exchange Bank of Santa Rosa has held and does now hold a first deed of trust on said property upon which payments in the sum of $65 per month are due and that defendants have made certain of said payments to the Exchange Bank, for which they are entitled to credit, and that plaintiffs are ready, willing and able in the event said sale is set aside to pay to defendants Gates such sums as may in justice, right and equity be owing from plaintiffs to these defendants.

Paragraph XIV alleges the illness of plaintiff, Carson J. Hauger, contracted while serving in the army in World War I and that by reason of this condition he was handicapped in attending to his business.

Paragraph XV alleges that the notice of breach and intention to sell was given at a time when plaintiffs were not indebted to defendants Gates, as the defendants well knew, and that plaintiffs ask for exemplary damages.

Respondents Gates and Sonoma County Abstract Company filed a general and special demurrer to the said second amended complaint, setting forth various particulars in which the complaint was claimed to be uncertain, unintelligible and ambiguous, and also setting up laches and that plaintiffs were estopped to assert any claim of illegality of the sale. Respondent Chalmers demurred on the grounds, (1) that the complaint did not state a cause of action against her; (2) that a cause of action to set aside a foreclosure sale under a deed of trust was improperly united with a cause of action for damages for breach of contract of sale of personal property; and, (3) that a cause of action to set aside a trustee's sale of real property and a cause of action for damages for breach of contract for sale of personal property have been united and not separately stated.

Appellants contend that the court erred in sustaining the demurrers without leave to amend and that the judgment should be reversed. They contend first that a trustor under a deed of trust is entitled to offset money owing to him by the beneficiary under the deed of trust against the amounts secured by the deed of trust, and that a sale under a deed of trust cannot be upheld where there was not in fact any indebtedness due from the trustor to the beneficiary under the note secured by the deed of trust. They argue that the sale involved in the instant case was invalid because appellants were not indebted to respondents Gates at the time of the sale or at the time of the notice of default for the reason that the amount due from respondents Gates to appellants by reason of the failure of respondents Gates to perform their contract of sale exceeded the amount due under the note secured by the deed of trust. They assert that according to the allegations of the complaint, which for the purpose of demurrer must be taken as true, respondents Gates were indebted to appellants in the sum of $987.50 which exceeded the amount due from appellants to respondents Gates upon the promissory note at the time of notice of default and at the time of sale.

Appellants quote the following from 59 C.J.S., Mortgages, § 619, page 1086:

> "As a general rule, where an action to foreclose a mortgage is, in effect, one to recover money on contract and the amount of the mortgage debt is in issue and plaintiff seeks to enforce defendant's personal liability by a deficiency judgment, defendant may counterclaim or set off a claim or demand against plaintiff which is connected with the mortgage transaction and affects the consideration thereof, and it has been held that all just set-offs may be allowed in ascertaining the amount due to the same extent and the same manner as like set-offs are allowed in actions at law. Any matter or demand which will defeat recovery by plaintiff in whole or in part, whether legal or equitable, or whether in the nature of a set-off, recoupment, cross bill in equity or otherwise, has been held available to defendant as a counterclaim, and a credit or claim which the parties have agreed shall be applied in reduction of the mortgage debt may be set off.
>
> * * * * * *
>
> "Defendant has been permitted to set up various matters by way of counterclaim, set-off, or recoupment, as being connected with, or arising out of, or incident to, the mortgage transaction or plaintiff's cause of action, such as a partial failure of consideration, or damages for breach of agreement, of covenant, or warranty, or of condition. * * *"

They also cite Woodland Cooperative Rice Growers v. Smith, 91 Cal.App.2d 926, 206 P.2d 73, where this Court held that:

> "In an action to foreclose a deed of trust on property given by defendant as security for a note after he had received from plaintiff payment for a tractor and failed to deliver the tractor or return the payment, the court properly awarded plaintiff the amount of the note and costs and allowed defendant an offset for the rental value of a tractor furnished by him to plaintiff only on the condition that his debt to plaintiff be fully discharged by a sale of the property under the trust deed, where the security under the trust deed appeared to be inadequate and defendant was in financial straits, since, the action being equitable, the court had broad power to grant appropriate relief without being bound by the strict legal rights of the parties, and to allow defendant the offset unconditionally might have left plaintiff depend-

ent on a deficiency judgment of dubious value for the amount represented thereby." (Syllabus.)

[1] The foregoing authorities indicate that in a foreclosure action there may be a counterclaim or set-off if it is connected with the general sale transaction and affects the consideration thereof. This rule, however, applies to foreclosure actions filed in court where the plaintiff seeks to enforce the defendant's personal liability by a deficiency judgment, and we do not believe that it can be applied to an extrajudicial sale under a deed of trust as was the sale in the instant case.

In the case of Woodland Cooperative Rice Growers v. Smith, supra, there was a court action to foreclose a deed of trust and this court in affirming the judgment stated that a counterclaim was proper in such a case, and that the conditional nature of the allowance of the counterclaim was also proper under the broad powers of a court of equity. So it is clear that in that case a counterclaim was allowed in a foreclosure action against the secured party only after his secured obligation was fully satisfied.

[2, 3] We do not believe that either reason or authority supports the contention of appellants that, even though they admittedly failed and refused to make an installment payment on the note secured by the deed of trust, for which notice of breach and election to sell was declared, they are entitled to set aside the sale because respondents Gates did not deliver to them certain personal property to which they were entitled under the agreement of sale, the value of which was greater than the amount of the installment due. Appellants had at best an unliquidated claim for damages for breach of the contract of sale. They were aware that the installment was due on the note and they had demanded the delivery to them of the personal property and had informed respondents Gates that they would pay the installment if the personal property were delivered. They were aware that notice of election to sell for failure to pay such installment was recorded and that notice of sale was given. If they desired to prevent the sale under the deed of trust upon the ground that there was no default they should have commenced an action to enjoin the sale and then asserted their claims in court. The respondent Sonoma County Abstract Bureau was entitled to proceed with the sale in accordance with the law and the provisions of the deed of trust, and there is no contention that they did not so proceed and respondent Chalmers was entitled to become a purchaser at such sale. Appellants have set forth no facts that would justify the setting aside of the sale under the deed of trust in the instant case, and if their contention upon this point should be sustained it would have a tendency to cast a cloud on sales under deeds of trust.

We therefore hold that the court properly concluded that appellants had not alleged facts sufficient to set aside the sale and that they could not allege such facts. It follows that the demurrers of respondents Sonoma County Abstract Bureau and Edna S. Chalmers were properly sustained without leave to amend.

[4] However, it appears from the complaint that appellants prayed for alternative relief in the form of damages. Appellants sought damages in the amount of $987.50 for the breach of the original contract of sale by respondents Gates in failing and refusing to deliver certain personal property called for by the contract. It appears that appellants properly pleaded a contract to deliver this personal property, a breach by failure to deliver same, and damages. This is sufficient to withstand a general demurrer. 6 Cal.Jur., Contracts, sec. 285. We believe, therefore, that in so far as a cause of action for damages against respondents Gates is concerned the court erred in sustaining the demurrer without leave to amend.

The judgment is affirmed as to respondents Sonoma County Abstract Bureau and Edna S. Chalmers and reversed as to respondents Charles E. Gates and Ruby J. Gates.

VAN DYKE, P. J., and PEEK, J., concur.

119 Cal.App.2d 783

ROSENBERG v. FEIGIN.

Civ. 19587.

District Court of Appeal, Second District,
Division 1, California.

Aug. 19, 1953.

Action against physician by plaintiff whose wife had been treated by physician, without plaintiff's consent, in such manner that a miscarriage resulted. The Superior Court of Los Angeles County, Julius V. Patrosso, J., entered judgment from which plaintiff appealed. The District Court of Appeal, Scott, J., pro tem., held that physician who had given wife the care and treatment she required and consented to in relation to her pregnancy, according to accepted standards of his professions, was not liable to husband because he had not notified husband of nature and possible effects of the care, even though a miscarriage resulted.

Judgment affirmed.

1. Assault and Battery 🔑11

The consent of a husband to medical treatment for the wife is not necessary, but consent of the wife alone is sufficient, even though the medical care and treatment regarding pregnancy of wife is one which might result in a miscarriage.

2. Physicians and Surgeons 🔑16

Physician who gave wife the treatment that she required and consented to with relation to her pregnancy, according to accepted standards of his profession, was not liable to husband because of failure to notify husband of nature and possible effects of the treatment, even though a miscarriage resulted.

◆

Edward B. Freed, Los Angeles, for appellant.

Ralph N. Highsmith, Henry E. Kappler, Los Angeles, for respondent.

ROBERT H. SCOTT, Justice pro tem.

Plaintiff appeals from judgment of dismissal pursuant to an order sustaining demurrer to plaintiff's third amended complaint without leave to amend. The latter order was made on November 24, 1950. Plaintiff, on January 12, 1951, moved to set aside the ruling previously made, and this motion was denied. Plaintiff then undertook to appeal from the order denying the motion to set aside the ruling, and this appeal was dismissed. 110 Cal.App.2d 56, 241 P.2d 1043. The remittitur was filed with the county clerk on May 27, 1952 and was entered in the minutes of June 30, 1952. Thereafter, on August 4, 1952, the judgment was signed from which this appeal is taken.

The eight and one-half pages of the third amended complaint undertake to set out two causes of action by plaintiff, an allegedly aggrieved husband, against defendant who was the personal physician of plaintiff's wife. The wife does not join in this action.

Plaintiff alleges that his wife on February 18, 1950 was pregnant and that she retained defendant, a licensed physician to attend her, but without plaintiff's authority or consent; that defendant knew or should have known (1) that the wife did not require the care defendant gave her and (2) that it might cause a miscarriage. He further alleges that defendant was told by the wife that plaintiff had opposed any such treatment unless it was required for her general health and well-being; that plaintiff did not know his wife was to undergo care or treatment other than in the ordinary course of her pregnancy; that he did not consent to it, and that it was not necessary; that the treatment "was in the nature of an examination with instruments which included therein probing, so as to amount to or constitute surgery"; that defendant's failure to notify plaintiff and get his consent amounted to malpractice; that the wife had a miscarriage that would not have occurred except for defendant's treatment of her.

It is then alleged: "that plaintiff who had been joyously anticipating the supplementation of his family was thereby caused grievous mental disturbance, suffering and injury, and will continue to suffer grievous mental anguish throughout the entire lifetime of plaintiff, all to plaintiff's damage in the sum of $50,000". He also asks $600 medical expenses for the wife.

The second cause of action is substantially the same as the first and adds that the acts of defendant deprived plaintiff of and interfered with his constitutional rights "specifically his rights to the pursuit of happiness in his marital relations in accordance with Article I, Sec. I of the Constitution of the State of California"; that plaintiff was made emotionally, physically ill and suffered mental anguish. In addition to the damages set out under Count I, plaintiff seeks an additional $10,000 because "defendant's actions have caused a schism to be created in the marital relations of plaintiff and plaintiff's wife" causing further emotional and physical suffering to plaintiff.

The theory upon which plaintiff proceeded in filing his third amended complaint seems to be contained in the following portion of his brief:

"It is submitted that if a husband shall not have the right to consent to or oppose medical care and treatment to a wife regarding a pregnancy which care and treatment might result in a miscarriage, *where her health and well-being are not involved,* is to destroy and to deny his manhood; and to abrogate his manhood could only result in the destruction of the family as a unit and of society as a product of the family. Therefore, while admitting that as a general proposition of law, a wife has the right to obtain medical care and treatment for herself where her health and well-being are involved, there must be an exception to that law, which exception must recognize the purpose, function and objectives of marriage and the family, and the rights of the individual therein."

As nearly as we can ascertain from plaintiff's brief, his oral argument and his memorandum later filed, he regards the failure of the defendant to notify him of the contemplated care and treatment for the wife and to get plaintiff's consent thereto, as constituting negligence, and malpractice, and an interference by defendant with plaintiff's pursuit of happiness in planning for and having a family. It would seem therefore that if plaintiff's knowledge and consent were not required, the order and judgment of the trial court were correct.

In his later memorandum plaintiff emphasizes that "the appellant's (plaintiff's) causes of action in the complaint are for causes of action predicated upon violation of personal rights of the plaintiff as distinct from injury to those rights that arise in consequence of injury to his wife. * * * Plaintiff has not claimed damages for injuries to his wife but only for injuries to himself."

The cases cited by plaintiff: Perkins v. Trueblood, 180 Cal. 437, 181 P. 642; Foreman v. Hunter Lumber Co., 36 Cal.App. 763, 173 P. 408; Langford v. Kosterlitz, 107 Cal.App. 175, 290 P. 80; Ingamells v. Goodfellow, 109 Cal.App. 62, 292 P. 162, and set out in 18 McKinney's Digest, 594, deal with questions of malpractice and in no way support the theory plaintiff seeks to maintain in the case now before us. We have read pages 467 to 499 of Restatement of Torts, volume 3, which plaintiff has asked us to consider as epitomizing legal basis for the contentions contained in the third amended complaint, and find nothing which suggests that plaintiff's position is legally tenable.

[1] The only case mentioned by plaintiff which throws light on his contention is Kritzer v. Citron, 101 Cal.App.2d 33, 224 P.2d 808. That case effectually disposes of his claim that the husband must know about and consent to medical treatment for the wife. In that case it was held that the consent of both husband and wife is not necessary, and on the contrary, the consent of the patient (wife) alone is sufficient, although in that case the operation performed was one in which the wife was sterilized and thereby rendered incapable of further child-bearing.

[2] The defendant as physician for the wife of plaintiff had a right and duty to give her the care and treatment that she required and consented to, according to accepted standards of his profession, and is not liable to the husband because he did not notify the husband of the nature and possible effect of the care which he contemplated and regarded as necessary, and did not secure the husband's consent.

We can only conclude that plaintiff, who now disavows any theory grounded in law, not only has not stated but could not state a cause of action against defendant and that the ruling of the trial court and judgment pursuant thereto were correct. A defendant should not be harassed and the time of a court occupied with the trial of a case for which there is no warrant in law.

Judgment affirmed.

WHITE, P. J., concurs.

DORAN, J., concurs in the judgment.

WEST KEY NUMBER SYSTEM

119 Cal.App.2d 768

BEABOUT et al. v. BEAM.

Civ. 8212.

District Court of Appeal,
Third District, California.
Aug. 18, 1953.

Action by mother to regain custody of minor children who had been removed to California by father after he had obtained a divorce decree in Indiana awarding custody of children to him. The Superior Court, Sacramento County, entered orders awarding actual physical custody of children to mother for removal to Indiana, and the father appealed. The District Court of Appeal, Schottky, J., held that the only issue properly before Superior Court was whether there had been such a change of circumstances as to justify awarding custody of children to mother and that, since court expressly declined to rule upon such issue, order was unsupported by any finding.

Orders reversed.

1. Divorce 🔑300

Where divorce decree awarding custody of minor children to father and giving mother right to visit children at reasonable times did not prohibit removal of children from state, father did not commit an illegal act or contempt by moving with children to another state.

2. Divorce 🔑332

In action commenced by mother in California to regain custody of minor children who had been removed to California by father after he obtained a divorce decree in Indiana awarding custody of children to him, California Superior Court had power to pass upon issues presented by pleadings and to determine whether there had been such a change of circumstances since entry of divorce decree as to make it for the best interests of children that their custody be given to mother.

3. Divorce 🔑332

Provisions of divorce decree determining custody of minor children may be modified in courts of another state only upon a showing of change of circumstances arising subsequent to entry of decree.

4. Divorce 🔑332

Where father moved with minor children to California after obtaining divorce decree in Indiana awarding custody of children to him, Indiana divorce decree was entitled to full force in California and, while mother was entitled to file action in California court to regain custody of children, she could regain such custody only upon a finding that there had been such a change of circumstances as to justify a change in custody.

5. Divorce 🔑332

Where father removed minor children to California without violating divorce decree obtained in Indiana awarding custody of children to him, the only issue properly before California Superior Court in action by mother to regain custody of children was whether there had been such a change of circumstances as to justify awarding custody of children to her and where California trial court expressly declined to rule upon such issue, order awarding actual physical custody of children to mother for removal to Indiana without prejudice to rights of father to institute proceedings in Indiana court for purpose of asserting and adjudicating his right to custody of children was unsupported by any finding and could not be sustained.

John M. Price, Sacramento, for appellant.

Frank K. Richardson, Sacramento, for respondent.

SCHOTTKY, Justice.

In October, 1950 appellant was granted a decree of divorce from respondent by the Circuit Court of Clinton County, Indiana, and said decree awarded the custody of the three minor children of the parties to appellant father with the right of respondent mother to visit the children at reasonable times. In March, 1951, appellant, with the three minor children, removed to California and established a home in Sacramento, the household consisting of appellant, the three minor children, aged 12, 9 and 4, and appellant's mother. On July 31, 1951, the Judge of the Circuit Court of said Clinton County entered an order purporting to modify the decree by granting the custody of the three minor children to respondent, but said order was obtained without notice and it is conceded that it was of no effect. Respondent demanded that appellant surrender the custody of the children to her and upon his refusal to do so commenced an action in the Superior Court of Sacramento County to regain the custody of the children, the first cause of action set forth in the complaint being based on the order modifying the decree, and the second cause being based on respondent's allegation that she was now in a position to adequately provide for said children and the best interests of the children would be served by awarding them to her.

A demurrer was sustained to the first cause of action because the purported modification of the divorce decree was of no effect, having been made without notice, and the cause proceeded to trial upon the second cause of action before Honorable J. O. Moncur, a retired Superior Judge, who was sitting in the Superior Court in Sacramento County under assignment by the Judicial Council pursuant to the provisions of Section 6 of the Judges' Retirement Act. Stats. 1951, ch. 1641, Deering's Gen.Laws, Act 5849a. Evidence was introduced by both parties and thereafter the court on December 7, 1951, ordered, adjudged and decreed as follows:

"It Is Hereby Ordered, Adjudged, And Decreed that the custody of the minor children of the parties hereto, to-wit: Ariel Beam, Dinah Beam, and Darrell Beam, be and the same is hereby given and awarded to plaintiff Mary Beabout for the purpose of taking the said minor children to the State of Indiana for further proceedings herein, said order and award to be without prejudice to the defendant Leland R. Beam in asserting and adjudicating in any custody proceeding in Indiana his rights and claims to the custody of the said children."

On December 10, 1951, the court made and filed an amended order, superseding the original order, which ordered, adjudged and decreed as follows:

"1. This Court will not rule upon the issues presented by the Complaint of plaintiff, Mary Beabout, formerly Mary E. Beam, and the Answer of the defendant, Leland R. Beam.

"2. The actual physical custody of the minor children of the parties, to wit, Ariel Beam, Dinah Beam, and Darrell Beam, be and the same is hereby given and awarded to plaintiff, Mary Beabout formerly Mary E. Beam, for the purpose of removing the said minor children from the State of California and taking the said three minor children to the State of Indiana, said actual physical custody of the said three minor children to be and remain in the plaintiff, Mary Beabout, formerly Mary E. Beam unless and until such actual physical custody is changed by reason of a Decree or Order of a Court of competent jurisdiction in the State of Indiana; the Order here made is without prejudice to the right of the defendant, Leland R. Beam, to institute proceedings in a Court of competent jurisdiction in the State of Indiana for the purpose of asserting and adjudicating his right to the actual physical custody of the said minor children."

Appellant father has appealed from both orders and makes two major contentions: (1) That the Honorable J. O. Moncur was not constitutionally a judge so as to have power to render a decree in this case; and (2) That the court's order and decree cannot be sustained because the court specifically declined to rule upon the issues presented by the complaint and answer, and that the court had no power to make the decree that it made without determining the issues presented by the pleadings and at the trial.

The greater portion of the briefs filed are devoted to a discussion of the question of the constitutionality of Section 6 of the Judges' Retirement Act, supra, which section reads as follows:

"Justices and judges retired under the provisions of this act, so long as they are entitled by its provisions to receive a retirement allowance, shall be judicial officers of the State, but shall not exercise any of the powers of a justice or judge except while under assignment to a court as hereinafter provided. Any such retired justice or judge may, with his own consent, be assigned by the Chairman of the Judicial Council to sit in a court of like jurisdiction as, or higher jurisdiction than, that court from which he was retired; and while so assigned shall have all the powers of a justice or judge thereof. * * *"

We have concluded that the orders appealed from must be reversed upon the second ground urged by appellant, and for that reason we deem it unnecessary to pass upon the constitutionality of said Section 6. Furthermore, the question of the constitutionality of said section is now before our Supreme Court in another action, and it would serve no useful purpose for us to pass upon the question of constitutionality when it is not necessary to a decision in the instant appeal. We shall, therefore, proceed to discuss the question as to whether the order and decree made by the court can be sustained.

As hereinbefore stated, the matter proceeded to trial upon the second cause of action which was a cause of action by respondent against appellant for the custody of the three minor children, the complaint alleging that she was a fit and proper person to have custody of the children; that she had remarried since the divorce decree and maintained a home in Lafayette, Indiana, in which she could adequately care for the children; and that the best interests of the children would be served by awarding their custody to her. The answer of appellant denied the material allegations of the complaint and set up a separate defense that a decree of the Circuit Court of Clinton County, Indiana, had granted appellant a divorce from respondent upon the ground of adultery and had awarded the custody of the minor children to him and that there had been no change in circumstances which would warrant a change of custody of said children.

Respondent and her present husband testified in support of the allegations of respondent's complaint. Their testimony showed that respondent separated from appellant in May, 1950, and lived with her present husband and married him four days after appellant was granted a divorce on his cross-complaint, as hereinbefore set forth; that they now have a suitable home in which to care for the minor children and that respondent's present husband was earning a sufficient income to enable him to support them, even though he had to pay $50 for the support of his two children by his first marriage.

Appellant, his mother, and a neighbor gave testimony tending to show that appellant had established a good home for the children in Sacramento; that he has a good position and that the children were well cared for.

[1] It is apparent from the record here that the court was of the opinion that the matter of the custody of the minor children should be decided by the Circuit Court of Clinton County, Indiana, and that appellant had violated the decree of that court by bringing the children to California, and the court thereupon specifically declined to rule upon the issues presented by the pleadings, but instead ordered the children into the custody of respondent for the purpose of taking them back to Indiana. The divorce decree did not prohibit the appellant from removing the children from the State of Indiana and we do not consider that appellant committed any illegal act or contempt in moving with them to California when he had the opportunity of a better

position. In re Dowell, 4 Cal.App.2d 688, 41 P.2d 596. Respondent's own testimony in this proceeding showed that she had lived with her present husband prior to the date on which appellant was granted the divorce decree and that she had married him nine days thereafter. It is quite understandable that under such circumstances appellant might wish to move with the children to another state.

[2, 3] The Superior Court of the State of California had power to pass upon the issues presented by the pleadings and to determine whether or not there had been such a change of circumstances since the entry of the Indiana divorce decree as to make it for the best interests of the minor children that their custody be given to respondent. For as stated in Foster v. Foster, 8 Cal.2d 719, at page 727, 68 P.2d 719, at page 722:

"This same rule that former decrees of custody may be modified only upon a showing of change of circumstances arising subsequent to the entry of the former decree applies with equal force to the question of the finality of the decree of custody of a sister state made and entered in a divorce proceeding. It has been so held in the cases of In re Wenman, 33 Cal.App. 592, 165 P. 1024; In re Marshall, 100 Cal.App. 284, 279 P. 834; In re Livingston, 108 Cal. App. 716, 292 P. 285, 286; Titcomb v. Superior Court, 220 Cal. 34, 29 P.2d 206. The case of In re Livingston, supra, quotes with approval from In re Marshall, supra, and says: 'The quotation just set forth * * * indicates the rule generally prevailing that a decree of a court of one state, having jurisdiction, relating to the custody of minor children is under the doctrine of comity prevailing among sister states and, subject of course to the right of the parties to show a change in the circumstances or conditions, entitled to recognition in another state.' This same case also quotes with approval from a case note appearing in 20 A.L.R. 815, where the authorities on the subject are collected, as follows: '"With some variation of statement, and an occasional intimation to the contrary, it is established by the great weight of authority that in the absence of fraud or want of jurisdiction, affecting its validity, a decree of divorce awarding the custody of a child of the marriage must be given full force and effect in other states as to the right to the custody of the child at the time and under the circumstances of its rendition; but that such a decree has no controlling effect in another state as to facts and conditions arising subsequently to the date of the decree; and the courts of the latter state may, in proper proceedings, award the custody otherwise upon proof of matters subsequent to the decree which justify the change in the interest of the child."' See, also, note, 72 A. L.R. 442." See, also, 9 Cal.Jur. "Divorce and Separation" sec. 142; Titcomb v. Superior Court, 220 Cal. 34, 29 P.2d 206; Dotsch v. Grimes, 75 Cal.App.2d 418, 171 P. 2d 506; In re Bauman, 82 Cal.App.2d 359, 186 P.2d 154.

[4] The decree of the Indiana court was entitled to full force in California, and under that decree appellant was entitled to the custody of the three minor children. While respondent was entitled to come into California and file this action to regain the custody of the children, she could only be entitled to regain said custody upon a finding by the court that there was such a change of circumstances as to justify the change. The only issue before the court was whether or not there had been such a change of circumstances that the best interests of the children would be served by awarding their custody to respondent.

[5] Upon the record in the instant case it is difficult to see how the court could have made such a finding, but it is not necessary to decide whether such a finding would have been sustained by the record because the court specifically declined to rule upon the issues properly before the court and so stated in the order. There is therefore no finding to support the orders made by the court, and for that reason the said orders must be reversed.

The orders appealed from are reversed.

VAN DYKE, P. J., and PEEK, J., concur.

119 Cal.App.2d 762

CHOMISTEK v. ARAK.

Civ. 19557.

District Court of Appeal, Second District, Division 1, California.

Aug. 18, 1953

Action by buyer against seller of bakery business for breach of seller's alleged warranty and guarantee that business would gross approximately $700 per week about three months after purchase. The Superior Court of Los Angeles County, Alfred L. Bartlett, J., entered judgment for seller following order granting motion for nonsuit, and buyer appealed. The District Court of Appeal, Scott, J. pro tem, held that no contract existed upon which buyer could recover from seller for breach of seller's alleged warranty and guarantee.

Judgment affirmed.

1. Sales 🔑52(7)

In action by buyer against seller of bakery business for breach of seller's alleged warranty and guarantee that business would gross approximately $700 per week about three months after purchase, evidence was not sufficient to establish fraud. Civ. Code, § 1572.

2. Sales 🔑427

Where bakery business had been purchased after buyer had made full investigation, which had disclosed that business was falling off, and seller had not agreed that sale might be rescinded or cancelled or that he would reimburse purchaser if sales did not reach $700 per week about three months after purchase, buyer could not recover from seller for breach of alleged warranty and guarantee, which was contained only in ratification of sale written by business broker, that business would gross about $700 per week after about three months after purchase. Civ.Code, §§ 1732, 2787–2866.

3. Sales 🔑277

In action for breach of seller's alleged warranty and guarantee that bakery business, which was sold, would gross approximately $700 per week about three months after purchase, the trial court could not be called upon to make a contract for the parties.

Eugene L. Wolver, Los Angeles, for appellant.

Stanley Sapiro and Charles M. Arak, Los Angeles, for respondent.

ROBERT H. SCOTT, Justice pro tem.

Plaintiff appeals from an adverse judgment following an order granting motion for nonsuit.

In his complaint plaintiff alleges that on July 27, 1951, he purchased a bakery business from defendant for a price of $3,500.00, that in the written agreement defendant "warranted and guaranteed that the sales of such business would reach a gross volume of approximately $700.00 per week by the 15th day of October, 1951"; that relying on said warranty and guarantee, plaintiff signed the agreement, made the required payments and executed an instrument covering the unpaid balance; that the sales volume of the business was substantially less than $700.00 per week; in December plaintiff served on defendant a written notice of breach of warranty and by this action seeks rescission of the contract and return of all money paid by him. A supplemental complaint was filed asking further damages for loss by plaintiff of his time which he put into the business.

The evidence is brought before this court by a settled statement on appeal.

Plaintiff had contacted a business broker, in response to an advertisement in a newspaper, and was told by the broker that the bakery was doing $700.00 a week. Plaintiff was then referred to defendant. The latter said "the business was doing approximately $500.00 at the time." The books were shown to plaintiff and they reflected that the business was not doing $700.00 a week. Plaintiff noticed that in the previous winter months, the figures were over $700.00 and defendant told him "the business in his opinion would reach $700. by October". Before he purchased the business, plaintiff was there at the place of business and observed its method of operation for two weeks. Plaintiff testified further as follows: "Looking at the books, I saw the business was doing $500 a week. I asked Mr. Arak why the business was not doing

$700 a week, and Mr. Arak's reply was, it was summertime, the bakery is not as good in summer as in the wintertime. 'According to your books', I said, 'it was much better last August than it was this August, and that was summertime; do you have an explanation for that?' 'No', Mr. Arak said, 'No, I have no explanation'. I said, 'I can hardly buy a business that is doing $500.00 a week when I was told it would do $700.00'. Mr. Arak said he would guarantee it to do $700.00 per week. Mr. Arak said, 'I will guarantee.'"

Plaintiff explained that from 1944 to 1951 he was employed "in an office capacity", the last two years as office manager. His testimony shows some familiarity with business methods and practices. When he examined defendant's books it must have been obvious to him that sales had fallen below $700 a week for several months and during June and July often were falling below $500 a week. The last two weeks of June, 1950 showed sales in excess of $1,400.00 each week while the same two weeks in June, 1951 showed sales of $495.00 and $571.00, respectively. Other comparisons must have put plaintiff on notice that the business he was buying, if operated as defendant had been operating it, could not be expected to produce weekly gross sales of $700.00 per week.

[1] Evidence produced by plaintiff was not sufficient to establish fraud under section 1572, Civil Code. In his opening brief, plaintiff makes no contention that his claim is based on that code section and in his closing brief asserts "that the written warranty and guarantee of respondent was not a representation" but was "an expressed warranty and guarantee". He offers for our consideration two decisions in the case of Chamberlain Co. v. Allis-Chalmers Mfg. Co., 51 Cal.App.2d 520, 125 P.2d 113 and 74 Cal.App.2d 941, 170 P.2d 85, and the case of Stott v. Johnston, 36 Cal.2d 864, 229 P.2d 348, 28 A.L.R.2d 580, but we find these cases to have been based largely on section 1732, Civil Code, which reads as follows:

"Sec. 1732. Definition of expressed warranty. Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty."

Appellant does not suggest that he makes any distinction between the words warranty and guarantee. Section 2787, Civil Code, defines a guarantor as one who promises to answer for the debt, default or miscarriage of another, or hypothecates property as security therefor. The section further states that the distinction between sureties and guarantors is abolished. Sections 2788 to 2866, Civil Code, cover the matter of Suretyship. We find nothing in them which would give any legal basis for appellant's claimed right to recover.

[2, 3] The trial court in this case was confronted with the problem of a purchaser who bought a business after full investigation. This had disclosed that business was falling off and could not be expected to improve unless some factors were added which would materially change conditions. The plaintiff knew that defendant could not assure a continuity of patronage. Defendant did not agree that the contract might be rescinded or cancelled or that he would in any way reimburse purchaser if sales did not come up to the amount mentioned. It is significant that only in the "Ratification of Sale" written by the business broker on his own office form, and in no other document do the words appear upon which plaintiff relies. From the record it was obviously a device employed by the broker to complete a sale which would entitle him to a commission. There was no meeting of minds of the parties and therefore no contract upon which this action could be based. The trial court could not be called upon to make a contract for the parties. On no legal theory had plaintiff made a prima facie showing of his claimed right to recovery and the motion for nonsuit therefore properly was granted. Sweet v. Markwart, 115 Cal.App.2d 735, 743, 252 P.2d 751.

Respondent has moved to dismiss the appeal, asserting that appellant has closed the business and moved out and therefore is not in a position to restore the business to respondent if he were to prevail in the action. Appellant admits that this is true but says it happened after the trial of the case. This motion to dismiss was ordered submitted for consideration by us in connection with the matters raised on appeal. Because of our determination on the principal issue of the appeal, the motion requires no discussion. The motion to dismiss is denied. Judgment affirmed.

WHITE, P. J., and DORAN, J., concur.

---

119 Cal.App.2d 802

ROSENBLUM et al. v. CORODAS et al.

Civ. 19487.

District Court of Appeal, Second District,
Division 1, California.
Aug. 21, 1953.

In action by veteran, who had purchased house with money borrowed from United States Government under Serviceman's Readjustment Act, and his wife to quiet title and for cancellation of promissory note allegedly given pursuant to agreement whereby plaintiffs promised to pay a sum greater than the government-appraised value, wherein defendants contended that the total price was given not only for the house but for furniture and furnishings. The Superior Court, Los Angeles County, Thomas P. O'Donnell, J., entered judgment for plaintiffs, and defendants appealed. The District Court of Appeal, Doran, J., held, inter alia, that the evidence sustained trial court's determination that plaintiffs had been required to pay a price in excess of that permitted under the Serviceman's Readjustment Act.

Affirmed.

1. Pleading 🔑250

In action to quiet title and for cancellation of promissory note which allegedly had been given by veteran in violation of Serviceman's Readjustment Act providing that agreement to pay for realty a sum greater than government-appraised value is illegal, wherein defendants by cross-complaint sought foreclosure of trust deed given to secure note, where veteran by counterclaim to cross-complaint forewarned defendants that demand would be made for affirmative relief, permitting veteran to amend complaint after trial so as to seek and receive money judgment was not error. Serviceman's Readjustment Act of 1944, § 500 et seq., 38 U.S.C.A. § 694 et seq.

2. Army and Navy 🔑51

In action by veteran who had purchased house with money borrowed from United States government under Serviceman's Readjustment Act to quiet title and for cancellation of promissory note allegedly given pursuant to agreement whereby veteran promised to pay a sum greater than the government-appraised value, wherein defendants contended that total price included price for furniture and furnishings, evidence sustained trial court's determination that veteran had been required to pay a price in excess of that permitted under such act. Serviceman's Readjustment Act of 1944, § 500 et seq., 38 U.S.C.A. § 694 et seq.

◆

Marvin A. Freeman, Beverly Hills, for appellants.

Aaron Sapiro, Stanley Sapiro, Los Angeles, for respondents.

DORAN, Justice.

This is an appeal from the judgment in an action to quiet title and for the cancellation of a promissory note.

The action is the result of a transaction relating to the purchase of a home by plaintiffs from defendants. As part of the transaction plaintiffs executed a promissory note in the sum of $1,500 secured by a trust deed. It is alleged that the purchase and sale was in violation of the "Serviceman's Readjustment Act of 1944". The plaintiff was a veteran of World War II and borrowed $6,800 from the U. S. Government to buy the home. It is alleged "that in order to obtain the real property described herein and the house thereon, plaintiffs at the demand of the defendants agreed to pay to defendants the sum of $14,000.00 for said real property, and that the sale price as specifically set out in the escrow instructions covering said property was $8,500.00, and that the sum of $5,500.00 over and above the sale price set out in escrow was to be kept secret in order for plaintiffs to obtain possession of said property.

"That the Serviceman's Readjustment Act of 1944, 38 U.S.C.A. § 694, et seq., provides that an agreement to pay for real property a sum greater than the government appraised value thereof, is illegal and unenforceable.

"That said property was appraised by an agent of the Veterans' Administration at the sum of $8,500.00, and that plaintiffs borrowed the sum of $6,800.00 from the United States Government under the provisions of law extending such benefits to Veterans.

"That plaintiffs executed said note in order to obtain housing accommodation and would not have executed said note except for the demands of defendants and would not have kept secret said excess sum of $5,500.00 paid to defendants except under duress of defendants."

See Young v. Hampton, 36 Cal.2d 799, 228 P.2d 1, 19 A.L.R.2d 830.

The judgment quieted the title for plaintiff, cancelled the note and provided for the payment to plaintiff by defendant of $860.

In a cross-complaint defendants sought the foreclosure of the trust deed.

It is contended on appeal that the court abused its discretion "in permitting plaintiffs to amend their complaint after the trial, to permit plaintiffs to seek and receive judgment for money, despite the fact that the complaint originally sought only the cancellation of the remaining obligation of plaintiff to defendant". That the court erred in denying defendant the relief sought and that, "The major ground of appeal is that the transaction involved did not violate the Serviceman's Readjustment Act."

[1] There was no prejudicial error in permitting the amendment. As pointed out by respondent, "By means of the Counterclaim to the Cross-Complaint, respondents forewarned Appellants that a demand would be made for affirmative relief in this case. The element of surprise was absent; and there was no new evidence introduced to prove the subject matter of this amendment."

[2] Appellants' other contentions relate to the sufficiency of the evidence and the applicability of the Serviceman's Readjustment Act. Whether that law applied and whether the evidence was sufficient were questions primarily addressed to the judgment of the trial court and the record supports the trial judge's conclusions with regard to both. Appellant argues in this connection, "Granted, as stated above, that the Court has the power to examine a transaction fully, to determine its true nature, the fact is that in this case an examination of the true nature of the transaction discloses it to be exactly what the parties set it up to be, namely, the sale of a house and of a house full of furniture and furnishings for $14,000.00. An examination of the entire record discloses no intention at any time to deceive the Veterans Administration, nor to change the form of the transaction in order to set up a fictitious transaction. * * *

"The trial court had no basis on which it could find that this transaction was violative of the Act. The most the trial court could have found from the evidence was that the machinery established by the Act could be improved, but that problem is not for the courts but for the legislature. The trial court erred in enlarging the scope of the Act by applying fraud and evasion rules to a situation where there was no such fraud or evasion involved." Obviously, the trial court disagreed with defendant and appellant, hence the judgment for plaintiff. There are no prejudicial errors in the record.

The judgment is affirmed.

WHITE, P. J., and ROBERT H. SCOTT, J. pro tem., concur.

119 Cal.App.2d 777

PEOPLE v. SANDOVAL et al.

Cr. 2881.

District Court of Appeal, First District,
Division 1, California.
Aug. 19, 1953.

Robbery prosecution. The Superior Court, Alameda County, Charles Wade Snook, J., entered judgment of conviction, and defendant appealed. The District Court of Appeal, Wood, J., held that the court had not committed errors in the admission and exclusion of evidence.

Affirmed.

1. Criminal Law ⚷455

In robbery prosecution, prosecuting witness' testimony relating to his physical condition at time of trial was relevant to issue of force or fear involved in commission of alleged robbery, and was properly admitted over objection that it was the opinion and conclusion of the witness and was irrelevant and immaterial.

2. Witnesses ⚷282½

In robbery prosecution, court properly curtailed further exploration of subject on cross-examination whether prosecuting witness had been beaten on ground that witness had already answered such question in the affirmative.

3. Criminal Law ⚷656(2)

In robbery prosecution, it was proper for trial court to ask witness, who was called for purpose of showing that defendant had been with prosecuting witness at time in question, as to whether witness in answering "I guess he did" to question whether prosecuting witness had talked with defendant meant that to the best of her memory the conversation had taken place.

4. Criminal Law ⚷419(10), 463
Witnesses ⚷287(4)

Where prosecuting witness in robbery prosecution had been questioned on cross-examination concerning doctors' advice to quit drinking, question on redirect as to whether doctors had said that he must quit drinking because of his condition and that his condition was due to fractured skull allegedly received in beating on night of robbery was not objectionable as calling for opinion and conclusion, as hearsay, as leading or as incompetent, but was proper as an attempt to clear up and clarify the situation opened up on cross-examination.

5. Criminal Law ⚷785(12)

Where district attorney claimed surprise, reminded prosecution witness of her out-of-court statement, and witness then reaffirmed such statement, court properly informed jury that all statements of witness could be considered as evidence of truth of matter contained in them, even though district attorney had sought to impeach witness by showing prior inconsistent statement.

6. Criminal Law ⚷406(1)

In robbery prosecution, defendant's written statement to effect that he and another had started to take prosecuting witness home in automobile and that when prosecuting witness became ill, other person took him out of automobile, hit him with his fist, and came back with money from prosecuting witness' wallet qualified as an admission by defendant that he had participated significantly in the alleged robbery, and corroborated other evidence in the case, and was admissible over objection that the statement was exculpatory.

◆

Thomas F. Poggi, Oakland, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Wallace G. Colthrust, Dep. Atty. Gen., for respondent.

FRED B. WOOD, Justice.

To a charge of robbery, taking $580 from Andrew Ford on February 2, 1952, Raymond Sandoval pleaded guilty and testified on behalf of the state. To the same charge in the same information Louis Benavides pleaded not guilty, and was convicted of second degree robbery. He has appealed from the judgment and from the order denying his motion for new trial.

He did not testify at the trial and does not question the sufficiency of the evidence to support the verdict. He makes five assignments of prejudicial error upon the part of the court during the course of the trial.

[1] (1) *Did the court commit prejudicial error in allowing Ford, the prosecuting witness, to testify concerning his physical condition at the time of the trial, June 9, 1952? No.*

Over the objection that it called for the opinion and conclusion of the witness and was irrelevant and immaterial, Ford was allowed to answer the question "Are you under a doctor's care at the present time as a result of the injuries you received on February 2nd?" He answered, "I still go to the hospital and take outside hospital treatment." The question was relevant to the issue of force or fear, if any, involved in the commission of the alleged robbery. Pen.Code, § 211. The witness was competent to testify concerning the facts elicited. Moreover, he had previously stated without objection, "I have received outside patient treatment since then [February 7th, when he left the hospital]."

[2, 3] (2) *Did the court erroneously summarize the evidence and thereby commit prejudicial misconduct? No.*

Ford testified that he met Sandoval and Benavides at a certain cafe. When it came closing time he understood them to say they would take him back to his ship or to his home. So he entered a car with them and was placed in the back seat. He tried to get out but they put him back in the car and he "passed out." The next thing he remembered was fighting near some railroad tracks. He was not certain whether he was fighting both Sandoval and Benavides or only one of them. He remembered being struck by some one. He tried to defend himself but it did him no good. Upon cross-examination defendant's counsel sought to get Ford to say or to admit that he did not remember being hit, that he inferred he was hit because he was badly bruised when he woke up in the morning by the side of the railroad tracks. In response to a series of such questions Ford said he did not know which of the two men struck him, nor how many blows; he passed out in the car; the next thing he remembered was standing on a railroad track and fighting; he remembered squabbling and fighting with them; couldn't say whether "he hit me"; asked "You don't remember getting hit, do you?" he said, "Yes, I can say I got hit because my eyes were all black and blue and my face all scratched up." He gave similar answers to similar questions several times repeated. Asked if he actually remembered the blows, he said, "I couldn't say how many there was before I went down but I do remember hitting the crossties * * *." Asked by the court, "Do you remember whether somebody hit you?" he replied, "Yes, I remember him hitting me, sir."

Then the following ensued: "Q. [by defendant's counsel] You don't actually remember anybody hitting you, do you? A. * * * I remember him hitting me." Mr. Cox: "I object to that question on the ground it has been asked and answered." Mr. Parrish: "Oh, no, it hasn't." The court: "It has been asked and answered. That isn't what he said. He said he remembered somebody hitting him and he said that half a dozen times this morning and this afternoon, particularly on cross-examination." Defendant's counsel then said, "With all due respect to your Honor, I take objection to your summation of the evidence and I don't think it is correct." The court sustained the state's objection.

We think the court gave a fair summary of this witness' testimony in response to these questions. Some of the answers were argumentative, but so too were the questions, and it does not appear likely that further repetition of the questions would have produced different answers than those already given. Moreover, the very question under consideration brought forth the answer "I remember him hitting me." Besides, Ford appears to have been a witness who was none too able to express himself. He had but a fourth or fifth grade education and defendant's counsel later said of him "This type of man will say yes to anything if you give him a question that calls for yes or no." In such a case, the trial court committed no abuse of discretion in curtailing further exploration of the subject with this witness. In his instructions, the trial judge advised the jury to disregard any ruling or any language used by him that might have seemed to indicate his opinion as to any question of fact, concluding in respect thereto that the jury "must determine for yourselves all questions of fact, without regard to any opinion you may suppose the judge of this Court may have or entertain." Finally, there was no real conflict in the evidence on the question whether or not Ford was hit as an incident to being robbed. Defendant did not testify but in a signed statement he gave the police, which was read at the trial, he said that Sandoval took Ford over near a ditch, that defendant saw Sandoval hit Ford and heard Ford groaning while being hit and that later Sandoval told defendant he kicked Ford.

Defendant also claims that the trial court misconstrued certain of the testimony of Anita Valenzuela, a waitress at the cafe attended by Ford that evening. Asked by the district attorney if Ford talked with Benavides, she said "I guess he did. I think so." Then the following ensued: "Q. You think so, is that your answer, ma'am? A. I guess he did talk to them. I didn't see him though. The court: When you say 'you guess,' you mean that is your best memory? The witness: Yes, that is the best that I can remember. Mr. Parrish: I think the answer should be stricken on the ground it is pure speculation. She says she didn't see him talk to anybody. The court: Objection overruled. Mr. Parrish: If the record shows that she didn't see him talk to anybody would you still make the same ruling? That is the record, Judge. The court: She said she guessed that she saw him talk to him and then I asked her if she meant by that, that that was her best memory and she said yes. Mr. Parrish: Well then she said, 'I guess so, I didn't see him talk to anybody.' The Court: Well the jury will judge the testimony of the witness."

We see no error in this. Witnesses now and then use such expressions as "I think so," "I guess so," "I am not sure," meaning it is thus and so "to the best of my recollection". See Weingetz v. Cheverton, 102 Cal.App.2d 67, 73, 226 P.2d 742, 746. It is proper for the trial court to ascertain the intent with which a witness uses such an expression. That is what the trial court did in this case.

[4] (3) *Did the court commit prejudicial error in permitting Ford to testify as to what his doctors had told him? No.*

Upon cross-examination defense counsel questioned Ford at some length concerning advice given Ford by the doctors at the hospital relative to his drinking habits and admonition against drinking. Upon redirect the district attorney asked him: "Mr. Ford, you told counsel that the doctors at the Marine Hospital told you to quit drinking for a while? A. Yes, they told me to quit drinking, sir. Q. And that if you drink in your condition you might go down like a vegetable or words to that effect? A. Yes, sir. Q. Didn't they tell you that was because you had gotten a fractured skull?" The last question was objected to as calling for an opinion and conclusion, as hearsay, as leading and as incompetent. Upon the overruling of the objection, the witness answered "Yes."

We find no error here. This was simply clearing up and clarifying a situation opened up on cross-examination.

[5] (4) *Did the court commit prejudicial error in advising a juror that all of the statements of the witness Valenzuela could be considered as evidence of the truth of the matter contained in them even though the district attorney had sought to impeach the witness by showing prior inconsistent statements? No.*

Asked if while they were in the cafe that evening she saw Sandoval talking to Benavides, Valenzuela said she wouldn't know how to answer that because everybody was talking to one another, she couldn't say whether they were together or not. Asked if she saw Sandoval talking to Ford, she said "No." The district attorney, claiming surprise, reminded her of a conversation she had with him and Inspector McDonough in which she said that Sandoval and Benavides left the cafe at closing time, said they were going to take him [Ford] back to the ship; and that she (Valenzuela) told Benavides "You had better take this man [Ford] back to the ship," and that Ford, Sandoval and Benavides left the cafe together. She confirmed having so stated on that occasion. Asked, "is that true that you told us that?" She said "Yes." Asked, "and it is corrected now?" She answered "Yes." Thereby she confirmed, also, the truth of her out-of-court statement making it a statement in court under oath.

As this witness left the witness stand, a juror asked if the jury should take the testimony pertaining to the impeachment as a part of the trial, to which the court responded: "All of the testimony is to be taken into consideration in determining the case. However, if the witness is not impeached you don't have to consider the impeachment. However, certain statements she was questioned about, she said that she made and that they were true, as far as the record goes at this time you may take those into consideration, not as impeachment but as her testimony after her recollection was refreshed."

Defendant's counsel objected to this as an incorrect statement of the law respecting impeachment. The court correctly ruled thereon: "when she said that certain things were true the jury has a right to take them into consideration."

[6] (5) *Did the court commit prejudicial error in allowing in evidence a written statement of the defendant? No.*

Defendant's objection is based upon the claim that the statement was exculpatory, not an admission.

This statement, signed by defendant, recited that he arrived at the cafe about 10 p. m.; met Sandoval there; observed Ford, who was drunk; left as the place closed; the waitress told him to take Ford home; Sandoval wanted to come along; he took his father's car because his own would not go; defendant drove out to East Oakland; Ford got sick, so Sandoval took him out of the car, hit him with his fists, came back without Ford and gave defendant $200 from Ford's wallet, saying to defendant "that is your part." The statement went into considerable detail but enough has been narrated here to demonstrate that in content it qualified as an "admission" by defendant that he participated significantly in the alleged robbery. It also corroborated much of the other evidence in the case.

The judgment and the order denying a new trial are affirmed.

PETERS, P. J., and BRAY, J., concur.

---

119 Cal.App.2d 156

CROFOOT v. BLAIR HOLDINGS CORP. et al.

RICE v. BLAIR HOLDINGS CORP. et al.

Nos. 15593, 15595.

District Court of Appeal, First District, Division 1, California.

July 13, 1953.

Hearing Denied Sept. 10, 1953.

Proceedings for confirmation of an arbitration award. The Superior Court of the State of California in and for the City and County of San Francisco, Preston Devine, J., confirmed the award, and entered judgment pursuant to its terms, and an appeal was taken. The District Court of Appeal, Peters, P. J., held, inter alia, that the record would not sustain appellant's contention that damages had been awarded upon an issue not pleaded in any of the six court actions submitted to arbitration.

Affirmed.

1. Arbitration and Award ⇨2

By enacting 1927 arbitration statute, legislature intended to adopt a comprehensive, all-inclusive, statutory scheme applicable to all written agreements to arbitrate, and intended that in such cases the doctrines applicable to common law arbitration should be abolished. Code Civ.Proc. §§ 1280–1293, 1281, 1283.

2. Arbitration and Award ⇨72

Failure of parties to secure consent of courts where actions between them were pending by requesting an order submitting case to arbitration did not deprive Superior Court of jurisdiction to entertain proceeding to confirm statutory arbitration award. Code Civ.Proc. §§ 1280–1293, 1281, 1283.

3. Arbitration and Award 🔑3

Under statute providing for arbitration of any controversy which "arises out of" a contract or the violation of "any other obligation", tort liabilities are included. Code Civ.Proc. § 1281.

4. Arbitration and Award 🔑7

In submission agreement providing that arbitration should, with certain exceptions, be mutually conclusive and binding as to all issues in court actions between parties, and providing that "decision of arbitrators shall be final as to all facts found by him", quoted sentence was not intended to require findings to be submitted to courts where actions between parties were then pending.

5. Arbitration and Award 🔑84

Agreement to submit issues involved in six enumerated court actions to arbitration "under sections 1280 through 1293 * * * of the California Code of Civil Procedure", authorized entry of judgment in Superior Court of county in which arbitration was had, notwithstanding failure of agreement to expressly provide for entry of judgment upon confirmation. Code Civ. Proc. §§ 1280–1293.

6. Arbitration and Award 🔑7, 29

Arbitrator derives his powers from arbitration agreement and has no legal right to decide issues not submitted to him; but in statutory arbitration, terms of statute are, by implication, written into arbitration agreement, and, where not inconsistent with agreement, terms of statute control. Code Civ.Proc. §§ 1280–1293.

7. Appeal and Error 🔑1010(1)

Arbitration and Award 🔑72

Neither Superior Court, upon motion to confirm arbitration award, nor appellate court reviewing lower court's order, has power to review sufficiency of evidence to sustain award. Code Civ.Proc. §§ 1288 and subd. (d), 1289.

8. Arbitration and Award 🔑66

Both before Superior and appellate courts, every intendment of validity must be given arbitration award, and burden is upon one claiming error to support his contention. Code Civ.Proc. §§ 1288 and subd. (d), 1289.

9. Arbitration and Award 🔑73

In absence of some limiting clause in arbitration agreement, merits of award, either on question of law or of fact, may not be judicially reviewed, except as provided in statute. Code Civ.Proc. §§ 1288 and subd. (d), 1289.

10. Arbitration and Award 🔑80

Submission agreement providing that arbitration should be mutually and conclusively binding as to all issues in court actions between parties save for such rights as parties, or any of them, might have under Code Civil Procedure §§ 1287–1293, and providing that decisions of arbitrator should be final "as to all facts found by him" conferred finality on arbitrator's award as to all issues, whether of fact or of law, except as limited by statute, the quoted clause being inserted merely to assure that, regardless of statute, finality was to be given to findings of fact. Code Civ.Proc. §§ 1287–1293.

11. Arbitration and Award 🔑72

In proceedings for confirmation of arbitration award, record would not sustain contention that arbitrator had awarded damages upon an issue not pleaded in any of six court actions submitted to him. Code Civ.Proc. § 1288.

12. Arbitration and Award 🔑52

Arbitrator is under no compulsion to explain his award or give reasons for his conclusions.

13. Arbitration and Award 🔑58, 59, 60

Where amount of damages were fixed and rights of offset were likewise definite, and elections contained in award were embodied in immediately or conditionally enforceable judgments which were clear and certain and as to which there could be little doubt that those entitled would elect most productive liability, award was "mutual, final and definite," within meaning of arbitration statute, notwithstanding various elections contained therein. Code Civ. Proc. § 1288(d).

14. Arbitration and Award ⚷1

In absence of agreement to contrary, law of forum governs arbitration proceedings.

15. Arbitration and Award ⚷72

Where parties had contracted to submit controversies set forth in New York Court actions to a California arbitration under California law, California court had jurisdiction to confirm award even though controversies were involved in out-state action. Code Civ.Proc. § 1289.

16. Arbitration and Award ⚷31

Where arbitration agreement listed six pending court actions between parties and provided that parties to agreement thereby submitted to arbitration all issues existing between them and raised by any pleading served by them prior to a specified date, arbitrator was without power to permit party thereafter to submit amendments to conform to proof.

◆

Phillip Barnett and Rodney H. Robertson, San Francisco, for Crofoot & Bay City Bank.

Roger Anderson, San Francisco, for Paul Rice.

Keesling & Keesling and Henry C. Clausen, San Francisco, Wm. Dwight Whitney and Edward C. Perkins, New York City, of counsel, for respondents.

PETERS, Presiding Justice.

Crofoot and Rice separately appeal from an order correcting and confirming an arbitrator's award and from the judgment entered on the award. Section 1293 of the Code of Civil Procedure provides that "An appeal may be taken from an order confirming, modifying, correcting or vacating an award, or from a judgment entered upon an award * * *." This section certainly makes either the order of confirmation "or" the judgment appealable. Whether the section requires an election between the two alternatives need not be decided because the parties have appealed from both, and the same points are presented on both appeals. The appeal of Rice from the judgment was not filed until the 61st day after its entry, see Rule 2(a) of the Rules on Appeal, but the 60th day was a holiday, so that the time to appeal was extended. Section 12 of the Code Civ.Proc.; Rules on Appeal, Rule 45(a); Grande v. Donovan, 55 Cal.App.2d 694, 131 P.2d 855.

Before discussing the details of this complicated controversy, a brief statement of facts should be set forth in order that the detailed facts can be related to the overall picture. Crofoot was the sole owner of the stock of T & C, a corporation engaged in the wholesale distribution, upon a nationwide scale, of popcorn vending machines and supplies. Rice managed this corporation on behalf of Crofoot. Crofoot arranged a sale of 27 shares of the capital stock of T & C, which was 54% of the total capital stock, to Blair Holdings Corporation, hereafter referred to as Blair. Written contracts were executed in April of 1947 whereby Crofoot made certain warranties and representations as to the correctness of the T & C balance sheets, current income statements, and certain listings of unfilled orders. These agreements also provided that Rice was to become president of T & C, and should remain as manager, and that Crofoot should become a member of the three-man board of directors. The agreements also gave Blair, within a designated time, the option of purchasing the balance of the shares of T & C. In October, 1947, within the time specified in the option, Blair exercised its rights and purchased the remaining 23 shares, that is, the balance of 46% of the capital stock of T & C. Shortly thereafter Blair exchanged 75,000 shares of its own stock in a complicated deal in satisfaction of the balance of its liabilities to Crofoot. Rice continued as president and manager, and Crofoot as director of T & C.

About a year after the exercise of the option, Blair claimed to have made a delayed discovery that the balance sheets, current income statements and lists of unfilled orders warranted by Crofoot to be true upon the initial sale of 54% of the T & C stock contained false statements, and that Crofoot and Rice, after the initial sale, in their official capacities, had concealed and failed to disclose the falsity of such representations. Blair thereupon sent notices to the San Francisco Stock Exchange, where the Blair shares were traded, and circularized the membership of the exchange, charging that Crofoot's title to the Blair shares was defective, and that Rice, who had received 7,050 Blair shares for services rendered to Crofoot, also had defective title to his shares. Blair also ordered its transfer agent to refuse to transfer any of the Crofoot and Rice shares, and ordered all dividends on the Crofoot-Rice shares to be withheld. This resulted in Crofoot and Rice being unable to sell their Blair shares. Crofoot had pledged a large portion of his Blair shares as security with the Bay City Bank & Trust Co., and this pledgee was prevented, for a substantial period, from selling these shares to protect its loans.

These controversies resulted in a plethora of actions being filed, with complaints, answers, counterclaims and cross-complaints, and even cross-complaints to cross-complaints. By the beginning of 1949 two court actions were pending in New York and four in California, in which various Blair and Crofoot groups were parties. Basically these actions were aimed by the Blair interests at securing a rescission of the T & C transactions for breach of warranty, or at securing damages for deceit. The Crofoot and Rice group wanted to compel the transfer of the Blair shares, or wanted to secure damages for their conversion, for libel, for disparagement of title, for wrongful institution of civil process, and statutory penalties for failure to transfer the shares.

After most of the actions had come to issue, the parties on March 6, 1950, executed an agreement to arbitrate under Code of Civil Procedure, sections 1280 through 1293. The agreement provided that the parties agreed to arbitrate "all issues existing between them and raised by any pleadings served by any of them in any of the said actions, other than superseded pleadings, prior to March 10, 1950 * *

"All parties agree that the arbitration shall be mutually conclusive and binding as to all issues in the Consolidated Action save for such rights as the parties, or any of them, may have under Sections 1287 to 1293, inclusive, * * * of the California Code of Civil Procedure. The parties agree that the decision of the Arbitrator shall be final as to all facts found by him." It was also provided that "The Arbitrator shall be given such powers as are provided for by law," and that "The Arbitrator shall be the judge of the relevancy and materiality of the evidence offered. Strict conformity to all legal rules of evidence shall not be necessary." It was agreed that the actions then on file should be stayed pending the arbitration.

The arbitrator selected was Professor George E. Osborne of the Stanford University Law School. He took evidence and heard argument for many days, received over 4,000 pages of depositions, and permitted some 600 exhibits to be introduced. After lengthy arguments, both written and oral, he rendered his award. The award itself is but 5 pages in length, but the findings and opinion cover some 215 pages, in which the arbitrator carefully, and in detail, disposed of practically every contention, major or minor, of the parties.

The award, generally speaking, found Crofoot liable in damages, in large amounts, for breach of the warranties contained in the initial agreement to buy and sell the T & C stock, and further found that, after that date, Crofoot and Rice had practiced deceit in their fiduciary relationships by concealing the existence and continuance of certain contingent liabilities of T & C, which resulted in Blair exercising the option to buy the balance of the stock of T & C. Damages were awarded Blair against Crofoot and Rice, but with various elections, set forth in detail in the award, to avoid the possibility of double recovery upon different causes of action relating to overlapping items of damage. The Blair parties were found liable to Crofoot and Rice for conversion and disparagement of title of the Blair stock. It was also held that the Blair parties had lost their rescission rights because of their laches and delay, because of their affirmation of the transaction after knowledge, and because of their failure to restore or offer to restore benefits received by them. A small statutory penalty was awarded against Blair in favor of Rice. If these awards to Crofoot and Rice be deducted as offsets from the sums awarded to Blair, the overall result of the award is a large judgment in favor of Blair, its precise amount being dependent upon the elections made by Blair, and upon the value of the Blair stock found to have been converted by Blair, and which it must repurchase.

The opinion and award of the arbitrator are the sole guide to the evidentiary facts upon these appeals. The court is not called upon to review the evidence produced before the arbitrator, and such is not included in the record on appeal. The record consists of the opinion and award of the arbitrator, of the pleadings in the various court actions, and the proceedings upon confirmation of the award.

After the award had been made, the Blair parties moved to confirm it, subject to certain modifications. This was opposed by Crofoot and Rice. They unsuccessfully sought a writ of prohibition to prevent confirmation, and argued vigorously before the superior court that the award should not be confirmed. The award, subject to correction of a mathematical calculation, was confirmed, and a judgment entered pursuant to its terms. The Crofoot parties attempted, by an application for an original writ, unsuccessfully, to halt the entry of that judgment. Crofoot and Rice thereupon appealed, as already indicated.

Reference should now be made to the pleadings in the six actions which were the subject of the arbitration.

Rice was not a party to the two New York actions. The first New York action, filed upon December 20, 1948, was by the Blair Holdings Corporation against Crofoot. This complaint stated two causes of action. The first sought to rescind both purchases of the T & C stock for false representations, and breach of warranty as to the income statements, balance sheets and unfilled orders of T & C. As to the breach of warranty, there was no allegation of knowledge of the falsity of the representations. The second sought damages for deceit. It realleged all the pertinent allegations of the first cause of action, added allegations as to knowledge of the falsity and intent to deceive of concealment of the breach of warranty, and that Rice and Crofoot, in their fiduciary capacities, rendered false and untrue reports to Blair, resulting in the purchase of the remaining 23 shares of the stock of T & C by Blair. The prayer was for rescission of the T & C purchase transactions, including the transfer to Crofoot of the 75,000 shares of Blair stock, "and/or" for $750,000 damages. Crofoot's answer denied the principal allegations, and pleaded laches, ratification and estoppel against the Blair parties, and inability on their part to transfer back the benefits they had received in the transaction. Blair filed a bill of particulars in this action specifying the transactions relied upon, and alleging that the damages specified were occasioned by the false representations made by Crofoot and Rice.

The second New York action was by Crofoot against Mario Giannini, and also named various Blair companies as defendants. It charged a conversion of Crofoot's Blair stock, and a conspiracy between the Blair parties and Giannini to gain control of this stock. A second cause was for conversion, libel and disparagement of title, and wrongful institution of civil process. Legal and equitable relief were prayed for.

A California action was instituted by the Bay City Bank & Trust Co. against the Blair parties. The plaintiff was the pledgee of 20,000 shares of Blair stock that had been transferred to it as pledgee by Crofoot. This complaint sought an order compelling Blair to transfer title to the stock to it, and also requested that the statutory penalty provided by Corporations Code, section 3016, be imposed. By way of cross-complaint, Crofoot and Rice having been brought in as parties, Blair pleaded a cause of action for rescission, and asked that a constructive trust be imposed on the Blair shares. This cause of action for rescission contains similar allegations to those in the New York action, except that here it is specially alleged that the representations and warranties made by Crofoot and Rice were known by them to be false and untrue, and that Rice conspired with Crofoot in making the representations and warranties, and in concealing their falsity from Blair. A demurrer to this count of the cross-complaint on the ground that it contained more than one cause of action was overruled by the California court.

This cross-complaint also alleged a cause of action for fraud against Crofoot and Rice for concealment and misrepresentation of T & C's financial position while Rice and Crofoot held official positions, and is very similar to the allegations in the second New York action. The prayer is for restoration of the Blair shares, their impounding *pendente lite*, rescission of the agreements to buy the T & C stock, and for $750,000 damages.

Crofoot counterclaimed and cross-complained, alleging the following causes of action:

1. Failure to transfer shares held by Bay City as pledgee after a court order had been secured and a bond posted, which resulted in a major loss to Crofoot. This apparently is intended to allege a cause of action for conversion of these shares;

2. Refusal to pay dividends to Crofoot or Bay City upon the Blair stock held by them;

3. Conversion of the balance of the Blair stock still held by Crofoot, and failure to pay Crofoot a later dividend on that stock;

4. Denial to Crofoot of the right to vote the Blair stock;

5. Disparagement of Crofoot's title to the shares and libel of him by the letters sent to the San Francisco Stock Exchange and its members. The prayer asks for $440,107.54 compensatory and $880,215.08 punitive damages, for an injunction and for an order compelling the transfer of such shares.

Rice cross-complained for conversion of his 7,050 shares of Blair stock by that company's refusal to transfer the shares or pay dividends, for a statutory penalty of $500 for refusal to transfer the shares. The prayer of Rice's cross-complaint requests judgment "for the full value of said Paul Rice's stock at $3.10 per share in the amount of $21,855, or for the difference between said price and the market price." He also prayed for punitive damages of $50,000, for past dividends, for an injunction and for the statutory penalty.

Crofoot also brought a California action (Crofoot v. Dardi, et al.) against certain officers, employees and agents of Blair, alleging a conspiracy to prevent the transfer of Crofoot's personally held Blair shares, apparently a conversion, failure of Blair to pay declared dividends on such stock, denial to Crofoot of the right to vote such stock, libel and disparagement of title, a willful conspiracy to prevent the Bay City Bank from selling the 20,000 shares pledged to it by Crofoot resulting in a loss to him, aggravated by failure to pay dividends on such stock. Here the prayer was for $440,107.54 damages, treble punitive damages, and for an injunction.

Rice also brought a California action against Blair alleging the conversion of his 7,050 shares. Here the prayer demanded judgment "for the full value of plaintiff's stock at $2.90 per share, or in the alternative, judgment for the difference between said price and the price eventually to be received by plaintiff when he is able and does sell and transfer said stock, or the difference between said price and the market value of said stock when plaintiff is able to sell and transfer." Rice also requested an order compelling Blair to make the transfer, and for an injunction.

Blair brought in Crofoot as a party to this action, and then cross-complained against him and Rice in language almost identical with that used by Blair in the Bay City Bank action, the first California action herein discussed.

The sixth action was by Rice against Blair for a writ of mandate to compel the transfer to Rice of his 7,050 shares. When the arbitration agreement was signed an alternative writ had been issued in this proceeding and an answer filed.

These were the six actions that the parties sought to arbitrate. Neither party secured from any of the courts where such actions were pending orders submitting the actions to arbitration pursuant to the arbitration agreement. The six actions were referred to in the arbitration agreement and listed in a schedule attached. The agreement expressly provided that the parties "agree to submit to arbitration, under Sections 1280 through 1293 * * * of the California Code of Civil Procedure, all issues existing between them and raised by any pleadings served by any of them in any of the said actions, other than superseded pleadings, prior to March 10, 1950." Unanswered pleadings were to be deemed denied. The agreement then provided, in addition to the clauses already noted, the following provisions: "Pending completion of the Arbitration contemplated by this Agreement and confirmation of the award to be made therein, subject to the provisions of Sections 1287–1293, inclusive, of Title X, Part 3 of the California Code of Civil Procedure, each of the actions listed in Schedule I shall be stayed in all respects, save for completion of depositions, and appeals shall be similarly stayed, and an order to this effect shall be consented to and filed by the respective parties or their attorneys in each of said actions, it being the intent of this Agreement to preserve the status quo of each of said actions as of the date upon which this Agreement becomes effective and binding upon the several parties."

As already pointed out, no one prior to the arbitration, sought the consent of the courts where such actions were pending by requesting an order submitting the cases to arbitration. The record shows, however, that after the arbitration hearings had taken place, but before the award had been made, Crofoot noticed a motion for such an order, *nunc pro tunc*, it being his contention that such an order of submission was necessary if the award to be rendered was to become effectual. Blair opposed the motion as unnecessary. The motion was denied "without prejudice." This failure to secure a submission order, on these appeals, is alleged by Crofoot to invalidate the award.

The award is a most complete and exhaustive document. As already pointed out, the findings and opinion cover some 215 pages. A summary of the award follows:

The arbitrator first considered the liability of Crofoot. He examined, generally, the breach of warranty and deceit causes of action against him. He noted that while the cause of action for breach of warranty did not have its own allegation of damage, merely pleading a rescission, that the prayer for damages applied to both causes, and intimated that the prayer alone might be sufficient to allow damages for breach of warranty. He went on to hold, however, that the second or deceit cause of action included the allegations of the breach of warranty cause of action; that despite this apparent improper joinder of two causes of action in one count, the whole set of allegations, under modern concepts of a cause of action, did constitute a "broad cause" for "false and untrue representations, concealments and warranties made independently or in conspiracy."

After finding a valid statement of a cause of action for deceit, it was found that it and the complaint as a whole contained valid causes of action for breach of warranty as to the first T & C purchase contracts, and valid allegations of fraud and deceit based upon the representations and warranties in those contracts. It was also found that Blair had properly pleaded, independently, a cause of action for fraud and deceit for misrepresentations made between the first and second purchases of the T & C stock which resulted in Blair executing the option and making the second purchase. The arbitrator noted that in reference to the transaction of November 19, 1947, whereby the Blair shares were exchanged in satisfaction for the balance of the liability on the purchase of the T & C stock, which occurred about a month after the exercise of the option, Blair had not alleged such transaction was entered into on reliance on such representations, nor had it been alleged that Crofoot or Rice had knowledge of the falsity or the intent to induce Blair to enter this transaction. Accordingly it was found that Blair had no independent right to rescind this transaction, and that if Blair once possessed such right it had been lost by delay.

The arbitrator then analyzed at length the April, 1947, transactions leading up to the first purchase by Blair of 54% of the T & C stock. Prior to this sale Crofoot owned T & C, but Rice, who was secretary and general manager of that corporation, had a contract entitling him to 10% of the net profits or of the sale proceeds. At that time T & C sold its popcorn vending machines via order bills of lading with sight drafts attached, sent to a Galveston bank for credit to T & C's account and for collection through correspondents. T & C retained title until the drafts were paid.

Early in 1947 Crofoot talked to several directors of Blair, in San Francisco, about Blair buying T & C. In March and April of 1947 Crofoot personally negotiated the sale in New York, taking the Blair parties in great detail over the financial operations of T & C and furnishing them with financial statements later the subject of the warranties. The arbitrator found that the Blair parties relied upon Crofoot and his reputation, making little independent investigation of its own. Crofoot argued before the arbitrator that Blair should not have so relied, being a "sophisticated buyer," and that the misrepresentations were so obviously false that no one should have relied upon them. These contentions were rejected by the arbitrator, he holding that the evidence showed that the Blair negotiators were inexperienced, and, at any rate, sophisticated or not, did in fact rely upon Crofoot, and that Crofoot contended he did not know of the falsity of the representations and therefore could not logically contend that Blair should have known of their falsity.

The arbitrator then found false and untrue representations and warranties in the April contracts as to both the balance sheet and income statements of T & C in that in reference to two major transactions the balance sheet falsely showed the making of contracts and the receipt of payments on these sales by T & C, while the income statements falsely showed an absolute bank credit in favor of T & C resulting from such sales. These two transactions involved the sale by T & C of 491 machines to Barry Distributors at a sale price of $71,599.44, and 100 to Popcorn of Louisiana at a sales price of $13,300. Both of these distributors had dishonored the drafts presented to them and had not paid for the machines. These facts were not disclosed in T & C's books. The books showed these two major sales, and an unconditional liability of the bank in Texas to T & C. Blair, of course, knew that purchasers of the machines were given credit and that sight drafts in the ordinary course of business would be outstanding, but what Blair did not know, and what the books failed to disclose or misrepresented, was that these drafts were in default for periods far beyond the ordinary course of business. In fact, the books failed to disclose that by March 17, 1947, a notice of cancellation of Popcorn's distributorship had been served, and that all shipments to Barry had been stopped, that company then being in a hopeless condition. Rice, in fact, notified T & C on April 10, 1947, that he intended to set up a new distributorship for Barry.

The arbitrator then found that, because these same liabilities were concealed by both the balance sheet and the income statement, Blair was only entitled to one recovery for both violations. It was found that the representations were material in that they made the cash position of T & C illusory in that they set forth fictional sales amounting to one-third of the current income, and represented that the second largest distributor of T & C was satisfactorily operating. It was further found that these representations and warranties were made with the intent to induce action by Blair in reliance upon them, and that Rice had actual knowledge of their falsity.

The arbitrator spent some time discussing the question as to whether Crofoot had knowledge or notice of the falsity of the representations, but finally, based upon Crofoot's intimate knowledge of T & C's business, his knowledge of some of the distributorship difficulties, his presence at conferences aimed at finding new distributors for those in default, found that, although the evidence did not show that Crofoot had positive knowledge of the defaulted drafts, there was no reasonable grounds for him to believe that such defaults did not exist.

The arbitrator concluded that Blair was entitled to damages against Crofoot for breach of the warranties contained in the April contracts, but was not entitled to a rescission of those contracts. Fixing the damage thus caused presented some difficulties. There had been no loss as to the 100 machines sold to Popcorn because there was a bona fide outright resale of them. The Barry machines were also resold to a new distributor known as Automatic Merchants, but this was not an outright resale. T & C entered into a deal whereby a corporation known as CMAC financed Automatic Merchants and T & C guaranteed to CMAC the amount of all the notes of Automatic Merchants. This guaranty created a contract liability which when allocated to the machines resold, reduced by payments, increased by interest, and considering certain offsets, resulted in a net loss to T & C of $22,554.88.

In considering the deceit cause of action as to the April contracts, the arbitrator noted that in addition to the facts discussed under the warranty cause of action it was necessary to find an intent to deceive upon the part of Crofoot, or the affirming of knowledge of that not positively known. Crofoot was found liable for deceit in making representations of facts not known by him to be true. The liability for such deceit was found to be $77,931, but it was pointed out that because of the damages for the breach of the warranties already discussed and those incurred as to breach of warranty as to unfilled orders, the damages for breach of warranty exceeded those for deceit. It was held that since both liabilities were predicated upon the same representations they were mutually exclusive, and that Blair must elect between them, and presumably would elect the larger sum.

The arbitrator then considered some special damages caused by the contingent liability to CMAC as guarantor of the notes of Automatic Merchants. On April 26th and 30th, 1947, T & C had made written contracts with Automatic Merchants as a new distributor. Automatic agreed to buy 491 machines held by Barry under the defaulted drafts already discussed and 275 other machines that had been paid for by Barry. These written contracts were expressly conditioned upon Automatic giving satisfactory financing "with CMAC or other lending institution." But before these agreements were signed Rice had orally agreed with CMAC that T & C would sign the repurchase agreement, or guaranty, and similar representations were made to Automatic, it being given the option to use CMAC for financing or finding local financing if it desired. The arbitrator found that the oral agreement with Automatic was collateral and supplementary to the written agreement and that it imposed a specific duty on T & C to either guarantee to CMAC Automatic's notes, or accept independent financing by Automatic if it elected to secure such financing.

Automatic was unable to secure local financing so that on May 13, 1947, T & C signed an agreement with Automatic and CMAC guaranteeing Automatic's credit up to $150,000. Under this agreement the 491 machines held under the Barry defaulted drafts, plus the 275 machines owned by Barry but repurchased by Rice with money personally advanced by Crofoot, were re-invoiced to Automatic upon sight drafts accepted and paid by CMAC, which drafts were then substituted with Barry's Texas bank in satisfaction of the defaulted drafts.

The arbitrator found that this contingent liability of T & C to CMAC was incurred not in the ordinary course of business pursuant to an agreement before the sale to Blair on April 30, 1947, of the 54% of T & C stock, and was itself a breach of warranty.

Blair first had notice of the existence of some sort of repurchase agreement in January, 1948, and knowledge of the guaranty arrangement July 23, 1948, but did not gain actual knowledge of the link between the guaranty and the payment of the defaulted drafts until October of 1948.

While the arbitrator had found that Crofoot had no actual knowledge of the defaulted Barry drafts, he here found from all the facts, including Crofoot's evasive testimony and his personal loan to Rice to repurchase the 275 Barry machines, that he had actual knowledge of the making of the guaranty to CMAC.

The liability of Crofoot for this misrepresentation was found to be identical with liabilities already found except as to the new contingent liability on the 275 machines repurchased from Barry for sale to Automatic. Properly adjusted and apportioned this additional liability was fixed at $12,654.28.

The April contracts for the sale of T & C stock contained an express warranty that a statement as to unfilled orders was true and correct. The arbitrator found that the subject matter of this warranty was information furnished by Crofoot consisting of a file of distributors' contracts, showing the number of machines ordered, their price, the amount of commissions, and a listing of the number of machines shipped. Taken together these documents purported to show the number of unfilled orders. It was found that the warranty was intended to mean that there were valid subsisting contracts represented by the orders, but was not intended to guarantee future performance of the contracts. The arbitrator then held that liability for breach of this warranty would be limited to the three contracts of distributors whose financial condition had become hopeless, and who had their contracts cancelled at the time the warranty was made. The arbitrator excluded liability for distributors who were then in partial default or were showing financial weakness.

The three distributors involved were Barry, Popcorn of Louisiana, and Consolidated Popcorn Supply. All were in a hopeless condition when the warranty was made. Crofoot was found to have had no belief in the truth of his representations as to these three distributors, and it was found that Blair had no knowledge of the falsity of the representations.

The damages for this breach of warranty were calculated by taking the total number of machines unshipped under the contracts and multiplying by the net profit per machine that should have been made. So computed, and allowing all legitimate offsets, the total damages for breach of the warranty as to unfilled orders as to these three companies, was fixed at $137,132.26.

The arbitrator then found that Crofoot had a tort liability for deceit in connection with these same unfilled orders, but that such liability was the same as that involved on the breach of warranty and deceit in connection with the balance sheets and income statements. Blair is entitled to only one recovery and must elect among its claims. If it elects one claim of damages it is barred as to the others.

The arbitrator then devoted his attention to misrepresentations, concealments or nondisclosures between May 1, 1947, and October 31, 1947, the period between the two purchases of the T & C stock by Blair. During this period, pursuant to the provisions of the April contracts, Rice became president and general manager of T & C, and Crofoot became a member of the three-man board of directors. This arrangement was to assure continuity in the management of the business. The arbitrator found that in performing their functions Rice and Crofoot owed a fiduciary duty of disclosure to Blair.

It was found that Crofoot during this period improperly concealed from Blair the past misrepresentations made by him, and that this was a material inducement to Blair to exercise the option in October. As to new misrepresentations and concealments it was held that certain representations made by Rice were mere "puffing" and that certain representations as to certain distributors were not false and were outside Crofoot's actual knowledge. Crofoot, however, was found liable for a breach of fiduciary duty in failing to disclose the facts as to the CMAC guaranty, which liability was fixed at $35,158.86. But this liability was also found to be in duplication of the damages already allowed for breach of this guaranty, and so these damages were allowed only upon election to forego other claims.

The arbitrator then separately considered whether there had been any additional misrepresentations and concealments between October 31, 1947, to November 19, 1947. This last date is when the contract was executed whereby Blair turned over 75,000 of its shares in satisfaction of its liability to Crofoot. The arbitrator found that no separate cause of action had been pleaded for this period, that there were no new misrepresentations, and therefore no liability for this period.

The arbitrator then held that all rescission rights of Blair were barred, partly by laches and delay, partly because of some knowledge of the facts, and also because of failure on the part of Blair to offer to restore, and its inability to restore, what it had received under the contracts. Pending these suits T & C had become a practically worthless corporation, partly due to the misrepresentations already discussed, but also due to the acts of Blair. Since Blair is not appealing, these findings need not be further considered.

The arbitrator next turned his attention to Blair's claims against Rice, pointing out that these claims paralleled those against Crofoot, particularly where it was claimed that a conspiracy between the two existed.

As to the April, 1947, contracts it was found that Rice was not a contracting party, had then no duty of disclosure, and that any partial disclosures that amounted to misrepresentations were not relied upon by Blair. Rice was not liable for any misrepresentations made in connection with this contract.

As to Blair's rights against Rice between May 1, 1947, and October 31, 1947, however, it was found that, as president and general manager of T & C, Rice was Blair's agent, acted as Crofoot's sub-agent with the same duties owed to Blair as were owed by Crofoot, and in some functions acted as a direct agent for Blair. It was found that Rice not only failed to reveal the CMAC guaranty, but actively concealed it in several ways set forth in the findings. It was also found that a conspiracy existed between Crofoot and Rice proved by their former associations, Rice's 10% profit sharing contract with Crofoot, Crofoot's advance to Rice in connection with the repurchase of the 275 Barry machines, and certain coincidences of trips and meetings between the two. Thus it was found that Rice was not only independently liable for breach of a fiduciary duty in failing to disclose the CMAC guaranty (and also in failing to disclose some facts as to what is referred to as the "Chicago situation,") but also liable, with Crofoot for conspiracy. The arbitrator carefully limited Rice's liability to the loss incurred by Blair upon exercising the option in October of 1947, and by a method of computation, fully set forth in the findings, fixed this liability at $23,446.72. But the arbitrator was most careful not to permit Blair to recover from both Crofoot and Rice for this same damage. Crofoot's liability for deceit was fixed at $77,000 plus, but an alternative right of recovery for breach of warranty in a greater sum was also granted against him. It was provided that Blair could have but one recovery. If it elected to enforce its rights against Crofoot for breach of warranty recovery against Rice is denied, and if it elects to hold Crofoot for deceit any damages received from Crofoot will constitute a satisfaction *pro tanto* against Rice, and vice versa.

Consideration was next given to Crofoot's claims against Blair. After first holding that the various causes of action had been properly pleaded, the arbitrator disposed of each cause as follows:

It was held that Crofoot could not recover on his cause of action against Blair for the claimed wrongful initiation of civil proceedings, because the evidence showed that the actions had been instituted in good faith, that Blair had probable cause for the institution of such proceedings, and there was an absence of a termination of such proceedings favorable to Crofoot.

On the conversion count, however, the arbitrator found the Blair Holdings Corporation guilty of such conversion, by reason of the corporate refusal to permit a transfer of stock by one with title and a right to transfer. Good faith and innocent mistake constitute no defense to such an action. Damages for the conversion were calculated at $3.50 per share (pursuant to a stipulation that such sales in that amount had been made in New York), fixed by the highest sale price of Blair stock after the conversion and up to the start of the arbitration proceeding. The arbitrator found that Blair blocked the sale by Crofoot of

31,725 shares, and also the sale of the 20,000 shares pledged with the Bay City Bank, thus converting 51,725 shares, which at $3.50 per share comes to $181,037.50, less the $36,515 received ultimately on the sale of the Bay City Bank stock, leaving a balance of $144,522.50. But as a condition to receiving this amount Crofoot must transfer to Blair the certificates for 33,725, the balance of the converted stock held by him. The theory of this conditional award is that a conversion amounts to a forced purchase by the converter. Crofoot was also awarded $12,631.25 in withheld dividends on which interest was allowed, but interest was denied on the main award. Crofoot was also allowed, by stipulation, $1,270.71 as the cost of a bond necessary to free the pledged shares, but denied other costs, and also denied the statutory penalty provided by section 3016 of the Corporations Code. These awards were against Blair Holdings Corporation only.

As to the cause of action for disparagement of title, which is a cause of action for the publication, without privilege, of matter disparaging to another's property rights resulting in damage, the arbitrator held that while most of the Blair parties had an honest belief in the validity of the claims asserted by them, and acted only upon advice of counsel after a full and fair disclosure to counsel, that this was not true of Dardi, vice-chairman of the Blair board of directors, chairman of its executive committee, and acting chief of the company. As to him, it was found that he did not make full disclosure to counsel of many pertinent facts, set forth in the findings, that he acted contrary to counsel's advice in various specified ways, and by his actions had demonstrated that he did not act within the privilege that would constitute a defense. His acts imposed liability not only on himself but on Blair. Damages, limited to the amount for which the stock might have been sold, were awarded Crofoot, but since this could not possibly exceed the amount already awarded for conversion, it was decreed that he must elect between the two rights.

As to the libel cause of action, it was found that but one false publication was proved, which was later corrected, and which resulted in no damage.

In considering Rice's claims against Blair the arbitrator held that Rice had properly pleaded against Blair two causes of action for the conversion of his 7,050 shares, and also a cause of action for the statutory penalty. In pleading his damage and in his prayer in the conversion actions Rice had averred that the highest value of this stock was $3.10 per share. He attempted to file amendments to conform to proof so as to add new causes of action to his pleadings, and to amend the prayer so as to ask for damages based on $3.50 per share, the amount the Blair interests stipulated in the Crofoot actions was the highest amount large blocks of the Blair stock had been sold. Permission to file such amendments was denied. The arbitrator ruled that he, under the arbitration agreement, lacked the power to grant amendments to conform to proof. He also held that the allegation in the prayer fixing damages at $3.10 a share was not amendable, was material, and limited the maximum damages allowable. Thus, after finding that the facts already set forth in the Crofoot action also supported a cause of action by Rice for conversion, the arbitrator fixed such damages at $3.10 per share at $21,855, allowed $1,762.50, with interest, as damages for withheld dividends, such awards being conditioned upon his transfer of the shares to Blair. He also allowed $300 statutory penalty against the stock transfer agent of Blair, based upon her refusal to transfer the shares.

The award proper is quite short. It provides that for breach of the three warranties in the April, 1947, agreement as to the income statements, as to unfilled orders, and as to the absence of liabilities Blair is awarded against Crofoot specified amounts totalling $172,341.42. The award provides that "Should Blair elect to enforce its rights under this part of the Award [it being the most favorable award to Blair], it shall be precluded from enforcing against Crofoot or Rice any other rights to damages given to it by other parts of the Award."

Blair was then awarded against Crofoot $77,931 for deceit in connection with the

April, 1947, agreement. "Should Blair elect to enforce its right under this part of the Award, it shall be precluded from enforcing against Crofoot any other rights given to it by other parts of the Award. Furthermore, if Blair elects to enforce its right under this part of the Award, any amount it collects in satisfaction of it shall reduce, *pro tanto*, the amount of its right under the Award against Rice."

Blair was next awarded $35,158.56 as damages against Crofoot for breach of his fiduciary duty to disclose to Blair the existence of the CMAC guaranty. The elections as to this award were somewhat complicated. It is provided that if Blair elects to enforce this part of the award it is precluded from enforcing its rights to damages for breach of warranty as to the income statements, fixed at $22,554.88, and for breach of warranty as to no liabilities, fixed at $12,654.28. It was further provided that election to take these damages for breach of fiduciary duty would reduce, *pro tanto*, the deceit damages.

Crofoot is allowed to offset his recovery against Blair if he transfers 33,725 shares to Blair. In the unlikely event that Blair elects a recovery that is less than the amount awarded to Crofoot, Crofoot can recover, upon transfer of the shares, the excess amount.

Blair is awarded against Crofoot $23,446.72, with interest, from November 15, 1948, to the date of the award for his failure to disclose the contingent liability assumed by T & C. Election by Blair of rights for breach of warranty against Crofoot precluded these damages, Rice not being liable for breach of warranty, but simply concealed the true facts as to what Crofoot had warranted. It was also provided that election by Blair to collect damages for deceit against Crofoot would reduce, *pro tanto*, the amount awarded against Rice, in the amount so recovered. But if Blair elected to collect this award against Rice any amount collected would reduce, *pro tanto*, the amount of the award against Crofoot.

Crofoot was awarded $144,522.50 against Blair for conversion of 51,725 shares of Blair stock, plus $12,931.25 for withheld dividends, with interest, the condition of enforcement being the transfer to Blair of 33,725 shares. There was also awarded to Crofoot $1,270.71 as reimbursement for a bond required to transfer the stock pledged to the Bay City Bank.

Crofoot was awarded a right, in an unspecified amount against Dardi and Blair Holdings Corporation for disparagement of title, but these damages are the same and subject to the same conditions as Crofoot's conversion rights above discussed. Enforcement of the conversion and other rights above discussed will preclude enforcement of his rights for disparagement of title, and vice versa.

Rice was awarded $21,855 for conversion of his 7,050 shares of stock, and $1,762.50, with interest, as damages for withholding dividends, conditioned upon his transfer to Blair of the 7,050 shares. Against the stock transfer agent Rice was also awarded $300 as a statutory penalty for refusing to transfer.

Each party was required to bear his own costs, including his share of the arbitration costs as provided in the agreement. All other claims asserted by any party were denied.

On the motion of Blair to correct, modify and confirm the award, a mathematical error was corrected, and the award confirmed as corrected. Judgment was entered the same date (July 5, 1951) determining that the arbitration finally determined the rights of the parties.

At the inception of this appeal we are met with the contention made by Crofoot that the superior court was without jurisdiction to confirm the award or to enter judgment thereon for the reason that no court order was ever secured submitting the then pending court actions to arbitration. In the absence of such an order, it is contended, there was merely a voluntary submission of the parties to a common law arbitration. A common law arbitration award is not specifically enforceable, and can only be enforced by an independent court action. It is urged that, lacking an order of submission, the superior court was without power to confirm, or to enter judgment.

Crofoot's arguments are all based on the law as it existed prior to 1927. Prior to that date it was undoubtedly the law that both common law and statutory arbitrations existed in this state, that in the absence of an order of submission the arbitration was deemed to be a common law arbitration, and that in such common law arbitration the award could only be enforced by an independent action and could not be entered as a judgment. Fairchild v. Doten, 42 Cal. 125; Kagel, California Arbitration Statute, 38 Cal.L.Rev. 799, 806. It was then necessary to hold that both common law and statutory arbitrations existed in this state because the then statutory arbitration was limited to certain controversies, and because the then statute—section 1283 of the Code of Civil Procedure—provided that the arbitration agreement could provide for the submission order by a court, and a statutory arbitration could not be had unless such submission order was secured from a court and filed with the clerk. Draghicevich v. Vulicevich, 76 Cal. 378, 18 P. 406; Ryan v. Dougherty, 30 Cal. 218; Heslep v. San Francisco, 4 Cal. 1.

Since 1927, however, these limitations on statutory arbitrations no longer exist. In that year, upon the recommendation of the Judicial Council (First Report of the Judicial Council, 20, 27), the Legislature completely redrafted the arbitration law, by redrafting sections 1280–1293 of the Code of Civil Procedure. Under the law as it presently exists there is no field for a common law arbitration to operate where the agreement to arbitrate is in writing. Under the provisions of section 1281 the parties may, in writing, submit "any controversy" to arbitration. The provision formerly existing requiring the order of submission to be filed with the clerk of the court was entirely deleted. There is now no requirement for the securing of a submission order or that any such order be filed with the clerk or at all. Now section 1281 reads: "Two or more persons may submit in writing to arbitration any controversy existing between them at the time of the agreement to submit, which arises out of a contract * * * or the violation of any other obligation. They may also so agree that a judgment of a court of record, specified in writing, shall be rendered upon the award, made pursuant to the submission. If the court is thus specified they may also specify the county in which the judgment shall be entered. If the writing does not specify, the judgment may be entered in the superior court of the county * * * in which said arbitration was had." Thus, not only is there no express requirement of first securing a court order of submission, but the last two sentences of section 1281 necessarily imply that if the particular court is unspecified, or no court is specified, the court in the county where the arbitration was had will obtain jurisdiction in the absence of any prior submission by it. This conclusion is fortified by section 1291 which provides that judgment may be entered in the court where the application for confirmation was filed.

[1, 2] The effectiveness, operation and enforcement of a common law arbitration differ in almost every respect from a statutory arbitration. We conclude that by the adoption of the 1927 statute, the Legislature intended to adopt a comprehensive all-inclusive statutory scheme applicable to all written agreements to arbitrate, and that in such cases the doctrines applicable to a common law arbitration were abolished. As Kagel puts it (38 Cal.L.Rev. at p. 809): "It is reasonable that parties who voluntarily agree in writing to arbitrate should be bound by the statute and should not as an afterthought be permitted to escape from their contract through the portals of the common law." It must be held that the arbitration here involved is a statutory arbitration[1], and that since the statute not only does not require a prior order of submission but directly implies that none is required, such order is not essential to confer jurisdiction upon the court to entertain a proceeding to confirm the award or to enter judgment thereon.

---

[1] The arbitration agreement refers to the statute as governing in at least three places.

[3] Crofoot also contends that the arbitration statute does not include liabilities in tort, and that for this reason this is not a statutory arbitration. The statute is made applicable to all agreements in writing to submit to arbitration "any controversy * * * which arises out of a contract or the refusal to perform the whole or any part thereof or the violation of any other obligation." § 1281, Code Civ.Proc. Thus the statute, extending as it does to the violation "of any other obligation", clearly includes tort liabilities. Moreover, even if the statute were limited to disputes "arising out of a contract," which it is not, the present controversy certainly involves a dispute that "arises out of a contract". There is no requirement that the cause of action arising out of a contractual dispute must be itself contractual. At most, the requirement is that the dispute must arise out of contract. That is certainly true here. There is no merit to the point.

[4] Crofoot next argues that under the terms of the arbitration agreement the arbitrator was limited to finding the facts, and therefore the agreement necessarily contemplated presenting such findings to the various courts where the actions were pending for their legal conclusions based on such findings. That not having been done, the judgment is void. This conclusion, so at variance with normal procedure in arbitration proceedings, is based entirely on the one sentence appearing at the end of clause two of the arbitration agreement to the effect that it is agreed "that the decision of the Arbitrator shall be final as to all facts found by him." The contention completely overlooks or disregards the preceding sentence to the effect that "All parties agree that the arbitration shall be mutually conclusive and binding as to all issues in the Consolidated Action save for such rights as the parties, or any of them, may have under Sections 1287 to 1293, inclusive, of Title X, Part 3 of the California Code of Civil Procedure." Obviously, the sentence quoted by Crofoot was not intended to require the findings to be submitted to the courts where the actions were then pending. That sentence has relevancy, if at all, only on the question of the scope of the review permitted, a point later discussed.

[5] Crofoot also contends that the court lacked jurisdiction because the arbitration agreement failed to provide for the entry of judgment upon the confirmation. The agreement provides that the parties "agree to submit to arbitration" the issues involved in the six enumerated actions "under Sections 1280 through 1293, * * * of the California Code of Civil Procedure." The last sentence of section 1281 provides that, when the agreement does not specify the court, the judgment may be entered in the superior court of the county in which said arbitration was had. In Snyder v. Superior Court, 24 Cal. App.2d 263, 74 P.2d 782, it was held that submission of disputes to an arbitrator for "determination" implies that the parties are to be bound by his determination, and that the statute fills the gap in the agreement by furnishing the procedure to be followed in obtaining such judgments. Here the agreement necessarily implied, if it did not provide expressly, that the provisions of sections 1280–1293 should be read into and become part of the agreement.

Crofoot next contends that in various respects the arbitrator exceeded his powers as conferred upon him by the arbitration agreement. Before directly discussing these contentions something should be said about the scope of the arbitrator's powers, the extent to which the superior court could or should have reviewed these powers, and the scope of our powers on this review.

Arbitration has had a long and troubled history. The early common law courts did not favor arbitration, and greatly limited the powers of arbitrators. But in recent times a great change in attitude and policy has taken place. Arbitrations are now usually covered by statutory law, as they are in California. Such statutes evidence a strong public policy in favor of arbitrations, which policy has frequently been approved and enforced by the courts.

[6] The strength of arbitration is that it is not compulsory but is predicated upon the voluntary agreement of the parties to

arbitrate future or existing disputes. Since this is so, it is well settled, and all the parties to this appeal agree, that the arbitrator derives his powers from the arbitration agreement. He has no legal right to decide issues not submitted to him, and must decide all issues that are so submitted. But in a statutory arbitration the terms of the statute are written in by implication to the arbitration agreement, and where not inconsistent with the agreement, the terms of the statute control.

The statute here involved, expressly made a part of the arbitration agreement, contains several provisions relating to the powers of the arbitrator and of the trial court upon a motion to confirm. Section 1288 of the Code of Civil Procedure provides that upon application of any party to the arbitration, the superior court of the county "must" vacate the award if the arbitration was secured by corruption or fraud, where any arbitrator was corrupt, where the arbitrator is guilty of misconduct in refusing a postponement upon sufficient cause, in refusing to hear pertinent evidence or other prejudicial misconduct. No serious contention is made that any of these provisions are applicable. Then subdivision (d) of the section provides, in part, that the award must be vacated "Where the arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final and definite award, upon the subject matter submitted, was not made. * * *"

Section 1289 of the Code of Civil Procedure requires the appropriate superior court upon application of any party to the award to modify or correct the award where the award contains an evident miscalculation, evident mistake in description, where the arbitrator decides issues not presented to him or "Where the award is imperfect in a matter of form * * *."

[7, 8] It is conceded by all here involved that, under the statute and the terms of the arbitration agreement, the superior court upon motion to confirm, and this court on appeal, has no power to review the sufficiency of the evidence to sustain the award, and in fact the evidence produced before the arbitrator is not even made a part of the record on appeal. Under the 1927 statute, it is well settled that both before the superior and appellate courts every intendment of validity must be given the award and that the burden is upon the one claiming error to support his contention. Popcorn Equipment Co. v. Page, 92 Cal.App.2d 448, 207 P.2d 647. It has been held that the arbitrator need not make findings or give reasons for his conclusions. Sapp v. Barenfeld, 34 Cal.2d 515, 212 P.2d 233. Certainly it is settled that the courts have no power to review the sufficiency of the evidence. Pacific Vegetable Oil Corp. v. C. S. T., Ltd., 29 Cal.2d 228, 174 P.2d 441; 5 Cal.Jur.2d p. 120, § 52. The law is not quite so clear as to a court's powers of review over questions of law. The earlier cases held that the court had the power to review errors of law, at least where they appeared upon the face of the award.[2] In re Frick, 130 Cal.App. 290, 19 P.2d 836; Utah Const. Co. v. Western Pac. Ry. Co., 174 Cal. 156, 162 P. 631. The later cases have gone much farther in granting finality to the award even as to questions of law. In Pacific Vegetable Oil Corp. v. C. S. T., Ltd., 29 Cal.2d 228, 233, 174 P.2d 441, 445, it was bluntly held that "The merits of the controversy between the parties are not subject to judicial review." In Sapp v. Barenfeld, 34 Cal.2d 515, 523, 212 P.2d 233, 239, the court held: "Even though a party expressly asserts a lawful claim in the submission or raises it by the presentation of evidence to the arbitrators, the law does not guarantee that the claim will be allowed. Arbitrators, unless specifically required to act in conformity with rules of law, may base their decision upon broad principles of justice and equity, and in doing so may expressly or impliedly reject a claim that a party might successfully have asserted in a judicial action." See, also, Riley v. Pig'n Whistle Candy Co., 109 Cal.App.2d 650, 241 P.2d 294; McKay v. Coca-Cola Bottling Co., 110 Cal.App.2d 672, 243 P.2d 35; Glesby v. Balfour, Guthrie & Co., Ltd., 63 Cal.App.2d 414, 147 P.2d 60; Jar-

---

[2] But even prior to 1927 it was held that only "gross" errors of an arbitrator were reviewable—In re Connor, 128 Cal. 279, 282, 60 P. 862.

dine-Matheson Co., Ltd., v. Pacific O. Co., 100 Cal.App. 572, 280 P. 697; Kagel, California Arbitration Statute, 38 Cal.L.Rev. 799, 825, et seq.; Fraenkel, The New York Arbitration Law, 32 Columbia L.Rev. 623, 638. In United States v. Moorman, 338 U.S. 457, 70 S.Ct. 288, 94 L.Ed. 256, the United States Supreme Court, in upholding as final the arbitrator's determination, held that, whether the problem raised was one of law or of fact, the courts should not fritter away the arbitrator's powers under the guise of interpretation.

[9] Under these cases it must be held that in the absence of some limiting clause in the arbitration agreement, the merits of the award, either on questions of fact or of law, may not be reviewed except as provided in the statute.

[10] But Crofoot contends the agreement does limit the powers of the arbitrator beyond the provisions of the statute. In this connection he relies principally upon the last sentence of clause 2 of the contract: "The parties agree that the decision of the Arbitrator shall be final as to all facts found by him." That clause, says Crofoot, limits finality to fact questions, and necessarily excludes finality as to law questions. This interpretation is a strained and unnatural one and violates the obvious spirit of the contract. This interpretation completely disregards the first sentence of the same clause which reads: "All parties agree that the arbitration shall be mutually conclusive and binding as to all issues in the Consolidated Action save for such rights as the parties, or any of them, may have under Sections 1287 to 1293, inclusive * * * of the California Code of Civil Procedure." Then follows the provision as to finality as to facts.

Reasonably interpreted these two sentences conferred finality on the arbitrator's award as to all issues, fact or of law, except as limited by statute. The fact clause was obviously inserted merely to assure that, regardless of the statute, finality was to be given to the findings of fact.

This interpretation not only follows from a reasonable interpretation of the two sentences, but is suggested, if not compelled, by other provisions of the agreement. The parties agree to submit to the arbitrator "all issues" in the six pending cases, and do so pursuant and subject to the provisions of the California arbitration law. The arbitrator is given "such powers as are provided for by law," the arbitrator is made "the judge of the relevancy and materiality of the evidence offered," strict compliance with legal rules of evidence is waived, the arbitrator is empowered to determine procedure, and to require briefs on the facts or law. The whole spirit of the agreement is that these parties, when the agreement was executed, wanted to settle the many court actions then pending between them, carefully selected a competent and impartial arbitrator, and were then content, as long as the arbitrator acted within the limitations of the arbitration statute, to accept his determinations as final, both as to law and facts. Now that such determinations have not turned out as this appellant hoped, he is attempting to secure a complete reconsideration of many legal (and some factual) determinations in this court. Under his agreement and the provisions of the law, except where permitted to do so by statute, this he cannot do.

We turn now to a discussion of Crofoot's contentions that the arbitrator exceeded his powers in various respects. He first contends that the arbitrator exceeded his powers by creating and deciding three causes of action not involved in the six actions submitted to him. If the arbitrator in fact created causes of action not within the arbitration agreement, and then decided these unsubmitted issues, that would require a vacation of the award as being in excess of the arbitrator's powers within the meaning of section 1288 of the Code of Civil Procedure. Bierlein v. Johnson, 73 Cal.App.2d 728, 166 P.2d 644.

[11] Crofoot urges first that the arbitrator awarded damages against him for breach of warranty, which is a fact, and contends that Blair had only pleaded a cause of action for rescission based upon breach of warranty, and asked damages only for deceit. Hence it is urged damages were awarded upon an issue not pleaded and hence not submitted to the arbitrator.

It is true that in the main New York action Blair, in his first cause of action, pleaded a breach of warranty and asked to rescind his two contracts of purchase of the T & C stock. The second cause is mainly devoted to alleging damage caused by the fraud and deceit of Crofoot. The prayer asked for rescission, "and/or" for damages, and for other, further and different relief. This prayer, including the prayer for damages, was directed at both causes of action. Moreover, all the allegations of the first cause of action were expressly incorporated into the second. Thus, even if the prayer plus the pleading of all the facts, did not raise the issue of damages in the first cause of action, the issue of damages for breach of warranty was directly involved in the second cause of action by the incorporation in such second cause of all of the allegations of the first. Thus the second count contained both a cause of action for damages for breach of warranty, and damages for fraud and deceit. Thus, even technically considered, the issue involving damages for breach of warranty was submitted to the arbitrator.

It is true that this second count improperly joined two causes of action in one count, and it is also true that in the New York action Crofoot demurred on this ground, and such demurrer was overruled. All of the existing pleadings, including this New York complaint which included the second count containing at least two causes of action, one of which was for damages for breach of warranty, were submitted to the arbitrator. He notes in his opinion that before him this improper joinder, a mere defect of form and not of substance, "was not objected to * * * even as a matter of form." Thus, in awarding damages for breach of warranty, the arbitrator did not exceed his powers.

Crofoot next claims the creation of a new cause of action by the arbitrator for breach of a fiduciary duty owed by Crofoot to Blair. Such contention requires but scant consideration. In the second New York cause of action Blair pleaded all the facts upon which it relied to show the fraud and deceit of Crofoot. Included were facts showing the relationship between Blair, Crofoot, and Rice, created by the contracts. Non-disclosure in violation of a fiduciary duty is simply a specialized form of fraud. The complaint contained ample allegations to warrant the arbitrator in deciding this issue.

The last and third contention of Crofoot in relation to the charge that the arbitrator improperly created new causes of action relates to the awarding of $4,130 damages for non-disclosure of the true amount of unfilled orders to Consolidated Popcorn Supply. The contention that this amounted to an award of damages for a cause of action not pleaded is not based upon the contention that Blair did not plead a general cause of action for breach of the warranty as to unfilled orders generally, but is predicated upon the fact that Blair, in response to a demand, in the New York action, filed a bill of particulars in which it did not list this item of damage. But that bill of particulars expressly averred that "Plaintiff is not presently able to state in what, if any, additional respects the unfilled orders of T & C Company were less than as shown on the Statement of Unfilled Orders," thus reserving to Blair the right to give further particulars upon discovery. Moreover, there was no bill of particulars as to the California actions where a good cause for breach of this warranty was properly pleaded. Under these circumstances the issue was included among those submitted to the arbitrator.

Most of the balance of Crofoot's contentions to the effect that the arbitrator exceeded his powers involve questions of law or fact that are conclusive on the parties and not subject to review under the rules already stated. Thus the award gave Crofoot an election between his conversion rights and rights for disparagement of title, and imposed the condition of a forced sale of the Blair stock upon the exercise of either election. While such a condition undoubtedly was proper in the conversion action, it is doubtful whether it should have been imposed in the disparagement of title action. Normally, disparagement of title does not require the injured party to sell the property disparaged to the other party. Normally, the injured party recovers the decrease in value caused by the disparagement. Restatement of Torts, § 633, comment "d." It is on these grounds that Crofoot urges an excess of power on the part of the arbitrator. Even if the arbitrator decided this point incorrectly, he did decide it. The issue was admitted properly before him. Right or wrong the parties have contracted that such a decision should be conclusive. At most, it is an error of law, not reviewable by the courts.

This same reasoning applies to the contention that the arbitrator, in excess of his powers, erroneously enforced an oral contract to guaranty the debt of another, unenforceable under the statute of frauds. This refers to the oral contract with CMAC that T & C would sign a repurchase agreement involving a guaranty of the credit of Automatic Merchants. This transaction has been fully set forth in the statement of facts. On its face it would appear that such an oral agreement is unenforceable under the statute of frauds. But what Crofoot fails to mention is the express finding of the arbitrator that T & C also had the oral agreement, prior to the date of the written agreement, with Automatic Merchants to guarantee its debts through CMAC. A promise to the debtor to guarantee his debts is not a promise to guarantee the debt of "another" within the meaning of the statute of frauds. King v. Smith, 33 Cal.2d 71, 199 P.2d 308. At any rate, this too was a question of law, within the power of the arbitrator to decide and therefore his determination is conclusive.

Crofoot next claims that he was denied the right of recoupment of $11,171.34 commission expense earned by T & C upon the Barry transactions. This is not even a question of law. The arbitrator found that this specific amount was swallowed up when T & C incurred the contingent liability upon the CMAC guaranty. Thus this was a question of fact within the issues submitted. Questions of fact and the sufficiency of the evidence cannot be reviewed by the courts.

[12] Crofoot next contends that the arbitrator exceeded his powers in allowing Blair damages computed on the basis that Blair owned 100% of the T & C stock, the true fact being that, when the warranties were breached, Blair had purchased but 54% of the stock. It will be remembered that Blair purchased 54% of the stock in April, and 46% in October of 1947. This, obviously, is an attack on a factual question. The April contract contained the option agreement that was exercised in October, so that the arbitrator was justified in finding that breach of the warranties led to the exercise of the option. Moreover, there is an express finding that Blair did not learn of the defaulted drafts until 1948 so that, since the same warranties were included in the October contract as were contained in the April one, the breach of this warranty is obvious. While the arbitrator did find that Blair had knowledge of the unfilled orders in September of 1947, so that he had knowledge of the breach of this warranty in October, when the option was exercised, the arbitrator has impliedly decided that there existed compelling reasons why the option was exercised. Although these reasons are not spelled out in the findings, since it is the law that the arbitrator is under no compulsion to explain his award or give reasons for his conclusions, Sapp v. Barenfeld, 34 Cal.2d 515, 212 P.2d 233, we must conclusively assume those conclusions are supported.

The last contention made by Crofoot in this series of objections is that the arbitrator used the wrong date in calculating the value of the deduction of damages allowed in respect to the 275 machines in Barry's inventory. If this were an error, a point we do not decide, it was an error of mixed law and fact, or of law, and, as such, not reviewable on this appeal.

[13] The next major contention of Crofoot is that the award is not "mutual, final and definite" within the meaning of section 1288(d) of the Code of Civil Procedure. It is urged that the various elections contained in the award, particularly those relating to the conversion liability, rendered the award uncertain and deprived it of the requisite finality and conclusiveness. It is somewhat difficult to follow this contention. The award is definite. The amounts of damages are fixed and the rights of offset are likewise definite. All issues submitted were decided. The elections provided for

are clear and definite and part of an earnest effort on the part of the arbitrator to achieve substantial justice among the parties.

Crofoot does cite one case that holds that conditioning the receipt of a credit upon a land conveyance rendered the award of the arbitrator tentative and defective, because the contingency was forever left open. Carnochan & Mitchel v. Christie, 11 Wheat. 445, 24 U.S. 445, 6 L.Ed. 516. But there is a line of authority upholding awards containing elections or contingencies that might never occur, or might become impossible of performance. Clement v. Comstock, Administrator, 2 Mich. 359; Williams v. Williams, 11 Smedes & Marshall, Miss., 393; Thornton v. Carson, 7 Cranch 596, 11 U.S. 596, 3 L.Ed. 451; In Peebler v. Olds, 56 Cal.App.2d 8, 132 P.2d 233, the appellate court upheld as not uncertain and inconclusive an award allowing a payment contingent in amount to be made upon a future date.

We see no logical reason why the elections here contained in the award should be held, as a matter of law, to render it uncertain and inconclusive. The elections are clear and definite. They are embodied in immediately or conditionally enforceable judgments which are clear and certain and as to which there can be little doubt but that those entitled will elect the most productive liability. The award, and the supporting opinion, show a studied and careful effort to do justice between these parties. With the many conflicting and overlapping causes of action involved the only practical approach for the protection of all was to set forth the award in a series of elections. The award, in our opinion, complies with the requirements of section 1288.

Crofoot next complains that the arbitrator failed to pass upon the pleaded issue of the capacity of Blair Holdings Corporation to sue. When Blair turned the 75,000 of its shares over to Crofoot in partial payment for its purchase of the T & C stock, this was done through the mechanism of Blair organizing a corporation known as Auto-Vend, a wholly owned subsidiary of Blair, and Auto-Vend was the entity that actually contracted with Crofoot for the purchase of T & C. Crofoot alleged these facts and then alleged Blair's incapacity to sue. Blair alleged that Auto-Vend was its agent. The arbitrator made no specific finding on the incapacity issue, although setting forth the facts of the Auto-Vend transaction. Obviously, the arbitrator did pass on this issue because he awarded damages to Blair. He was not required to set forth his reasons for doing so. It must be presumed "That all matters within * * * a submission to arbitration were laid before the arbitrators and passed upon by them". § 1963, subd. 18, Code Civ.Proc.

It is next asserted that in various respects the findings do not support the award. Most of these contentions are purely factual. Thus it is claimed the evidence as to Crofoot's intent to deceive was speculative, and unsubstantial, and that there was no evidence to show that contracts forming the basis of the warranty as to unfilled orders did not exist. It is also asserted that speculative damages were awarded without proof of actual loss from breach of the warranties, that the arbitrator should have found that Blair was a "sophisticated buyer", etc. These problems all deal with the sufficiency of the evidence to sustain the award, and, as such, do not involve problems reviewable on this appeal.

It is next claimed that the arbitrator erroneously found that Blair was not chargeable with the knowledge of Price Waterhouse gained by it of the fact that Barry had defaulted on the outstanding drafts. Price Waterhouse had been hired by Blair to make an audit of T & C's books and gained such knowledge during the course of the audit. This knowledge was not conveyed to Blair. The arbitrator found that Price Waterhouse was an independent contractor, and that, under the facts, Blair was not chargeable with knowledge gained by the auditor and uncommunicated to Blair. Appellant relies on the Restatement of Agency, section 272, and certain cases, to establish the principle that where a person is hired solely to secure certain information, or is authorized to conduct transactions based upon information so secured, the principal is bound by such person's knowledge so given although uncommunicated to him, whether such person is an agent or independent contractor. Even an agent's knowledge is not necessarily attributable to the principal unless it relates to the transaction for which the agency exists. Price Waterhouse was not hired as Blair's agent to purchase T & C from Crofoot, but simply to make an audit of T & C for Blair. Price Waterhouse was not employed to participate in any transaction involving Crofoot. This being so, it was a question of fact as to whether Price Waterhouse was under a duty to divulge the information it had gained to Blair, and whether Blair was chargeable with such knowledge in Blair's transactions with Crofoot. The arbitrator's determination is not reviewable.

Crofoot next urges that there were patent miscalculations throughout the award that require a modification of the award under section 1289 of the Code of Civil Procedure. Here this appellant makes identical contentions to many of those made upon the argument that the award should be vacated. We have held that these assertions do not require that the award be vacated. For the same reasons they do not require that the award be modified.

[14, 15] The last major contention of Crofoot is that the order of confirmation and the judgment entered thereon are void. It is first claimed that the superior court in San Francisco exceeded its jurisdiction in attempting to enter judgment in the New York actions. The obvious answer to this contention is that the parties contracted to submit the controversy set forth in the New York actions to a California arbitration under California law. Those controversies existed and were submitted to the arbitrator in California, the New York captions being used to identify the controversy. Moreover, all the issues involved in the New York actions were also pleaded in the California actions. It is, of course, the law that in the absence of agreement to the contrary the law of the forum governs arbitration proceedings, see annotations 85 A.L.R. 1124; 93 A.L.R. 1073.

Crofoot also points out that the arbitrator, in his opinion, held that if Blair elected to assert his lesser right to damages, Crofoot was entitled to recover from Blair the amount his award might exceed the award elected by Blair. The judgment does not mention this purely theoretical right of Crofoot, and it is therefore asserted that the judgment does not conform to the award. Blair has now recovered a judgment for the larger sum which it will naturally enforce, so that any right of Crofoot to recover any possible excess has no practical meaning.

Crofoot next complains that interest runs against him in the awards made in favor of Blair immediately, while he has to await a future date before interest on his award starts to run. This distinction was sound. Blair's awards were based on breach of warranty and fraud and deceit. Crofoot's claim was based primarily on a conversion. Before Blair can be liable at all Crofoot must convey the Blair stock to Blair—if Crofoot does not, no liability for the conversion will exist. Obviously, interest on the Crofoot awards should not start to run until that forced sale takes place.

There is no merit in any of the contentions of Crofoot, and as to him the order and judgment must be affirmed.

We turn now to a consideration of the contentions made by Rice. He, too, has appealed from the order confirming the award and from the judgment entered after the order of confirmation was made.

Most of the points raised by Rice are similar to those raised by Crofoot, and for the same reasons lack merit. All of his contentions involve attacks on the sufficiency of the evidence or involve questions of law which cannot be reviewed on this appeal.

His first point is that the evidence is insufficient to support the causes of action found to exist against him. He asserts that there was no evidence of any non-disclosure by him constituting a violation of his fiduciary duty. This contention is, of course, simply an attack upon the weight of the evidence, and completely overlooks the findings in reference to his continuing failure to disclose the facts in reference to the defaulted drafts. He also contends that Crofoot's knowledge as a T & C director of the defaulted drafts conveyed to him by

Rice constituted, so far as Rice is concerned, notice to Blair. Thus, so it is claimed, Rice must be exonerated from the consequences of his non-disclosure to Blair. Obviously, knowledge of an adverse agent acting for himself and against the interests of his principal, as was Crofoot, will not constitute knowledge to the principal, Restatement of Agency, § 282, particularly when the two conspire to defraud the principal.

It is also asserted that the evidence is insufficient to support the finding of a conspiracy between Rice and Crofoot to not disclose the true facts to Blair. But Rice was also found independently liable. At any rate, this contention, involving as it does the weight of the evidence, is not reviewable.

The next major contention of Rice is that the award exceeded the scope of the issues by finding that Rice had breached a fiduciary duty owed to Blair, it being contended that such issue was not pleaded. The allegations in this respect in reference to Rice are similar to those already discussed relating to Crofoot. For reasons discussed in disposing of the identical contention in reference to Crofoot, it must be held that this point is without merit.

Rice next complains that the award is imperfect and uncertain in that the rights to damages of the parties are so unclear as to be incapable of enforcement. His main thought seems to be that he cannot know his liabilities until Blair elects among his several rights. Rice is in no different legal position than any other joint tort-feasor against whom the holder of the right may enforce it against the one he elects.

[16] The last point raised by Rice relates to the amount of damages awarded him against Blair for conversion. Although the arbitrator, pursuant to a stipulation, had fixed the highest value of the Blair stock in the Crofoot conversion case at $3.50 per share, he fixed the value of the same stock in the Rice case at $3.10 per share. He did this because Rice had pleaded the highest value of this stock at $3.10 per share. He refused to permit amendments to conform to proof to raise new causes of action and to raise the allegations of Rice's pleading in reference to the amount of damage. His reason for refusing to permit an amendment to conform to proof in regard to damages was that under the arbitration agreement he lacked power to allow such amendment.

This was a proper interpretation of the extent of the arbitrator's powers. The arbitration agreement lists the six pending actions. Then it provides: "The parties to this Agreement agree to submit to arbitration * * * all issues existing between them and raised by any pleadings served by any of them * * * prior to March 10, 1950."

Thus the parties agreed to limit the arbitrator's powers to those issues set forth in the pleadings as they then existed. So far as Rice is concerned, those pleadings set forth a cause of action for conversion of stock and asked for damages based on $3.10 per share. The proof showed a possible higher value of $3.50. But the pleadings submitted to the arbitrator limited his powers to fixing such value at $3.10. In the absence of a stipulation agreeing to expand those issues the arbitrator, under the terms of the agreement, had no power to do so.

Of course, in the absence of an amendment, normally, even a court has no power to award damages in excess of the amount claimed in the complaint. Frost v. Mighetto, 22 Cal.App.2d 612, 71 P.2d 932; Meisner v. McIntosh, 205 Cal. 11, 269 P. 612; Merced Irr. Dist. v. San Joaquin L. & P. Corp., 220 Cal. 196, 29 P.2d 843; Monterey Park Commercial & Sav. Bk. v. Bk. of W. Hollywood, 125 Cal.App. 402, 13 P.2d 976.[2] A court would, however, in a proper case, have the power to grant an amendment to conform to proof. But here the parties by their agreement to arbitrate deprived the arbitrator of that power.

---

[2] It has been held that since conversion damages are fixed by statute, damages may be awarded by a court without amendment in accordance with the statutory provision and in excess of the prayer. Kimball v. Swenson, 51 Cal.App. 361, 196 P. 781; Du Pont v. Allen, 110 Cal.App. 541, 294 P. 409. But in Meisner v. McIntosh, 205 Cal. 11, 269 P. 612, it was held that the rule of these cases had to be limited to a situation where the case was tried on an agreed theory as to damages.

In concluding this opinion we desire to comment on the work performed by this arbitrator. His opinion, findings, and award, disclose that he has performed a careful, lawyer-like and judicial job in an earnest effort to adjudicate fairly the complicated rights and responsibilities of these parties. He is to be congratulated on a job well done.

On the appeals of both Crofoot and Rice, the judgment and order appealed from are affirmed.

BRAY and FRED B. WOOD, JJ., concur.

---

119 Cal.App.2d 774

PEOPLE v. HARDISON.

Cr. 875.

District Court of Appeal,
Fourth District, California.
Aug. 18, 1953.

Petition for writ of error coram nobis and motion to vacate and set aside a judgment entered upon conviction of defendant for assault with a deadly weapon and kidnapping. The Superior Court of Fresno County, George M. DeWolfe, J., entered order denying petition and motion, and petitioner appealed. The District Court of Appeal, Mussell, held that when application did not set forth specific facts sufficient to establish grounds for issuance of writ, and no convincing proof of facts constituting legal ground for setting aside judgment were produced, and no explanation was offered for delay in excess of three years in applying for writ, petition and motion were properly denied.

Judgment affirmed.

1. Criminal Law 🔑997

An applicant for writ of error coram nobis must show that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ, and unless he does so, he has stated no ground for relief.

2. Criminal Law 🔑997

Lack of effective aid of counsel cannot be determined in coram nobis proceedings.

3. Criminal Law 🔑997, 998

A contention that defendant's witnesses were not all called was a matter properly for consideration on motion for new trial or on appeal, and it could not be made a sustainable ground for an application for writ of error coram nobis or a motion to vacate the judgment.

4. Criminal Law 🔑997, 998

Questions of whether defendant was legally committed or was not informed of his right to counsel at preliminary hearing could not be determined on application for writ of error coram nobis and motion to vacate the judgment.

5. Criminal Law 🔑997

Where petitioner for writ of error coram nobis offered no explanation for delay in excess of three years in applying for writ, a denial of the petition was authorized.

◆

Ira Lee Hardison in pro. per.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for the People.

MUSSELL, Justice.

Defendant appeals from an order denying his petition for a writ of error coram nobis and his motion to vacate and set aside a judgment entered upon his conviction, after jury trial, of the crimes of assault with a deadly weapon and violation of Section 207 of the Penal Code (kidnapping). Defendant was charged with and admitted having suffered three prior felony convictions. The judgment was rendered on January 5, 1949, and defendant was sentenced to imprisonment in the state prison. The record does not indicate that a motion for a new trial was made or that an appeal was taken from the judgment.

[1] Appellant first claims that his conviction was obtained by fraud and trickery. However, there are no acts of such claimed fraud or trickery set forth in his petition, and, as stated in People v. Adamson, 34 Cal.2d 320–327, 210 P.2d 13, 16:

> "The applicant for the writ 'must show that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ; otherwise he has stated no ground for relief.'"

[2] Appellant contends that he was not afforded effective aid of counsel. Lack of effective aid of counsel cannot be determined in coram nobis proceedings. People v. Costello, 113 Cal.App.2d 481, 484, 248 P.2d 27. As noted, defendant failed to appeal from the judgment or to move for a new trial. These remedies were available to him and the facts, if they were facts, upon which he relies to establish his contention that he lacked effective aid of counsel were known to him at the trial.

[3, 4] The contention that defendant's witnesses were not all called was also a matter which could properly have been considered on a motion for a new trial or on an appeal and cannot be made a sustainable ground for an application for a writ of error coram nobis or a motion to vacate the judgment. People v. Krout, 90 Cal.App.2d 205, 208, 202 P.2d 635. Likewise, under the facts as presented by the record, the defendant cannot in these proceedings obtain a determination of the question of whether he was legally committed or was not informed of his right to counsel at the preliminary hearing. People v. Harding, 116 Cal.App.2d 65, 252 P.2d 1007.

The application for the writ before us does not set forth specific facts sufficient to establish grounds for the issuance of the writ and the defendant has not produced convincing proof of facts which constitute a legal ground for setting aside the judgment. People v. Shorts, 32 Cal.2d 502, 507–508, 197 P.2d 330.

[5] The record shows that the defendant failed to exercise due diligence in applying for the writ sought and no explanation is offered for the delay in excess of three years. Under such circumstances a denial of the petition for the writ was authorized. People v. Dunlop, 102 Cal.App.2d 314, 318, 227 P.2d 281; People v. Krout, supra, 90 Cal.App.2d 209, 202 P.2d 637.

The order denying the petition for writ of error coram nobis and the motion to vacate the judgment is affirmed.

BARNARD, P. J., concurs.

---

119 Cal.App.2d 685

MIRABILE v. SMITH.

Civ. 4579.

District Court of Appeal, Fourth District, California.

Aug. 13, 1953.

Rehearing Denied Sept. 4, 1953.

Hearing Denied Oct. 8, 1953.

Prohibition proceedings by which petitioner sought to prevent a judge of the municipal court from entering a default judgment against petitioner prior to determination of issues presented by answers of other defendants. The Superior Court of San Diego County, C. M. Monroe, J., granted writ, and respondent appealed. The District Court of Appeal, Griffin, J., held that when liability asserted against all the defendants was joint and not several, and answers presented defense of payment, judgment should not have been entered against defaulting defendant until determination of issues presented by answers of the other defendants.

Judgment affirmed.

1. Judgment ⚷98

Although, where several defendants are subject to a judgment holding them severally liable, a separate judgment against a defaulting defendant may be entered before issue is tried as to the appearing defendants, when the liability of the several defendants appears to be but joint, as in an action against defendants as partners upon partnership obligations, a judgment should not ordinarily be entered against a defaulting defendant until trial of issues as to the remaining appearing defendants. Code Civ.Proc. § 579.

2. Partnership ⚷165

The statutory rule that an obligation imposed upon several persons or a right created in favor of several persons is presumed to be joint, and not several, is deemed particularly applicable to the legal liability of partners upon partnership obligations, and the liability of the partners in such respect is joint and not several. Civ. Code, § 1431; Corporations Code, § 15015; Code Civ.Proc. § 579.

3. Prohibition ⚷3(3)

Where one of several defendants, who were jointly and not severally liable, defaulted, and default judgment was entered against him prior to determination of issue of payment presented by answers of other defendants, and judgment was set aside but default was allowed to remain, and stay of proceedings until issues presented by answers were tried was refused, no adequate relief could be obtained by defaulting defendant by appeal from the default judgment, and trial judge could properly be prohibited from entering default judgment until trial and determination of issues presented by answers.

Ruel Liggett, Roy M. Cleator, and E. C. Davis, San Diego, for appellant.

Frank Pomeranz, San Diego, for respondent.

GRIFFIN, Justice.

The writ was directed to appellant, as judge of the Municipal Court, prohibiting him from proceeding further against Paul Mirabile, the defaulting defendant in a Municipal Court action (and who is the petitioner and respondent in the instant proceeding) until such time as the issues raised by the answers of other defendants in the Municipal Court action, who appeared by answer, are adjudicated.

The facts are that one Steiner, as an assignee for collection, brought an action in the Municipal Court upon a contract for the sale and delivery of matches to be delivered at stated intervals. A money judgment is sought against Mirabile, Sherman and Louise Haynes, and others doing business as Sherman's Dine and Dance. The contract of purchase was signed "Sherman's, By Sherman Haynes". The Municipal Court complaint alleged, upon information and belief, that defendants were copartners and that Sherman Haynes acted for the others in signing the contract; that the amount sued for had accrued and was unpaid.

The Hayneses filed an answer denying generally the allegations of the complaint and alleged payment of the amount claimed due for all materials delivered pursuant to the contract. On August 3, 1950, Mirabile was served with process but failed to answer. At Steiner's request Mirabile's default was taken and the clerk entered judgment by default against him. Petitioner had no knowledge that such a judgment had been entered until March 16, 1951, when Steiner obtained a writ of execution and caused same to be levied on the petitioner's bank account. No further proceedings were taken in reference to bringing the action to trial against the other answering defendants. On September 5, 1951, petitioner, as plaintiff, brought an action in the Superior Court against Steiner to recover the funds obtained by the writ, and to restrain him from enforcing the default judgment. On January 9, 1952, that court declared the Municipal Court default judgment void and vacated it because it was a judgment that could not be entered by the clerk. On June 18, 1952, the respondent judge made an order setting aside that judgment but specifically provided that it did not apply to the default. Petitioner requested the respondent judge to make an order staying all proceedings in the Municipal Court action against him until a trial was had on the issues raised by the Hayneses' answer. A similar answer to that made by the Hayneses was proffered by Mirabile. The request was denied. On June 19, 1952, this petition for a writ of prohibition was filed in which it was asked that the municipal judge refrain from entering a default judgment against the petitioner until the issues raised by the answering defendants had been determined. After a hearing the petition was granted. The respondent judge appealed and maintains that the principal point raised is: "Where one of two or more defendants, both or all of whom are asserted in the complaint to be severally liable, are sued and are served with process and one of them defaults, the others answering, the defaulting defendant has waived his right to insist upon a stay of proceedings until the action is tried as to his codefendants."

Section 579 of the Code of Civil Procedure provides:

> "In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a *several* judgment is proper." (Italics ours.)

[1] Trans-Pacific Trading Company v. Patsy Frock & Romper Co., 189 Cal. 509, 209 P. 357, being a suit on a stockholder's liability, holds that this is proper whenever a *several judgment* is authorized.

In Lynch v. Bencini, 17 Cal.2d 521, 110 P.2d 662, at the time the appellant there defaulted, another defendant had appeared and the action was still pending against him on what, in a real sense, was the same obligation. The court there held, under somewhat similar circumstances to those in the instant case, that the clerk had no power to enter a judgment by default in such a case, and said, 17 Cal.2d at pages 529–530, 110 P.2d at pages 667.

> "It was, in fact, a case in which the matter [of entering judgment by default by the court] should have been held in abeyance until it was also decided against Gray, although the judgment, when finally determined upon, would be equally applicable against both of these defendants."

There are certain cases where default judgments were taken against defaulting defendants who were claimed to be *jointly and severally* liable with the answering defendants. There, however, they set up independent defenses *not involving the defaulting defendants.* Under such circumstances the courts held that a separate judgment against such defaulting defendants may be entered before the issue is tried as to the appearing defendants. Bailey Loan Co. v. Hall, 110 Cal. 490, 42 P. 962, and cases cited. To the same effect is Cole v. Roebling Construction Co., 156 Cal. 443, 445, 105 P. 255, as applied to joint tort-feasors. In Curry v. Roundtree, 51 Cal. 184, and Harrison v. McCormick, 69 Cal. 616, 11 P. 456, it was held that a different rule seems to apply in actions against several copartners alleged to be jointly liable on a partnership contract. In the Harrison case it is said, quoting from the syllabus:

> "Several persons contracting together with the same party for one and the same act are liable jointly, and not individually or separately, in the absence of any words to show that a several as well as an entire liability was intended. Especially is this the rule as to the legal liability of partners upon their partnership obligations."

[2] Under Section 1431 of the Civil Code an obligation imposed upon several persons, or a right created in favor of several persons is presumed to be joint, and not several, subject to certain exceptions. This rule has been held to be especially applicable to the legal liability of partners upon partnership obligations. 6 Cal.Jur. p. 342, sec. 204, and cases cited. The common-law rule that the liabilities of a partnership are joint has been expressly adopted into the code. Former Section 2442 Civ.Code; Section 15015 Corporations Code; Iwanaga v. Hagopian, 39 Cal.App. 584, 179 P. 523; Berringer v. Krueger, 69 Cal.App. 711, 232 P. 467; Yankelewitch v. Beach, 115 Cal.App. 629, 2 P.2d 498. The judgment sought to be obtained in the present action is a *joint,* and not a *several* judgment, predicated upon a claimed partnership or joint venture liability.

[3] In the instant action, if the defense presented by the appearing defendants is sustained, no judgment could or should be entered against this defaulting defend-

ant. Plott v. York, 33 Cal.App.2d 460, 91 P.2d 924; Nicholls v. Anders, 13 Cal.App.2d 440, 56 P.2d 1289; Lynch v. Bencini, supra; Minehan v. Silveria, 11 Cal.App.2d 266, 53 P.2d 770.

Under the circumstances here related a grave injustice would result if the Municipal Court proceeded to enter judgment against petitioner, as contemplated, and the other answering defendants established that the debt had been paid. For every wrong there should be a remedy, and no good reason appears why the perpetration of such a wrong could not and should not be prevented by this proceeding. The trial judge should be prevented from entering such a judgment until the determination of the action on its merits insofar as it affects petitioner's liability as a member of the partnership.

The further contention is made that there is no sufficient showing of threatened action in excess of the court's jurisdiction; that petitioner had a plain, speedy and adequate remedy by appeal, if such a judgment should be entered before the issues were presented as to the partnership's liability and claim of payment of the debt, and that the action for the writ should have named the Municipal Court as a party defendant and not a particular judge thereof.

The term "jurisdiction" has many different meanings, depending on the situation in respect to which it is used. The phrase "lack of jurisdiction" may apply to a case where, though the court has jurisdiction over the subject matter and the parties in the fundamental sense, it has no "jurisdiction" or power to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites. It is apparent here that no adequate relief could be obtained by an appeal from such a default judgment where Mirabile was deprived of showing, as indicated by his proffered answer, that the debt sued upon had been paid. Under such conditions such a writ may issue. A. G. Col Co. v. Superior Court, 196 Cal. 604, 238 P. 926; Rescue Army v. Municipal Court, 28 Cal.2d 460, 171 P.2d 8; Fortenbury v. Superior Court, 16 Cal.2d 405, 106 P.2d 411.

The action was brought against the judge who was about to act, and no prejudice resulted because the writ was directed to him.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

Hearing denied; CARTER, J., dissenting.

119 Cal.App.2d 744

In re McNAMARA'S ESTATE.

Petition of RITCHIE.

Civ. 19591.

District Court of Appeal, Second District, Division 1, California.

Aug. 17, 1953.

Hearing Denied Oct. 15, 1953.

Proceeding for the probate of a will. The Superior Court of Los Angeles County, Victor R. Hansen, J., denied probate of the document and the named beneficiary appealed. The District Court of Appeal, Drapeau, J., held that testator's handwritten unsigned disposition of his property, together with the signed copy of the disposition, could not be construed as a valid holographic will.

Affirmed.

1. Wills 🔑97

In the law of wills, "integration", as distinguished from incorporation by reference, occurs when there is no reference to distinctly extraneous document, but it is clear that two or more separate writings are intended by the testator to be his will.

See publication Words and Phrases, for other judicial constructions and definitions of "Integration".

2. Wills 🔑98

There is "incorporation by reference" when one of the writings is a complete testamentary instrument, and refers to another document in a manner clearly designed to accomplish that purpose.

See publication Words and Phrases, for other judicial constructions and definitions of "Incorporation by Reference".

3. Wills 🔑98

The requisites of valid incorporation by reference in a will are that the incorporated document must be clearly identified and in existence at time the will makes reference to it.

4. Wills 🔑130

The omission of an essential element from an otherwise valid holographic will is not supplied by a separate document or letter, when there is nothing to indicate that the second document is to be read or construed as part of the holographic will. Probate Code, § 53.

5. Wills 🔑130

A document, holographic in form, to be effective as a valid testamentary disposition of testator's property must strictly fulfill the mandatory requirements of the statute. Probate Code, § 53.

6. Wills 🔑98, 130

Where decedent, in his own handwriting, specified the disposition of his property, and requested that nephew, who was the sole beneficiary named, copy the writing, whereupon decedent signed, dated and wrote upon the copy "I have read the above statement", the doctrine of incorporation by reference could not be applied and the instruments were not a valid holographic will. Probate Code, § 53.

◆

Thomas A. Reynolds, Los Angeles, for appellant.

Shelby Lee Chambers, Los Angeles, Amicus Curiae, for all other heirs-at-law.

DRAPEAU, Justice.

John McNamara died July 5, 1952. He owned several apartment houses and other property. His heirs were seven nieces and nephews.

He attempted to make a will, and to leave all of his property to one of his nephews, Carroll E. Ritchie. In his own handwriting he wrote the following on a sheet of paper.

> "June 26 1952
>
> I in my right mind and in full possession of my senses do hereby bequeth to my nephew Carroll E. Ritchie my full interest in the Royal Alice Apts 214 East Adams Blvd my full interest in the Villard Apts 228 West 28th St my full interest in the Donna Apts 2731 West 15th St. my full interest in the Abby Apts 1649 West 48th St. my full interest in lots 26–27 Block K Norwalk and what money I have in the Security First National Bank and it is my wish he be the administrator of my estate."

If Mr. McNamara had gone on and subscribed his name to what he had written, the writing would, of course, have been a valid holographic will. For it would then have complied with Section 53 of the Probate Code,—"entirely written, dated and signed by the hand of the testator himself."

Instead of doing this, Mr. McNamara asked Mr. Ritchie to copy what he had written. He said he couldn't spell so well.

So Mr. Ritchie copied Mr. McNamara's writing onto another piece of paper. On this other paper, under Mr. Ritchie's writing, Mr. McNamara wrote: "I have read the above statement," and signed his name. Beneath his signature he wrote the date, "June 26, 1952."

Then Mr. McNamara handed the document to Mr. Ritchie, and said, "This will protect you."

Mr. Ritchie presented the writing for probate.

In the Probate Court Mr. Ritchie testified that, upon decedent's representation and promise to leave the property to him by will, he had sold his own business and was taking care of decedent's apartment houses when the writing was made. He also testified that after he had copied decedent's handwriting and decedent had written his name and the date on the paper, decedent said he approved it.

The Probate Court found: "that the instrument as a whole does not meet the requirements of an holographic will in this: That the same is not entirely written, dated and signed by the hand of the testator and that the portion of said document not written by decedent is not incorporated by reference."

From the order denying probate Mr. Ritchie appeals. In his brief he contends, "that considering the language of the will and the circumstances under which it was executed and the declarations of the decedent made in connection therewith, the lower Court should have determined that the first paragraph, not in the handwriting of decedent, was incorporated by reference by virtue of the portion subjoined thereto in decedent's handwriting, and that such document was executed *animus testandi* and should have been admitted to probate as the last will of John McNamara, deceased."

[1–4] The principles of integration and incorporation by reference in the law of wills are set forth in Re Estate of Wunderle, 30 Cal.2d 274, at page 281, 181 P.2d 874, at page 878:

"In the law of wills, integration, as distinguished from incorporation by reference, occurs when there is no reference to a distinctly extraneous document, but it is clear that two or more separate writings are intended by the testator to be his will. Thus several writings, connected by sequence of thought, folded together or physically forming one document have been admitted to probate as constituting an holographic will.

"On the other hand, there is incorporation by reference when one of the writings is a complete testamentary instrument, and refers to another document in a manner clearly designed to accomplish that purpose. The requisites of a valid incorporation by reference are that the incorporated document must be clearly identified and in existence at the time the will makes reference to it.

"* * * the omission of a testamentary intent or of a date from an otherwise valid holographic will is not supplied by a separate document or letter, when there is nothing to indicate that the second document is to be read or construed as part of the holographic will. And the date of an holographic will may not be supplied by one not in the handwriting of the testator." (Authorities in the foregoing quotation have been omitted.)

Our courts in California have gone a long, long way to carry into effect wishes of testators, despite informalities in holographic wills. Reference to our case law will disclose a considerable number of such instances. Undoubtedly the reason for this benevolent approach to the probate of holographic wills has been the human desire of men for a time clothed with judicial power to comply with the wishes of those who have gone to Hamlet's "undiscover'd country from whose bourn No traveller returns * * *."

[5] But there is another principle in the law of wills which must be kept in mind too. Such documents must meet the requirements of the statute which permits disposition of property by will.

In Re Estate of Towle, 14 Cal.2d 261, 93 P.2d 555, 124 A.L.R. 624, the writing presented for probate was partially in the handwriting of testatrix and partially in the handwriting of another person. In such circumstances our Supreme Court observed: "a document, holographic in form, to be effective as a valid testamentary disposition of a testator's property, must strictly fulfill the mandatory requirements of section 53 of the Probate Code." 14 Cal.2d at page 267, 93 P.2d at page 559.

And in the Towle case, the basic reasoning which requires denial of probate of incomplete holographic wills is stated:

"The refusal of the courts in the past to permit any deviation from the clear, plain requirements of the code section governing the due execution of holographic wills was based upon the theory that the rigid requirement that such wills be entirely in the handwriting of the testator was enacted by the legislature to afford protection from the danger of forgery of such a will, not protected, as is a formal will, by the safeguard of the requirement of due attestation by competent witnesses. * * * In other words, the fact that a document is entirely in the handwriting of a testator offers an adequate guaranty of its genuineness." 14 Cal.2d at page 271, 93 P.2d at page 561.

[6] So in this case the conclusion is inescapable that, notwithstanding the obvious wishes of the decedent, to hold the presented writing to be a will, or to declare it validated by including the copied writing of decedent, would unduly extend the framework prescribed by the legislature within which holographic wills may be admitted to probate, and open the door to fraud and forgery.

The order is affirmed.

WHITE, P. J., and DORAN, J., concur.

120 Cal.App.2d 62

BREEDEN et al. v. SMITH et al.

Civ. 4807.

District Court of Appeal, Fourth District,
California.
Sept. 2, 1953.

Action to recover damages for injuries sustained by employee and to set aside conveyance of realty by employer and wife to their son. After entry of judgment setting aside conveyance insofar as it affected rights of injured employee, grantors filed notice of motion to restrain sale of realty on execution under such judgment. The Superior Court of San Diego County entered order refusing to restrain execution sale, and defendant grantors appealed. The District Court of Appeal, Barnard, P. J., held that nothing appeared in the record which would adversely affect the validity of homestead declarations filed by grantors after conveyance to son but before entry of judgment setting aside conveyance, since they still retained the full equitable interest in the realty and that hence refusal to restrain execution sale was error.

Judgment reversed.

Homestead 🔑207

Where trial court found that title to realty conveyed to grantors' son in fraud of claim for injuries sustained by employee while helping build house on the realty was held by grantee in secret trust for grantors who retained the full equitable interest in realty, nothing appeared in the record which would adversely affect the validity of homestead declarations filed by grantors after conveyance but before entry of judgment setting it aside and refusal to restrain sale of such homestead property under execution issued on such judgment was error, in absence of showing that judgment creditors were entitled to such sale.

R. M. Switzler, San Diego, for appellants.

Walter Wencke, San Diego, for respondents.

BARNARD, Presiding Justice.

This appeal involves the legal effect of a homestead and the subsequent levy of a writ of execution under unusual circumstances.

The defendant Robert Smith, aged 73, was building a house for himself. He employed Joseph Breeden aged 63, to assist him. On February 15, 1951, Breeden fell from a plank and was injured. On April 9, 1951, Smith and his wife deeded the property on which the house was located to their son, Stanley Smith. The senior Smiths moved into the house about May 1, 1951, and have since resided there.

On August 22, 1951, Breeden and his wife brought this action. The first count of the complaint alleged a cause of action for damages, with a failure to carry compensation insurance or to secure permission to self insure. The second count alleged that the levy of an attachment "will be made" upon this property, as permitted by section 3707 of the Labor Code; that the conveyance to the son was made with intent to defraud creditors; and that the son received and accepted that deed with knowledge of this intent, and with the intent "to hold said land as a secret trust for Robert Smith." The prayer was for damages, to have the deed set aside, and that this land be adjudged subject to the lien of the attachment.

On October 22, 1951, Robert Smith filed a declaration of homestead covering this property. On October 24, 1951, he filed an answer denying all material allegations of both counts of the complaint, and alleging contributory negligence. On November 27, 1951, the Industrial Accident Commission entered an award in favor of Breeden and against Robert Smith.

This action was tried on July 23, 1952, without a jury. In its findings, filed on August 12, 1952, the court found that at the time of the injury Breeden was employed by the defendants; that on April 9, 1951, Robert Smith conveyed all his right, title and interest in this property to Stanley Smith without consideration and with intent to defraud his creditors; that the property was then worth $8000; that Stanley Smith accepted and received this deed with the intent to hold the property "as a secret trust for said Robert Smith"; "that since said conveyance the title to the above described real property has remained in the name of" Stanley Smith; that despite such conveyance Robert Smith and his wife remained in exclusive possession of said property until January 1, 1952, when Stanley Smith and his wife moved in and shared such possession; that on November 29, 1951, the Industrial Accident Commission entered an award in favor of Breeden and against Robert Smith; and that ever since said conveyance Robert Smith has been unable to pay this award. As conclusions of law, it was found that on February 15, 1951, Breeden became a creditor of the senior Smiths; that said conveyance was fraudulent as to creditors, and the senior Smiths became insolvent by reason thereof; and that the plaintiffs were entitled to a judgment decreeing that this conveyance was fraudulent as to Breeden, and should be set aside and annulled "insofar as it affects the rights of" Breeden. Judgment was entered on August 12, 1952, adjudging solely that this conveyance was fraudulent as to Breeden, and "hereby is set aside and annulled insofar as it affects the rights of the plaintiff Joseph W. Breeden." No appeal was taken from that judgment.

On August 4, 1952, before those findings and judgment were filed Robert Smith filed a second declaration of homestead, in which is was stated that a previous one had been filed. On October 31, 1952, a writ of execution was levied on this property, based on this judgment, although the court had made no findings with respect to the issue of damages and no judgment for money had been entered, other than for costs. Sale of the property was set for December 17, 1952.

On December 3, 1952, Robert Smith and his wife filed notice of a motion for an injunction restraining the plaintiffs from selling this property. This motion was heard on December 16, 1952, before another judge, and the declarations of homestead were received in evidence. The matter of a homestead had not theretofore been mentioned in the pleadings, findings or judgment. In ruling on this motion the judge said that the findings clearly stated that the senior Smiths had conveyed all their "right, title and interest" in the property to their son; that he felt bound by those findings; that he had reluctantly concluded that he had no right to interfere with the determination that the property was subject to execution sale; and that he could not tell from the judgment whether or not it was intended as an adjudication that there was no homestead on the property. An order partially denying the motion was entered on December 16, permitting the defendants to apply for relief in the department where the action had been tried, and staying execution for a limited time. On December 19, 1952, the defendants filed notice that they would move the court to correct its judgment of July 23, 1952, on the ground that the court had inadvertently omitted an adjudication of title with respect to whether or not the senior Smiths, at the time of the conveyance to their son, intended to and did part with all their right and interest in the property, or whether they retained some right and interest which was subject to their homestead rights. This motion was denied by the judge who tried the action, his order stating that there was no "inadvertent omission" in the findings or judgment. Thereafter, the other judge entered an order refusing to restrain the sale. This appeal was taken from that order.

There is nothing in the record to show that an attachment was ever levied and, in any event, a homestead was filed long before judgment was entered. The controlling question is whether or not a valid homestead existed. Its validity is not attacked except for respondents' claim that since the court found that Robert Smith conveyed "all his right, title and interest" in this property to his son on April 9, 1951, it follows that he then possessed no interest which could be homesteaded and any homestead declaration made thereafter was a nullity.

While the court found that all right and title had been conveyed to the son by the deed of April 9, 1951, and that "title" had remained "in the name of" the son, it further found that such title had been thus accepted and received by the son in trust for the father, and there is nothing to indicate that such situation was ever changed. It does not appear, therefore, that the father had no interest in this property which could be homesteaded. The only thing the judgment purported to do was to declare this conveyance fraudulent as to this creditor and to set it aside insofar as it affects his rights. There being no "inadvertent omission", it clearly appears it was intended to do no more. It did not make any adjudication as to whether or not there was a valid homestead on the property, no such issue having been presented, and it did not adjudicate that the property would be subject to sale on an execution to be issued pursuant to that judgment. The practical effect of the findings and judgment was to hold that the father had been the real owner of the property since the conveyance to the son. The father had a very substantial interest in the property after the conveyance, in fact the full equitable interest, and the homesteads were filed before any judgment was entered.

While it must be assumed that the finding, that the conveyance was fraudulent insofar as it affected Breeden, was supported by the evidence, the only evidence in the record before us is to the effect that, as between the parties, the deed was intended to take effect only on the death of the grantors. There is some inconsistency in respondents' position in relying on the fact that the deed was void insofar as it affected his rights for one purpose, and relying on its validity as affecting his rights for another purpose.

Had the appellants filed a homestead before this conveyance was made the respondents would have had no enforceable claim against this property. The judgment in this action did not establish such a claim, and nothing in the findings therein establishes the right to sell the property. The principles involved in the cases setting forth the general rules are not favorable to the only attack here made upon these homesteads. Montgomery v. Bullock, 11 Cal.2d 58, 77 P.2d 846; Prudential Ins. Co. v. Beck, 39 Cal.App.2d 355, 103 P.2d 241. A homestead was filed shortly after this suit was brought and another one was filed before the judgment became a lien. Yager v. Yager, 7 Cal.2d 213, 60 P.2d 422, 106 A.L.R. 664. The question of the validity or invalidity of the homestead was not raised or decided at the trial of the action. Duhart v. O'Rourke, 99 Cal.App.2d 277, 221 P.2d 767.

The court having found that the full interest in this property, other than the bare legal title, was in Robert Smith all the time, nothing appears in the record which would adversely affect the validity of the homesteads filed before judgment was entered. In the absence of any showing that the respondents were entitled to a sale of the property on execution it was error to refuse the restraining order asked for. While the respondents could have proceeded under sections 1245 to 1259 of the Civil Code, if the circumstances warranted, no such procedure is involved in this appeal.

The order appealed from is reversed.

MUSSELL, J., concurs.

119 Cal.App.2d 839

HAMRICK v. HAMRICK et al.

Civ. 15224.

District Court of Appeal, First District, Division 2, California.

Aug. 24, 1953.

Hearing Denied Oct. 22, 1953.

Divorce proceeding wherein second wife who married deceased husband day before final judgment on divorce between deceased husband and his first wife was entered, moved to have judgment entered nunc pro tunc as of date prior to her marriage to husband. The Superior Court, County of Alameda, Ralph R. Hoyt, J., rendered judgment in favor of movant and the first wife appealed. The District Court of Appeal, Goodell, J., held that under statute giving court authority to enter final divorce judgment after death of either party and statute authorizing court on motion of either party to enter final judgment nunc pro tunc as of date final judgment could have been entered, and validating marriages, court had power to make such nunc pro tunc entry of divorce judgment on motion of second wife despite fact she had not been party to divorce proceeding.

Order affirmed.

1. Divorce ⚷162

Under statute giving court authority to enter final divorce judgment after death of either party and statute authorizing court, on motion of either party, to enter final divorce judgment nunc pro tunc as of date final judgment could have been entered and validating marriages, court had power to enter divorce judgment nunc pro tunc as of date prior to marriage between deceased husband and second wife, on motion of second wife, despite fact that she was not a party to divorce proceeding. Civ.Code, §§ 132, 133.

2. Statutes ⚷223.2(23)

Statute giving court authority to enter final divorce judgment after death of either party and statute authorizing court, on motion of either party, to enter final divorce judgment nunc pro tunc as of date of final judgment could have been entered and validating marriages entered into subsequent to time that final judgment could have been entered must be construed together. Civ. Code, §§ 132, 133.

3. Divorce ⚷162

Fact that deceased husband failed to make payments required by interlocutory decree in suit by first wife for divorce and might not have been entitled to ask for final divorce judgment would not preclude granting of second wife's motion to have final judgment of divorce, which was applied for by first wife, moved back to date prior to marriage between husband and second wife. Civ.Code, §§ 132, 133.

4. Equity ⚷65(1, 3)

If a party comes into a court of equity with unclean hands relating to the transaction before the court he will be denied relief, but in determining that issue trial court can properly consider only whether moving party has clean or unclean hands in relation to matters properly before the court.

5. Equity ⚷65(3)

Contention that second wife was instrumental in creating situation which arose between deceased husband and first wife which resulted in divorce was not a matter properly before court on motion by second wife to have final judgment of divorce entered nunc pro tunc as of date prior to marriage between husband and second wife and would not be considered in determining whether second wife had come into a court of equity with unclean hands and was, therefore barred from relief. Civ.Code, §§ 132, 133.

6. Marriage ⚷40(5, 11)

When a person has entered into two successive marriages, a presumption arises in favor of validity of second marriage and burden is upon party attacking validity of second marriage to prove that first marriage had not been dissolved by death of spouse or by divorce or had not been annulled at time of second marriage.

7. Divorce ⚷184(10)

In divorce proceeding wherein second wife who married deceased husband day before final judgment of divorce between husband and his first wife was entered, moved to have judgment entered nunc pro tunc as of date prior to her marriage to husband, determination of trial judge that sufficient showing of mistake, negligence or inadvertence had been made would not be disturbed on appeal in view of presumptions that a person is innocent of crime or wrong and that second marriage is valid and of fact that matter was carefully considered by trial judge. Civ.Code, §§ 132, 133.

◆

W. I. Follett, Evelyn B. Follett, Oakland, Stanley C. Smallwood, Oakland, for appellant.

Robert T. Allen, Berkeley, for respondent.

GOODELL, Justice.

This appeal was taken from an order entered on August 14, 1951 which directed that a final judgment of divorce entered on July 13, 1950 should be signed, dated, filed, and entered, *nunc pro tunc,* as of July *6,* 1950.

On February 11, 1946 appellant Agnes Hamrick married John Forrest Hamrick in the State of Washington, and a son Russell D. Hamrick was born to them. On June 21, 1949 she sued for divorce on the ground of extreme cruelty. On July 5, 1949 an interlocutory judgment was granted to her awarding her $60 a month alimony and $90 a month for their one year old son, Russell.

When the time drew near for the final judgment, Agnes was in the State of Washington and she there made the requisite affidavit, which was presented to the court on July 13, 1950, whereupon the final judgment of divorce was entered on the 13th at her instance.

On the day before, however, defendant Hamrick, a Lieutenant in the Marine Corps, married respondent Jo Mae Hamrick in Vallejo. On September 25, 1950 he was killed in action in Korea. The marriage on the day before the entry of the final judgment gave rise to this litigation.

On April 4, 1951 respondent initiated proceedings to obtain the *nunc pro tunc* entry of appellant's final judgment (theretofore entered) to a time antedating her marriage to Lieutenant Hamrick. The final judgment could have been entered on July 6, 1950 (six days before the marriage) and the court on respondent's motion dated it back to that day.

The importance of the question presented on this appeal is obvious and need not be stressed.

Appellant has five distinct contentions herein.

[1, 2] *First*: That respondent Jo Mae Hamrick "was not a proper person to make the motion for the re-entry of the final decree *nunc pro tunc*" since she was not a party to the divorce proceeding.

In 1903 the legislature enacted § 132 of the Civil Code which read, and still reads, as follows: "When one year has expired after the entry of such interlocutory judgment, the court on motion of either party, or upon its own motion, may enter the final judgment granting the divorce, and such final judgment shall restore them to the status of single persons, and permit either to marry after the entry thereof; and such other and further relief as may be necessary to complete disposition of the action, but if any appeal is taken from the interlocutory judgment or motion for a new trial made, final judgment shall not be entered until such motion or appeal has been finally disposed of, nor then, if the motion has been granted or judgment reversed. *The death of either party after the entry of the interlocutory judgment does not impair the power of the court to enter final judgment as hereinbefore provided; but such entry shall not validate any marriage contracted by either party before the entry of such final judgment, nor constitute any defense of any criminal prosecution made against either.*" (Emphasis added.)

The first sentence provides for the ordinary case, where both parties are living at the end of the interlocutory period, the language being that "the court on motion of either party, or upon its own motion, may enter the final judgment * * *." The second sentence, which we have emphasized, provides for an altogether different situation. No language is to be found therein circumscribing the moving party or parties, for obviously after the death of one or both of the parties the language of the first sentence respecting motions would be wholly inappropriate. The second sentence comes out flatly and says that death shall not impair the *power* of the court. The legislature could not be expected to have foreseen the numerous and various situations where relatives, or perhaps even strangers in blood, would find it to their interest to have such judgment entered after the death of one or both of the parties, and so it would seem that the legislature wisely left it that way.

Section 132, however, makes no provision for *nunc pro tunc* entry, see Corbett v. Corbett, 113 Cal.App. 595, 298 P. 819 and discussion in Macedo v. Macedo, 29 Cal. App.2d 387, 390, 84 P.2d 552, and in 1935 the legislature enacted § 133, Civil Code, which at the time of respondent's motion read as follows:

"Whenever either of the parties in a divorce action is, under the law, entitled to a final judgment, but by mistake, negligence or inadvertence the same has not been signed, filed or entered, if no appeal has been taken from the interlocutory judgment or motion for a new trial made, the court, *on the motion of either party thereto or upon its own motion,* may cause a final judgment to be signed, dated, filed and entered therein granting the divorce as of the date when the same could have been given or made by the court if applied for. The court may cause such final judgment to be signed, dated, filed and entered nunc pro tunc as aforesaid, *even though a final judgment may have been previously entered* where by mistake, negligence or inadvertence the same has not been signed, filed or entered *as soon as it could have been entered under the law if applied for.* Upon the filing of such final judgment, the parties to such action shall be deemed to have been restored to the status of single persons as of the date affixed to such judgment, and *any marriage of either of such parties subsequent to one year after the granting of the interlocutory judgment as shown by the minutes of the court, and after the final judgment could have been entered under the law if applied for, shall be valid for all purposes as of the date affixed to such final judgment, upon the filing thereof.*" (Emphasis added.)

It must be borne in mind that the defendant did not apply for the entry of the final judgment; the appellant did so, and it was entered on July 13, 1950 while both parties to the action were living. That which the respondent sought was its entry as of July 6th instead of 13th. Such earlier entry meant a great deal to her and to her two sons by defendant. The procedure which she invoked was that prescribed in the second sentence of § 133, a final judgment having been previously entered, and she invoked it seven months after Lieutenant Hamrick's death. Section 132 gives the court the *power* to enter a final judgment after death. Section 133 gives the court the *power* to enter a final judgment *nunc pro tunc.* These sections must be read together. Macedo v. Macedo, supra; Estate of Hughes, 80 Cal.App.2d 550, 554, 182 P.2d 253; 23 Cal.Jur. 785–788, §§ 163, 166. While it is true the first sentence of § 133 provides for *nunc pro tunc* entry "on the motion of either party" the second sentence (under which respondent presented her motion) contains no such language, and such language *in the case of a death* (which is the case here) would be just as inappropriate in § 133 as it would be in § 132.

In Estate of Hughes, supra, 80 Cal.App. 2d 550, 553–554, 182 P.2d 253, 256, the court said: "The purpose was to validate otherwise void marriages and thus relieve the parties to such marriages from the stigma and other consequences of bigamous relationships into which they might innocently fall by reason of oversight or neglect to have a final decree entered. Mere entry of the *nunc pro tunc* judgment acts retroactively to restore them to the status of single persons and at the same time gives them and their later-acquired spouses legal married status. It is all strictly artificial, but so is the semidivorced status occupied by the holders of an interlocutory decree. The purpose of the law is not satisfied by the death of one of the parties prior to the entry of a *nunc pro tunc* judgment. True, death severs the marital relationship, but it severs it only as of the date of death, while the statute is designed to accomplish more than this. A final judgment, in usual form, dissolves the marriage as of the date of entry of the judgment. That is sufficient where other rights are not involved. Section 133 was enacted for the protection of such other rights and provides that even though a marriage has been dissolved by a final judgment, a *nunc pro tunc* judgment may be entered thereafter to accomplish the further purpose of validating otherwise invalid marriages. Section 132 gives the court authority to enter a final judgment after the death of either party. The two sections must be read together. While before the adoption of section 133 a final judgment entered after the death of either of the parties did not have the effect of validating an invalid marriage, the two sections read together now authorize the entry of a *nunc pro tunc* judgment after the death of either of the parties, and such judgment has the effect declared by section 133. Certainly if Mr. Hughes' first wife, Genevieve, had remarried before entry of a final judgment, the death of Mr. Hughes would not have deprived her of the right to have a *nunc pro tunc* judgment entered for the purpose of validating her marriage. To allow his death to deprive appellant of all rights under section 133 would unjustifiably and unreasonably limit the scope of that section. It seeks to accomplish a beneficent purpose and the court should give it a construction as broad as its purpose appears to be. We hold, therefore, that appellant's marriage to Mr. Hughes was validated by the *nunc pro tunc* judgment."

When § 133 provides for a *nunc pro tunc* entry "on the motion of either party" it of course contemplates that both parties are living, or at least that the one interested in antedating the entry is living. But Lieutenant Hamrick at the time of the motion had been dead for seven months. Had he lived he certainly would have been a proper party to make the motion. The motion was made by "Jo Mae Hamrick, wife of defendant, John Forrest Hamrick." The order refers to "The motion of Jo Mae Hamrick *on behalf of defendant John Forrest Hamrick*". (Emphasis added.) But be that as it may, it is certain that respondent was asserting in court a right based on and derived from the marriage ceremony performed on July 12, 1950 between herself and Lieutenant Hamrick. She was avowedly appearing in court to assert and establish her status as his lawfully wedded wife, and her purpose was to clear away any possible claim or stigma of a bigamous marriage, and to establish, also, the rights of the two children of herself and Lieutenant Hamrick as his legal heirs. She was asserting no right other than the party himself could have asserted had he lived.

Indeed this identity of interest is virtually conceded by appellant in her brief, wherein she says:

"There are sound reasons for requiring that movant and respondent, who was not a party to the divorce action, identify herself with the interest of one of the parties before being permitted to ask for a *nunc pro tunc* decree of divorce, even when the request is that the Court act upon its own motion. The first reason is that this Court would hardly permit a complete stranger to the action or to the parties thereto, to make such an application, even when the application is that the Court act upon its own motion. Necessarily, any person requesting a final decree of divorce *nunc pro tunc* would have to show such relationship to at least one of the parties thereto, that some interest of the movant would be affected by the granting or refusal of the *nunc pro tunc* decree, as, for example, the situation in the present case, where a marriage of movant to one of the parties would be validated thereby."

If appellant's contention were to be upheld it would have to be on the ground that the court had no *power* to make the *nunc pro tunc* order simply because the motion therefor was not made by *a party to the action*, when, in this particular instance, the only party to the action who would have been concerned in having the marriage status of himself and his second wife established and validated could not, in the very nature of things, make the motion.

Since under § 132 the *power* of the court remains unimpaired to enter a final judgment of divorce after the death of either or both of the parties, and since §§ 132 and 133 relate to the same subject and must be construed together, Ebert v. State of California, 33 Cal.2d 502, 509, 202 P.2d 1022, we are satisfied that the court had the *power* under § 133 to make the *nunc pro tunc* entry as of July 6, 1950 on the motion of respondent, who, after all, was seeking only that to which Lieutenant Hamrick, the party defendant, would have been clearly entitled had he lived, namely, the validation of their marital status as of July 12, 1950.

We might add that the Macedo case cited earlier was followed by this court in Ringel v. Superior Court, 54 Cal.App.2d 34, 128 P.2d 558; it was followed also in Estate of Hughes, supra; and it was again followed by this court in Armstrong v. Armstrong, 85 Cal.App.2d 482, 193 P.2d 495. In all three cases the Supreme Court denied a hearing.

The Macedo case [29 Cal.App.2d 387, 84 P.2d 554] holds that the enactment of § 133 was "both curative and remedial" as to § 132 and Estate of Hughes, 80 Cal.App.2d 553, 182 P.2d 256, says that § 133 "was enacted for the purpose of avoiding conditions due to the inadequacy of section 132."

Appellant's second contention is that the court did not order the *nunc pro tunc* entry on its own motion.

We must agree that such was the case. The form of order when tendered for signature recited: "The motion of Jo Mae Hamrick on behalf of defendant John Forrest Hamrick" and read: "Now therefore the above entitled court under the provisions of Civil Code Section 133 and on its own motion hereby orders" etc. The Judge struck out the words "and on its own motion" and initialed the deletion. Although the order was not *sua sponte* we are satisfied, for the reasons already given, that the court had the power to make it on respondent's motion.

[3] *Appellant's third contention* is that the defendant was in contempt of court when the final judgment was obtained, and that a party in contempt has no standing to apply for such judgment. We repeat that it was not the defendant who applied for the final judgment, but the appellant herself, who was the natural party to apply for it since she had been awarded the interlocutory judgment. What the respondent did was simply to move, some months after appellant had obtained it, that its entry be set back seven days. Appellant, however, contends that respondent—whose rights are identified with Lieutenant Hamrick's rights according to appellant's own concession already noted—had no standing in court since defendant himself could not have obtained the final judgment because of his delinquency in payments. There was no reason for him to apply for the final, since appellant had already done so. Respondent in moving for its *nunc pro tunc* entry simply took things as she found them. For reasons of her own, appellant desired the final, and got it; it is the same judgment, granted on her motion, only dated back seven days.

Admittedly the defendant had made none of the payments required by the interlocutory judgment, and had he applied for the final judgment he might perhaps have been halted, but since he did not apply, the court was not faced with any problem of his default, and he had never been brought up on contempt proceedings. Appellant's action in taking the initiative relieved the defendant from making any exculpatory showing, and it cannot now be claimed for the first time that he was in contempt. The authorities cited by appellant under this heading are not in point.

[4, 5] *Appellant's fourth contention* is that the order appealed from permitted the second wife to profit by her own wrong.

The argument is made that respondent was instrumental in creating the situation which arose between husband and wife which resulted in the divorce and that equitable considerations (the doctrine of clean hands) bar any relief.

The only question before the court was whether or not respondent was entitled to the *nunc pro tunc* order. The matters relied on by appellant occurred long prior to the time of the motion. In Boericke v. Weise, 68 Cal.App.2d 407, 419, 156 P.2d 781, 788, the court said: "Of course if a party comes into a court of equity with unclean hands relating to the transaction before the court, he will be denied relief. But in determining that issue the trial court can properly consider only whether the moving party has clean or unclean hands *in relation to the matters properly before the court.* The trial of the issue relating to clean hands cannot be distorted into a proceeding to try the general morals of the parties. To warrant denial of relief *the unclean hands must relate to the transaction before the court.*" (Emphasis added.)

This case and others cited by respondent have not been adequately answered by appellant. We find no merit in this point.

[6, 7] *Appellant's fifth and last contention* is that "There was no adequate showing of mistake, negligence, or inadvertence."

The motion was heard on three affidavits of the moving party and three on behalf of the appellant. One of appellant's affidavits was made by the attorney who had represented her in the divorce proceeding. From this is appears that there was a conversation between himself and Lieutenant Hamrick on July 7, 1950, in which the former told the latter that he was mailing the affidavit to appellant and that a form of final decree was prepared and "that when said affidavit was executed and returned by said Agnes Hamrick, affiant would present said affidavit and form of final decree of divorce to the above-entitled court to secure a final decree of divorce; *that affiant told said John Forrest Hamrick that he should not remarry until affiant notified him that said final decree had been obtained.*" (Emphasis obtained.)

Death of course prevented any comment by Lieutenant Hamrick on the attorney's version of the cautionary part of this conversation just emphasized, and technically, therefore, it stands uncontradicted. Nevertheless, the court could have concluded from all the circumstances that Hamrick might have mistaken or misunderstood what was said by the attorney, which mistake in itself would have come within the statutory language. In one of her affidavits respondent deposed that Lieutenant Hamrick had told her that the final judgment had been entered which, of course, would be additional evidence of mistake. On this question the presumptions were in favor of the respondent, namely, "That a person is innocent of crime or wrong;" Code Civ.Proc. § 1963, subd. 1. Here was an officer in the armed forces contemplating a second marriage, who admittedly had made inquiry of his wife's attorney respecting the time of entry of the final decree. No court would be inclined to presume that such officer with his commission and his military career at stake would wilfully and deliberately walk into a bigamous marriage. Nor, under § 1963, subdivision 1, is it to be presumed that respondent herself would do so. In Ortega v. Ortega, 118 Cal.App.2d 589, 258 P.2d 594, 597, the settled rule on this subject is restated as follows: "When a person has entered into two successive marriages, a presumption arises in favor of the validity of the second marriage, and the burden is upon the party attacking the validity of the second marriage to prove that the first marriage had not been dissolved by the death of a spouse or by divorce or had not been annulled at the time of the second marriage. Hunter v. Hunter, 111 Cal. 261, 43 P. 756, 31 L.R.A. 411, 52 Am. St.Rep. 180; In re Estate of Smith, 33 Cal. 2d 279, 281, 201 P.2d 539, and cases cited. '* * * the burden is cast upon the party asserting guilt or immorality to prove the negative,—that the first marriage had not ended before the second marriage.' Hunter v. Hunter, supra, 111 Cal. at page 267, 43 P. [756] at page 757." The trial judge had this rule and these presumptions to guide him in considering the affidavits on both sides of this motion, and his conclusion on the questions of fact thus presented is not to be disturbed on appeal.

Moreover, the record shows that no hasty action was taken by the court. The motion, filed in April, 1951, was heard and submitted on June 27 after a full presentation and argument. The order appealed from was presented, signed and filed on August 14, 1951. The record shows that the matter was carefully and thoroughly considered by the court.

The order appealed from is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

119 Cal.App.2d 666

ROBINSON v. HILES.

Civ. 19631.

District Court of Appeal, Second District, Division 1, California.

Aug. 13, 1953.

Hearing Denied Oct. 8, 1953.

In proceedings on plaintiff's motion to set aside a dismissal with prejudice, the Superior Court, Los Angeles County, made a determination adverse to defendant, and he appealed. The District Court of Appeal, White, P. J., held that pleadings and supporting affidavits authorized granting of relief sought.

Affirmed.

1. Dismissal and Nonsult ⟹43(5)

In affidavits supporting motion to vacate dismissal with prejudice, recitals that plaintiff had at no time authorized her attorneys to dismiss, that she had not signed any release of her claim against defendant, and that she had not at any time authorized acceptance of any check in settlement of her claim, set forth unequivocal facts rather than mere conclusions.

2. Dismissal and Nonsuit ⟹43(4)

Misunderstanding between attorney and client furnishes a proper and sufficient basis for setting aside a dismissal with prejudice. Code Civ.Proc. § 473.

3. Dismissal and Nonsuit ⟹43(5)

In proceedings on plaintiff's motion to set aside a dismissal with prejudice, alleged to have resulted from unauthorized and mistaken acts of counsel, pleadings and supporting affidavits authorized granting of relief sought. Code Civ.Proc. § 473.

4. Attorney and Client ⟹101(1)

Mere employment of attorney to represent client in litigation does not, under California law, carry with it power to compromise litigation.

5. Dismissal and Nonsuit ⟹29

Dismissal with prejudice is the modern name for "retraxit". Code Civ.Proc. § 473.

See publication Words and Phrases, for other judicial constructions and definitions of "Retraxit".

6. Dismissal and Nonsuit ⟹43(4)

Dismissal with prejudice could be set aside on statutory ground of mistake on part of plaintiff's counsel. Code Civ.Proc. § 473.

7. Dismissal and Nonsuit ⟹43(5)

In passing upon application to set aside dismissal with prejudice, trial court must exercise a sound and legal discretion. Code Civ.Proc. § 473.

8. Dismissal and Nonsuit ⟹43(5)

It is policy of law to bring about a trial on merits whenever possible, and therefore any doubts which may exist should be resolved in favor of application to set aside dismissal with prejudice, to end of securing for litigant his day in court and a trial upon merits. Code Civ.Proc. § 473.

◆

Wanzer & Litwin, Charles S. Litwin, Long Beach, for appellant.

Frank J. Kanne, Jr., Los Angeles, for respondent.

WHITE, Presiding Justice.

This is an appeal by defendant, Albert Edward Hiles from an order of the trial court vacating and setting aside a dismissal with prejudice and restoring the cause to the calendar for trial. Plaintiff's motion for such order was filed some two months and four days after the aforesaid dismissal with prejudice was filed.

Upon the hearing of said motion, the only facts presented were those contained in the affidavits of plaintiff, Nell S. Robinson, and of Charles S. Litwin, one of the attorneys for defendant. Epitomizing the factual situation as presented in the aforesaid affidavits, it appears that plaintiff herein, by and through her attorneys of record, filed an action against defendant, Albert Edward Hiles, to recover damages for personal injuries allegedly suffered as a result of the claimed negligence of defendant in the operation by him of an automobile. Defendant filed an answer to plaintiff's complaint through Messrs. Wanzer & Litwin, his attorneys of record.

According to the affidavit of Attorney Litwin, representing defendant, the original attorneys for plaintiff commenced negotiations with defendant's counsel looking toward a compromise and settlement of plaintiff's claim. Following such negotiations between counsel for the respective parties, an oral agreement was entered into whereby plaintiff's then attorneys accepted the sum of $600 by way of compromise and in full settlement of her claim, and said attorneys further agreed to dismiss said personal injury action with prejudice.

Thereafter, and on or about the 4th day of June, 1952, plaintiff's then attorneys forwarded to defendant's attorneys a dismissal with prejudice, with a letter authorizing the filing of said dismissal upon receiving a draft in the sum of $600 in favor of plaintiff and her attorneys. On or about the 6th day of June, 1952, defendant's attorneys forwarded to C. Ransom Samuelson and Robert A. Wenke, attorneys of record for plaintiff, a draft in the sum of $600, payable to plaintiff, Nell S. Robinson, a widow, and her attorney, C. Ransom Samuelson, and on the same day caused the dismissal with prejudice to be filed of record in said cause with the county clerk.

On September 4, 1952, Frank J. Kanne, Jr. was substituted by plaintiff as her attorney of record in place of C. Ransom Samuelson and Robert A. Wenke, and notice thereof was duly served upon the attorneys for defendant.

On September 10, 1952, plaintiff, through her present attorney, filed her "Notice of Motion to Vacate and Set Aside Dismissal with Prejudice and to Restore Case to Trial Calendar." The motion was supported by the affidavit of plaintiff and set forth that the motion "will be made under the provisions of Section 473, Code of Civil Procedure, on the grounds that the said Dismissal With Prejudice was signed, filed and entered by mistake, without any authority from the plaintiff, as will appear from her affidavit * * *."

In her foregoing affidavit filed in support of her motion plaintiff averred in part as follows:

> "That affiant at no time authorized C. Ransom Samuelson or Robert A. Wenke (her then attorneys) to dismiss, compromise or settle said action for any sum or at all; that affiant did not at any time sign any release of the claim which constitutes the cause of action against the defendant; that affiant did not at any time authorize the acceptance of any check, or endorse any check in settlement of her claim as set forth in her lawsuit.
>
> "That affiant has fully informed her present attorney, Frank J. Kanne, Jr., of the facts surrounding her cause of action against the defendants and has been advised that her claim is reasonably worth a sum substantially in excess of $600.00; that affiant has been informed by her former attorneys, C. Ransom Samuelson and Robert A. Wenke, that they accepted a draft in the sum of $600.00 tendered in behalf of the defendant at the time that the said attorneys, C. Ransom Samuelson and Robert A. Wenke, executed, filed and caused to be entered the Dismissal with Prejudice of the within action."

In opposition to plaintiff's motion, defendant in the trial court urged the following grounds:

> "1. That the affidavit of Nell S. Robinson in support of her motion to vacate is insufficient in that it does not set forth facts showing any mistake either on the part of herself or of her then attorneys of record;
>
> "2. That the affidavit of merits is insufficient in law;
>
> "3. That an executed agreement for Dismissal with Prejudice, followed by the filing of a formal written Dismissal with Prejudice with the Clerk, cannot be set aside over the objection of defendant;
>
> "4. That plaintiff has failed to show affirmatively that she has exercised due diligence in prosecuting the motion after discovery of the facts."

Appellant concedes that it is now well established in our law that appellate tribunals have always been and now are favorably disposed, in proceedings such as the one now before us, toward such action by trial courts as will permit, rather than prevent, the adjudication of legal controversies upon their merits. That, as was said in Jones v. Title Guaranty & Trust Co., 178 Cal. 375, 376, 377, 173 P. 586, 587, "This court has always looked with favor upon orders excusing defaults and permitting controversies to be heard upon their merits. Such orders are rarely reversed, and never 'unless it clearly appears that there has been a plain abuse of discretion.'"

However, appellant urges that while a large amount of discretion is reposed in a trial court, the ensuing decision of the court must be predicated upon sound considerations consistent with the showing made for the relief sought. That, as was said in Bailey v. Taaffe, 29 Cal. 422, 424, "The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia,* but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. In a plain case this discretion has no office to perform, and its exercise is limited to doubtful cases, where an impartial mind hesitates. If it be doubted whether the excuse offered is sufficient or not, or whether the defense set up is with or without merit *in foro legis*, when examined under those rules of law by which Judges are guided to a conclusion, the judgment of the Court below will not be disturbed. If, on the contrary, we are satisfied beyond a reasonable doubt that the Court below has come to an erroneous conclusion, the party complaining of the error is as much entitled to a reversal in a case like the present as in any other."

It is earnestly urged by appellant that in the light of the foregoing rules, the trial court, upon the showing made herein, abused the legal discretion vested in it by granting the aforesaid motion, because, among other considerations, "the settlement was made upon the merits by the parties." With this we cannot agree. The very gist of respondent's motion to vacate the dismissal was the fact that without her knowledge or consent she was deprived of her day in court to litigate her claim upon the merits.

[1, 2] Appellant insists, however, that the averments contained in respondent's supporting affidavit were insufficient to justify the court's action in setting aside the dismissal with prejudice. That respondent's affidavit set forth mere conclusions rather than facts. We do not, however, regard as conclusions, but rather as unequivocal facts, the recitals in respondent's affidavit (1) that she at no time authorized her attorneys to dismiss, compromise or settle said action for any sum or at all; (2) that she did not at any time sign any release of her claim; (3) that she did not at any time authorize the acceptance of any check, or endorse any check in settlement of her claim; (4) that on June 4, 1952, her then attorney signed a dismissal with prejudice of the case, which was filed on June 6, 1952, and entered on June 10, 1952.

Appellant's claim that if respondent desired to show that her attorneys mistakenly believed that they had the authority to make the agreement of settlement on her behalf with appellant, "the simplest and most direct and most satisfactory evidence would have been the statement of the attorney to that effect," is answered by appellant's own admission that "those attorneys participated in the hearing." Such being the case, their testimony was available to appellant, but was not offered. In the affidavit of appellant's attorney the only challenge to the existence of the "mistake" urged by respondent was by averments predicated upon information and belief or denials based upon lack of information or belief. And whether respondent's attorneys acted under a mistaken belief that they were authorized by her to settle the litigation or that they had the right to dismiss the case without express authority from their client, is beside the point. Her affidavit clearly avers that she did not authorize any settlement or compromise and did not sign any release or accept any money. It has been held that a misunderstanding between an attorney and client furnishes a proper and sufficient basis to set aside a default judgment resulting from such misunderstanding. Alvarado v. Sunset Supper Club, 57 Cal.App. 640, 641, 207 P. 940. We are satisfied that such a misunderstanding may also furnish grounds for setting aside an order such as the one with which we are here concerned. Furthermore, no prejudice will ensue to appellant from the granting of the motion in the instant case. It is only logical to assume that whatever preparation for a defense was desired was made prior to the payment of the $600 in return for the dismissal. The parties will have their day in court for a determination of the controversy upon the merits, which is the policy of the law, declared over and over again in the appellate decisions of this state.

[3] Appellant's contention that the affidavit of merits was insufficient to warrant setting aside the dismissal with prejudice cannot be sustained. Without here repeating the averments of the affidavit of merits, suffice it to say that the same was sufficient in form and substance. Moreover, it was aided by a verified complaint and answer, which were before the court upon the hearing of the motion, now before us on this appeal, and which raised material issues.

[4–6] Appellant next challenges the order of the court upon the ground that an executed agreement for a retraxit or abandonment and dismissal of respondent's cause of action cannot be set aside pursuant to the provisions of section 473 of the Code of Civil Procedure. It is true that the cases seem to hold that a distinction should be drawn between a situation where one attempts to set aside a compromise already completed, and where one attempts to enforce an agreement to compromise. Trope v. Kerns, 83 Cal. 553, 556, 23 P. 691; Woerner v. Woerner, 171 Cal. 298, 299, 152 P. 919; Preston v. Hill, 50 Cal. 43. But in the instant case we have concluded that the so-called compromise was never completed. Respondent at no time signed any release or compromise, nor did she authorize anyone else so to do. Neither did respondent accept any check or money or authorize anyone else to do so in her behalf. In California it is settled law that mere employment of an attorney to represent a client in litigation does not carry with it the power to compromise that litigation. Burns v. McCain, 107 Cal.App. 291 at page 294, 290 P. 623; Jones v. Noble, 3 Cal.App.2d 316, 320, 39 P.2d 486. We have carefully examined the authorities cited by appellant in his brief with reference to the finality of a dismissal with prejudice, which is the modern name for a retraxit, and which citations give evidence of commendable diligence and research, but we are satisfied that under the facts of this proceeding, where the agreement of compromise was never completed, the cited cases are not controlling. And we are equally satisfied that while section 473 of the Code of Civil Procedure is generally used by defendants to secure relief from default, it is also available to secure relief in a situation such as is here presented, and that the court had the power to grant the motion upon the stated grounds thereof. Isaacs v. Jones, 135 Cal.App. 47, 48, 26 P.2d 533.

[7, 8] Finally, appellant complains that respondent's affidavit in support of her motion fails to affirmatively show that she exercised due diligence in prosecuting her motion after discovery of the facts. It is true that a prime requisite for relief under section 473 of the Code of Civil Procedure is that the party claiming injury through mistake, etc., shall show affirmatively diligence on his part after discovery of the fact. However, the question of due diligence is dependent upon the facts of each individual case. In the proceeding now before us, the dismissal with prejudice was filed June 6, 1952, and the motion to vacate the same was filed September 10, 1952—some three months and four days later. The circumstances presented in the case at bar reflect that respondent lost confidence in her former attorneys; that on September 4, 1952 she selected her present counsel; and that the notice of motion under section 473 of the Code of Civil Procedure was filed by the latter under date of September 10, 1952. The decision to terminate the services of her former attorneys

and to seek new counsel necessarily took some time. Also time was required for respondent's present counsel to investigate the matter, advise with his client and commence appropriate proceedings to remedy the mistake allegedly made by her former counsel. The legal principles underlying the granting of motions under section 473 of the Code of Civil Procedure are comparatively simple and have frequently been announced by our appellate courts. In passing upon such applications the trial court is to exercise a sound and legal discretion. It is also well established that it is the policy of the law to bring about a trial on the merits whenever possible, so that any doubts which may exist should be resolved in favor of the application, to the end of securing to a litigant his day in court and a trial upon the merits. Tested by these legal principles, we are persuaded that in the instant proceeding there was no abuse of discretion on the part of the trial court in granting respondent's motion.

The order appealed from is affirmed.

DORAN and SCOTT, JJ. pro tem., concur.

Hearing denied; EDMONDS and SCHAUER, JJ., dissenting.

---

119 Cal.App.2d 605

FURST v. SCHARER et al.

Civ. 19422.

District Court of Appeal, Second District, Division 1, California.

Aug. 10, 1953.

Purchaser's action in form of common count for money had and received against vendor of bakery, broker, and escrow agent. The Superior Court, Los Angeles County, Allen W. Ashburn, J., rendered judgment of nonsuit as to broker and entered judgment on verdict in favor of vendor and escrow agent and purchaser appealed. The District Court of Appeal, White, P. J., held that evidence established that part payment which had been deposited in escrow had been received by broker as agent of vendor pursuant to deposit received as initial payment on purchase price.

Order granting nonsuit and judgment for vendor and escrow agent affirmed.

1. Brokers ⚷106

Escrows ⚷10

In purchaser's action in form of common count for money had and received aaginst vendor of bakery, broker, and escrow agent, evidence established that funds which were deposited by purchaser in escrow had been received by broker as agent for vendor pursuant to deposit receipt as initial payment on purchase price.

2. Fraud ⚷36

Negligence on part of plaintiff in failing to discover falsity of statement is no defense when misrepresentation was intentional, rather than negligent, nor is a plaintiff held to standard of precaution or of minimum knowledge of hypothetical reasonable man.

3. Appeal and Error ⚷931(1)

Findings of trial court are presumed to be supported by evidence.

4. Appeal and Error ⚷901

Appellant must shoulder burden of showing that findings of trial court are not supported by evidence.

5. Vendor and Purchaser ⚷44

In purchaser's action in form of common count for money had and received against vendor of bakery, broker and escrow agent, findings that purchaser was buying property as an investment, and that purchaser was experienced in real estate investments and did not believe or rely upon incorrect representations of vendor as to bakery's production, which purchaser asserted furnished basis of his claimed right to rescind agreement of purchase, were supported by evidence.

6. Vendor and Purchaser ⚷335

Defaulting purchaser of bakery was not entitled to recover any part of initial payment on purchase price in absence of proof that vendor was not damaged to extent of fund in hand.

Borah & Borah, A. Noah Borah, Los Angeles, for appellant.

Rinehart, Merriam, Parker & Berg, Jay D. Rinehart, Pasadena, for respondent D. Oliver Scharer.

Hahn & Hahn, Allyn H. Barber, Pasadena, for respondents Robert H. Eaton and Altadena Escrow Corp.

WHITE, Presiding Justice.

Plaintiff's action herein was in the form of a common count for money had and received. The defendant D. Oliver Scharer was the seller, defendant Robert H. Eaton the broker, and defendant Altadena Escrow Corporation was the escrow agent, in a transaction involving the sale to plaintiff of the real property, equipment and goodwill of a bakery business in the City of Monrovia, which transaction plaintiff attempted to rescind prior to its consummation upon the ground of fraud. Trial before the court resulted in a judgment of nonsuit as to Eaton, the broker, and a judgment at the close of trial in favor of the remaining defendants. From such judgments plaintiff appeals.

By his complaint for money had and received plaintiff sought to recover the sum of $7,000 which he had delivered to defendant broker, who in turn had deposited the same with the escrow corporation pursuant to the terms of escrow instructions executed by plaintiff and defendant Scharer. As developed at the trial, the fraud upon which plaintiff based his notice of rescission consisted of asserted misrepresentations as to the net income of the bakery business for the years 1949 and 1950. Recovery was sought against the broker, Eaton, by reason of the fact that his commission of $1,700 was paid to him out of the funds in escrow prior to service of the notice of rescission. This payment, it is contended, was made in violation of the escrow instructions.

The agreement of sale was entered into on August 8, 1951, in the form of a deposit receipt executed by both parties and the broker. The purchase price was $34,000, of which $8,500 was allocated to the value of equipment and fixtures. Under the agreed terms of sale the buyer was to pay $19,000 in cash and assume the principal balance of approximately $15,000 on a first trust deed. By the terms of the escrow instructions, the buyer authorized acceptance of a title subject to (1) taxes; (2) "Covenants, conditions, restrictions, easements, rights and rights-of-way of record"; and (3) the deed of trust of record. The instructions authorized the escrow agent to pay the broker his commission "upon receipt of the title report in escrow showing the title as called for, vested in the seller." Having received a title report, the escrow agent paid the commission. Thereafter, on August 14 or 15, 1951, the escrow agent was served with the notice of rescission.

[1] Appellant contends that it was error to grant a nonsuit as to the defendant broker, for the reason that he had "received money to which he was not entitled and which had come to him in the first instance directly from the plaintiff." Further, it is urged, the broker was not entitled to the money because it was disbursed to him before title to the property had been cleared to the satisfaction of the buyer under the escrow instructions. The record, however, discloses that the funds which were deposited in the escrow had been received by the broker as agent of the seller pursuant to the deposit receipt as an initial payment on the purchase price, and in such circumstances title thereto vested in the seller. See Norris v. San Mateo County Title Co., 37 Cal.2d 269, 273, 231 P.2d 493. Furthermore, the buyer "released" to the seller in the escrow instructions and authorized the payment of the commission upon receipt of a title report by the escrow agent showing title in the seller subject to "covenants, conditions, restrictions, easements, rights and rights of way of record." The party wall agreement which appellant contends should have been accepted by him before the title was considered satisfactory was a matter of record. Therefore the escrow agent did not violate its instructions in paying over the money to the broker Eaton.

However, a holding as to the correctness of the nonsuit as to the defendant broker is rendered unnecessary, for the reason that, under well-established rules as to the power of an appellate court when it is contended that the evidence is insufficient to support a finding, the judgment in favor of defendant vendor herein must be affirmed; and hence there remains no basis for recovery against the broker. In this connection, it should be noted that, with reference to the conduct and actions of the broker and his employee, appellant's attorney at the trial had this to say: "First of all, in justice to Mr. Barber's client, I felt that they did not, on their own books, make any misrepresentation. I spoke to Mr. Eaton before this suit was brought and I was satisfied that whatever he said and whatever Miss Stewart said they merely repeated statements made to them by their principal, and I don't want any misapprehension in the case. I don't feel that they acted in any wise other than as reputable persons, but there is that situation where one may innocently commit a fraud by passing on a representation made to them."

With respect to the basic issue of fraud, as developed by the evidence, the trial court found that a salesman of the broker represented that the property was earning an income of about $600 per month, "and thereafter and prior to the execution of said deposit receipt of August 8, 1951, the defendant Scharer represented to said plaintiff that the net profits of the bakery business operated by the defendant Scharer on his property during the years 1949 and 1950 were approximately $11,000 and $9,000, respectively, after deducting $300 monthly rental and $90 weekly salary for said owner; but in fact the production of said business, as thus stated, was incorrect and said sums so represented were in excess of the actual production of said business during said periods."

However, the trial court further found (and this is the finding of which appellant complains) "that at all times herein referred to the plaintiff herein was an experienced real estate investor, and that said plaintiff did not believe or rely upon any of said representations in entering into the agreement of purchase evidenced by the deposit receipt of August 8, 1951, nor was said plaintiff induced by any of said representations to enter into said agreement of purchase; nor did said representations as to the net annual business income, plus rental and salary (which indicated an aggregate amount of $19,527 for the year 1949, and $17,415 for the year 1950) furnish or supply any basis used or relied upon by plaintiff in determining the value of the Scharer real property which said plaintiff contracted to purchase for the sum of $34,000, and which said alleged earnings, if made, would have paid the full purchase price of said property in less than two years."

[2] Appellant contends that this finding is not supported by the evidence, for the reason that the trial court erred in applying an "objective" rather than a "subjective" test in determining whether there was reliance upon the representations. Appellant cites Hefferan v. Freebairn, 34 Cal. 2d 715, at page 719, 214 P.2d 386, at page 388, where the court said: "The standards by which the buyer's acts must be judged were set forth by this court in Seeger v. Odell, 18 Cal.2d 409, 115 P.2d 977, 980, 136 A.L.R. 1291, 'Negligence on the part of the plaintiff in failing to discover the falsity of a statement is no defense when the misrepresentation was intentional rather than negligent. * * * Nor is a plaintiff held to the standard of precaution or of minimum knowledge of a hypothetical, reasonable man. Exceptionally gullible or ignorant people have been permitted to recover from defendants who took advantage of them in circumstances where persons of normal intelligence would not have been misled. [Authorities cited.] "No rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool." * * *' * * *"

Appellant submits that the latter portion of the quoted finding, to the effect that the representations as to profit did not furnish a basis used or relied upon by plaintiff and that "such earnings, if made, would have paid the full purchase price of said property in less than two years", demonstrate that the court applied an "objective" test, and further that the test was unfair, in that the court overlooked the necessity for additional investment in supplies and other expenses, the personal services of an owner or manager, and the payment of taxes. It is urged that this court may reverse the finding when it is based upon an erroneous theory of the law applicable to the evidence.

It is not apparent from the finding, however, that the court applied an erroneous theory to the evidence or held the plaintiff "to the standard of precaution or of minimum knowledge of a hypothetical, reasonable man." To the contrary, it appears that the court's finding of non-reliance was based upon the qualifications, knowledge and experience of the plaintiff, an experienced real estate investor. As was further said, in Seeger v. Odell, quoted in Hefferan v. Freebairn, supra, 34 Cal.2d at page 719, 214 P.2d at page 389, "If the conduct of the plaintiff in the light of his own intelligence and information was manifestly unreasonable, however, he will be denied a recovery."

In a memorandum opinion the trial court said, in part:

> "In his opening statement plaintiff's attorney asserted reliance upon representations that the net profits of the business for 1949 and 1950 were approximately $11,000 and $9,000 after deducting $300 monthly rent and $90 weekly salary. * * *
>
> "Fifty-two weeks of salary at $90 makes $4,680 for the year; and the rent would be $3,600 as represented. Total is $8,280. When added to $11,247 the profit for one year appears to be $19,527. And for the other ($9,135 plus $8,280) the sum of $17,415. Plaintiff was buying for $34,000 and paying $19,000 into escrow, taking subject to a $15,000 trust deed. On this basis the place would yield the entire cash price, or substantially that, in one year. Plaintiff is an experienced real estate investor. The court finds, as stated at the trial, that plaintiff did not believe in or rely upon any such representation.

[3, 4] In the circumstances here presented, it cannot be held that the trier of fact acted arbitrarily in rejecting the testimony of the plaintiff on the subject of reliance. Hence, under well-settled rules, the finding on the subject may not be disturbed on appeal. Ortzman v. Van Der Waal, 114 Cal.App.2d 167, 170, 249 P.2d 846, 252 P.2d 7. It is equally well settled that the findings of the trial court are presumed to be supported by the evidence, and an appellant must shoulder the burden of showing the contrary. Appellant himself testified that he had not engaged in the bakery business, but had been a real estate investor, and that he was buying the real estate involved in this litigation as an investment.

[5] There is in the record testimony given by appellant himself that respondent Scharer told him at the very inception of the negotiations leading up to the sale that he, respondent Scharer, had been allocating $300 per month as rental for the real property. It is also undisputed in the record that prior to entering into the agreement for sale, respondent Scharer suggested to appellant that the former's foreman, who had been operating the business, might be interested in leasing the real property at a rental of $450 per month. Respondent Scharer also testified that when this leasing proposal was presented to his foreman the latter declined to lease the property at the suggested rental and this fact was reported to appellant. The record also shows that prior to attempting a rescission of his purchase appellant had negotiated a lease with one Bolkin for a term of five years at a rental of approximately $450 per month.

There is also testimony that prior to the making of the sales agreements appellant made inquiry as to the production of the bakery business then being conducted by respondent Scharer; that in response to appellant's request he was furnished with admittedly correct figures showing the gross sales of the business for the years 1949 and 1950, as well as the first six months of 1951. Respondent Scharer also produced for appellant's inspection the 1950 income tax return, which disclosed that, of the acquisition cost of the property, the sum of $27,500 had been allocated to buildings, and that these buildings had been depreciated for prior years to the extent of $2,300; and that during the year 1950 depreciation was claimed in the amount of $1,200.

The foregoing, and other testimony, warranted the court in concluding that appellant was not purchasing the property with a view to operating the business himself, but on the contrary, was in fact purchasing the property as an investment, and as appellant himself testified, with a view to leasing the property at a rental of approximately $450 per month.

Appellant's claim that the court should have made more ample findings or should have made findings upon other or additional matters, cannot be sustained. The court did make detailed findings of fact converting all the material issues presented by the evidence, and these findings clearly set forth the nature and character of the transactions involved. The court expressly found, upon substantial evidence, including, it may be said, appellant's own testimony, that he was a real estate operator and had never been engaged in the bakery business; that he was buying respondent Scharer's property as an investment; that appellant was experienced in real estate investments and did not believe nor rely upon the representations of respondent Scharer which appellant asserted furnished the basis of his claimed right to rescind his agreements of purchase. Rauer's Law & Collection Co. v. Bradbury, 3 Cal.App. 256, 260, 261, 84 P. 1007; Gantner & Mattern Co. v. Hawkins, 89 Cal.App.2d 783, 786, 201 P.2d 847.

[6] Equally without merit is the assignment entitled "Error to Fail to Declare Contract Subsisting", under which appellant urges that equity required that the sum in dispute be held for the benefit of plaintiff, subject to defendants' showing damage, or a declaration that the contract was in force and effect and should be carried out. The contract had been repudiated by the plaintiff some eight months before the trial, and his action was upon the theory of rescission. As pointed out by the trial court, plaintiff made no proof that defendant seller was not damaged to the extent of the fund in hand, and hence plaintiff was not entitled to recover any portion of it. See discussion in Baffa v. Johnson, 35 Cal.2d 36, 38, 39, 216 P.2d 13; also Norris v. San Mateo County Title Co., 37 Cal.2d 269, 270, 231 P.2d 493.

For the foregoing reasons, the order granting a nonsuit as to defendant Eaton and the judgment for the remaining defendants from which this appeal was taken are, and each is, affirmed.

DORAN and DRAPEAU, JJ., concur.

119 Cal.App.2d 748

POWELL v. CANNON et ux.

Civ. 19611.

District Court of Appeal, Second District,
Division 1, California.
Aug. 17, 1953.

Lessee's action for declaratory relief and injunction. The Superior Court, Los Angeles County, Arthur Coats, J., entered judgment for plaintiff, and landlords appealed. The District Court of Appeal, White, P. J., held that since landlords accepted rentals under original lease after due date without objection, entered into agreement extending lease provided all conditions of original lease were complied with, permitted lessee to defer payment of one month's rent for several months, and, after notifying lessee that forfeiture was claimed because of rental default, accepted payment of accrued rentals without reservations, landlords waived right to enforce forfeiture of lease until they had given notice to lessee of their intention in future to insist upon strict performance of covenant to pay rent at time specified in lease, and, in view of fact that lessee did not default after receipt of notice of forfeiture, which amounted merely to notice of intent to insist upon strict performance, lessee was entitled to extension of lease.

Affirmed.

1. Appeal and Error ⚿110

An appeal would not lie from order denying new trial.

2. Contracts ⚿318

Where time is made of essence of contract for payment of money, and covenant for prompt payment has been waived by acceptance of money after it became due, with knowledge of facts, such conduct creates such a temporary suspension of right of forfeiture as can only be restored by giving a definite and specific notice of intention to enforce it.

3. Landlord and Tenant ⚿112(2)

Where landlords accepted rentals under original lease after due date without objection, entered into agreement extending lease provided all conditions of original lease were complied with, permitted lessee to defer payment of one month's rent for several months, and, after notifying lessee that forfeiture was claimed because of rental default, accepted payment of accrued rentals without reservations, landlords waived right to enforce forfeiture of lease until they had given notice to lessee of their intention in future to insist upon strict performance of covenant to pay rent at times specified in lease, and, in view of fact that lessee did not default after receipt of notice of forfeiture, which amounted merely to notice of intent to insist upon strict performance, lessee was entitled to extension of lease.

◆

Roger J. Pryor, Compton, for appellants.

Bishop Moore, Los Angeles, for respondent.

WHITE, Presiding Justice.

[1] Plaintiff-respondent was the lessee under a lease and extension thereof in which defendants-appellants were lessors. The original lease was for a term of three years commencing August 5, 1949, and therefore expiring in August of 1952. On September 10, 1951, the parties entered into an extension agreement, reciting that "by mutual agreement of all parties concerned, the above mentioned lease is extended until August 4, 1956, provided all conditions of the original lease are met", and containing other provisions not material to the determination of this cause. On April 18, 1952, the lessors gave written notice that they had decided to "turn over" the property to a Mr. Warren. The notice further stated: "Due to the fact that you have defaulted on your lease, by nonpayment of rent, we hereby give you notice to make other arrangements on or before August 4, 1952, at which time we will turn the building over to Mr. Warren." Plaintiff thereupon brought an action for declaratory relief and injunction. After trial before the court without a jury it was adjudged "That the written extension of lease made by plaintiff and defendants dated September 10, 1951, at all times since the making and execution thereof has been and is now valid and in force and binding upon plaintiff and defendants and extended and does extend said original lease according to the terms of the said written extension of lease." Defendants appeal from the judgment. The attempted appeal from the denial of a new trial must be dismissed, as no appeal lies from such order.

The trial court found that the plaintiff had under the original lease usually made the rental payments due on the 5th of each month anywhere from ten days to two weeks later than the date specified in the lease but that the late payments were received by defendants without objection until the giving of the notice on April 18, 1952. When the notice was given, plaintiff was in default for the months of January and April, 1952. After receipt of the notice on April 19, 1952, plaintiff, on the following Monday, April 21, paid to defendants the overdue rentals, which were received by defendants without objection or reservation. The trial court further found "That the delay in payment of the said rent was consented to by defendants and plaintiff was not in default at any time in payment of rent or under any of the terms of the said lease."

The findings of the trial court are amply supported by the evidence, and no contention to the contrary is made in appellants' brief. Appellants concede that there was a waiver of the right to declare a forfeiture of the original lease for breach of the covenant to pay rent. Appellants urge, however, that "the real issue in this case is whether performance of the covenant to pay rent was a condition precedent to renewal of the lease. The court made no finding on this material issue, and as a matter of law the defendants contend that they had such a right. There was no waiver of the right to refuse renewal of the lease, for breach of covenant to pay rent, contained in the separate agreement of September 10, 1951."

Appellants refer to authorities which stand for the proposition that the right to declare a forfeiture of a lease and the right to refuse renewal thereof are separate and distinct rights; that, as said in 51 C.J.S., Landlord and Tenant, § 62, page 608, "Performance of the other covenants of the lease on the part of the lessees may be expressly made a condition to their right to enforce a covenant for renewal against the lessor, and in such case a performance which may serve to prevent a forfeiture of the lease is not the measure of performance required by a provision which makes faithful and legal performance the condition of an extension of a lease." The rule invoked by appellants has no application to the circumstances presented in the instant case. It is not questioned but that the lessors acquiesced in the payment of rent from one to two weeks late during the term of the original lease. When the extension agreement was entered into on September 10, 1951, the lessee was five days in arrears on the rent due September 5, 1951; thereafter the lessors accepted rent payments which were usually about ten days late until they gave notice on April 18, 1952. The lessors did not refuse a renewal upon the ground of nonperformance by the lessee, but on the contrary executed a contract of renewal and continued to accept late payments until April, 1952.

The record contains testimony, evidently believed by the trial court, that the defendant lessor Mr. Cannon, when asked by the lessee in January, 1952, if he "could skip a month and pick it up later," stated, "We had always paid our rent, and that he was not worried at all, and he thought that would be all right." Upon receipt of the notice of April 18, 1952, the lessee promptly cured any default by the payment of the rent for January and April. Although defendant lessor Mr. Cannon denied making the statement above quoted, he admitted that he had "allowed" late payments of rent "on many occasions", and "in fact after the first year he was in there he kept getting farther behind all the time."

[2] The lease in question did not provide that time was of the essence, but assuming that it was, nevertheless, appellants could not, in the circumstances presented, declare a forfeiture or termination without giving the lessee an opportunity to cure the default in payment of rent. "Where time is made of the essence of the contract for the payment of money and this covenant has been waived by the acceptance of money after the same is due, with knowledge of the facts, such conduct will be regarded as creating such a temporary suspension of the right of forfeiture as could only be restored by giving a definite and specific notice of intention to enforce it." Chin Ott Wong v. Title Insurance & Trust Co., 89 Cal.App.2d 183, 188, 200 P.2d 541, and cases cited.

[3] Appellants, in relying upon the distinction between the right to declare a forfeiture and the right to refuse a renewal, lose sight of the fact that they, as lessors, did not refuse a renewal, but entered into an agreement for renewal a year before the expiration of the term of the original lease, and at a time when the lessee was five days in arrears in the rent, and that thereafter they continued to accept without objection the late payments of rent, and further, permitted the lessee to defer the payment of the January, 1952, rent until the lessors gave notice in April of 1952. It is to be understood that the lessors are not being penalized for accepting payments of rent which were justly due them. But by their conduct they waived their right to enforce a forfeiture of the lease until they had given notice to the lessee of their intention in the future to insist upon strict performance. Assuming the sufficiency of

the ambiguous notice of April 18, 1952, the most it could accomplish would be to place the lessee upon notice that henceforward he would be held to strict performance of his covenant to pay rent at the times specified in the lease, under penalty of termination of the lease. See Chin Ott Wong v. Title Insurance & Trust Co., supra, 89 Cal. App.2d at page 188, 200 P.2d at page 544, and cases cited, particularly Boone v. Templeman, 158 Cal. 290, 297, 110 P. 947, 139 Am.St.Rep. 126; and American-Hawaiian Engineering & Construction Co. v. Butler, 165 Cal. 497, 519, 133 P. 280, Ann.Cas. 1916C, 44. In response to the notice, the lessee paid the overdue rent, which was accepted, thereby curing the existing default, and thereafter there was no default in the payment of rent.

The judgment is affirmed. The attempted appeal from the order denying a new trial is dismissed.

DORAN, J., and ROBT. H. SCOTT, J. pro tem., concur.

---

119 Cal.App.2d 738

MASONI et al. v. BOARD OF TRADE OF SAN FRANCISCO et al.

Civ. 15466.

District Court of Appeal, First District, Division 2, California.

Aug. 17, 1953.

Rehearing Denied Sept. 16, 1953.

Hearing Denied Oct. 15, 1953.

Action by partnership against Board of Trade and others for damages for unjustifiable interference with business relations. The Superior Court, City and County of San Francisco, Preston Devine, J., sustained general demurrer to complaint, and upon plaintiffs' refusal to amend, entered judgment for defendants, from which plaintiffs appealed. The District Court of Appeal, Nourse, P. J., held that where plaintiffs were not unable to pay their debts for reason that one of the partners had ample means to pay in full, conduct of defendants in truthfully informing creditors of plaintiffs' ability to pay and by offering and rendering their services as to collection of creditors' claims by legal means, did not constitute unjustifiable interference with plaintiffs' business relations, and lack of license to conduct collection activities did not render such conduct actionable as unjustifiable interference.

Judgment affirmed.

1. Torts 🔑12

Intentional and unjustifiable interference with contractual relatons is actionable, and such interference is not limited to inducing breach of an existing contract or other wrongful conduct but also comprises unjustifiably inducing a third person not to enter into or continue a business relation with another.

2. Torts 🔑12

Whether an intentional interference by a third party is unjustifiable and actionable depends on balancing of the importance, social and private, of objective advanced by the interference against the importance of the interest interfered with, considering all circumstances, among which the methods and means used and the relation of the parties are important.

3. Torts 🔑10(3)

Right of a debtor insolvent or unable to pay his debts as they mature to try to save his business by means of settlement with creditors is recognized as not only of private but also of social importance, and a third party who, without any special relation to the creditors, with no better objective than ill will, and by unfair means, induces creditors to stand on their legal rights and to destroy debtor's business may be liable for interference.

4. Torts 🔑10(3)

Where partnership debtor was not unable to pay its debts for reason that one of partners had ample means to pay in full, conduct of Board of Trade of San Francisco, and some of its officers, employees, and attorneys, in truthfully informing creditors of debtor's ability to pay and in offering and rendering their services as to collection of creditors' claims by legal means, did not constitute unjustifiable interference with debtor's business relations, and lack of license to conduct collection activities did not render such conduct actionable as unjustifiable interference. Business and Professions Code, §§ 6850 et seq., 6854(a), 6870, 6871; Corporations Code, § 15015.

◆

Courtney L. Moore, San Francisco, for appellants.

James M. Conners, Norman A. Eisner, Haskell Titchell, San Francisco, for respondents.

NOURSE, Presiding Justice.

This is an action for damages for unjustifiable interference with business relations. After a general demurrer to the complaint had been sustained plaintiffs refused to amend. They appeal from the adverse judgment entered accordingly.

The complaint alleges in substance: Plaintiffs are partners in a bar and restaurant business. About October 1, 1951, their partnership was in financial difficulties, owing approximately $17,000 to sixty-five creditors for supplies and merchandise needed for its business, and plaintiffs were trying to obtain from said creditors settlements for less than full payment or extension of time. However, Masoni, one of the partners, had ample individual means with which to pay the claims in full.

Defendants are the Board of Trade of San Francisco, hereinafter called the Board, and some of its officers, employees and attorneys. The Board has for many years engaged in the following conduct: When the Board became aware that somebody was indebted to various creditors it invited said creditors to meet with the Board at its offices and caused those that came to elect a creditors' committee, and said creditors' committee to adopt a resolution authorizing the Board to solicit from all creditors assignments of their claims to an agent of the Board, granting said assignee the right to bring action for collection of said claims, for which collection a fee was charged to the creditors.

Defendants conspired to follow the described line of conduct as to plaintiffs and their creditors and to prevent plaintiffs from settling with any of said creditors for a lesser amount than that owed or to obtain extension of time for payment. In carrying on such conspiracy the Board obtained assignments of six creditors' claims, two to defendant Drinnen, four to defendant Ryan; these assignees filed actions in the superior court through defendants Conners and Doran as their attorneys, and through them attached the bank account of plaintiff Masoni and placed a keeper in the place of business of the partnership. In a conference between plaintiffs and the defendants Hempy and Conners as to the settlement of claims defendant Hempy informed plaintiffs that the Board would not permit Masoni to deal with individual creditors directly for the purpose of settlement, but demanded payment of all claims in full plus 8% for collection fees of the Board. The Board informed plaintiffs' creditors in a circular letter that the creditors' committee had rejected a compromise because the assets of the partnership and of Masoni individually were sufficient to warrant full payment and asked creditors who wished to support the committee to execute assignments. When thereafter Masoni visited creditors to discuss a compromise they refused discussion because they had assigned their claims in response to the above circular letter. Claims of thirty-eight creditors were so assigned, a part to each of the defendants Frey, McPherson and Meyer. These assignees also filed actions through the defendants Conners and Doran, one in the superior court and two in the municipal court, and had attachments issued and a keeper placed in the plaintiffs' place of business with instructions to impound all its receipts. Defendants further threatened plaintiffs that if they did not pay, defendants would instruct the sheriff to remove plaintiffs' stock in trade and inventory to the sheriff's warehouse. Compelled by these measures and threats plaintiffs paid some of the claims sued for with costs and sheriff's fees and deposited a cash undertaking as to the others.

The conduct of defendants was illegal because none of them except the attorneys

Conners and Doran was qualified under Division 3, Chapter 8 of the Business and Professions Code to conduct the alleged collection activities, not having applied for or obtained a license as required by section 6870 of said code except for persons like attorneys at law exempted by section 6854, sub. (a), whereas section 6871 makes punishable as a misdemeanor the carrying on of such collection activities without a required license, and said conduct constituted illegal interference with the business relationship existing between the plaintiffs and their creditors and with plaintiffs' right to negotiate new contracts of compromise. Without said interference plaintiffs would have been able to reach compromises with some creditors for less than full payment. Moreover the levying was excessive. As actual damages plaintiffs claim amounts for reduction of claims not obtained, costs illegally caused and curtailment of sales by the presence of a keeper. In a separate count exemplary damages are claimed because of the malicious and oppressive character of the acts complained of.

The trial court in a letter to counsel of both sides, made part of the record, explained that it had sustained the demurrer with leave to amend because it was quite possible that plaintiffs could state a cause of action for wrongful attachment. However in their opening brief appellants expressly state that no such action was intended or presently possible and that the gist of the action instituted was actionable interference by strangers with the business relationship of plaintiffs and their creditors motivated by a desire of gain (collection fees) and unlawful because prohibited and punishable under the code. We shall therefore in accordance with the position of appellants consider the complaint as if the measures taken for the collection of the amounts for which action was brought would not have been illegal if taken by the original creditors themselves but the alleged illegal character of the conduct of defendants was solely based on their interference as strangers, considering also their lack of licenses and their motive.

[1] "Intentional and unjustifiable interference with contractual relations is actionable in California * * *." Speegle v. Board of Fire Underwriters, 29 Cal.2d 34, 39, 172 P.2d 867, 870. Actionable interference of this kind is not limited to inducing breach of an existing contract or other wrongful conduct but comprises also unjustifiably inducing a third person not to enter into or continue a business relation with another. Restatement, Torts, § 766 (a) and (b). We quoted this section of the Restatement in full in Remillard-Dandini Co. v. Dandini, 46 Cal.App.2d 678, 680, 116 P.2d 641, in which case we held that a cause of action was stated in a complaint which alleged that defendant for the purpose of destroying plaintiff's business not only induced creditors of plaintiff to breach their contracts with plaintiff but also caused them to demand immediate payment of plaintiff's accounts and to refuse to sell further to plaintiff on credit, so that plaintiff had to pay cash. In Romano v. Wilbur Ellis & Co., 82 Cal.App.2d 670, 673, 186 P.2d 1012, we held, following Speegle v. Board of Fire Underwriters, supra, that unjustifiable interference with contracts terminable at will is actionable, even though the termination itself is rightful. Sweeley v. Gordon, 47 Cal.App.2d 385, 118 P.2d 16, 842 and Colburn v. Sessin, 94 Cal.App.2d 4, 209 P.2d 989, cited by the trial court and respondent for the proposition that urging another to stand on his legal rights is not actionable, may well be correctly decided under the facts of these cases, which both relate to the right to invoke the statute of frauds, but it may not be inferred from them that inducing another to stand on his legal rights cannot be actionable interference under any circumstances. Gruen Watch Co. v. Artists Alliance, Inc., D.C., 89 F.Supp. 564, also cited in this relation, and containing the statement that inducement of breach of contract is essential for interference liability under California law, was reversed, 9 Cir., 191 F.2d 700. Even the right of the obligee himself is mostly qualified and may not always be exercised by all means and for all purposes. See American Bank &

Trust Co. v. Federal Reserve Bank, 256 U.S. 350, 358, 41 S.Ct. 499, 65 L.Ed. 983. The right of a stranger to interfere is still more clearly qualified.

[2, 3] Whether an intentional interference by a third party is unjustifiable and actionable depends on a balancing of the importance, social and private, of the objective advanced by the interference against the importance of the interest interfered with, considering all circumstances, among which the methods and means used and the relation of the parties are important. Restatement, Torts, § 767 and comments; compare Imperial Ice Co. v. Rossier, 18 Cal.2d 33, 35, 36, 112 P.2d 631. The right of a debtor insolvent or unable to pay his debts as they mature to try to save his business by means of a settlement with his creditors is recognized as not only of private but also of social importance. Compare the wide opportunity for arrangement offered in the Bankruptcy Act, 11 U.S.C.A. § 1 et seq. A third party, who without any special relation to the creditors, with no better objective than ill will, and by unfair means induces the creditors to stand on their legal rights and to destroy the debtor's business may well be liable for his interference under the above rule.

[4] However the facts here alleged are completely different. The debtor is not unable to pay, but one of the partners, fully liable for the debts of the partnership, § 15015, Corporations Code, is alleged to have ample means to pay in full. Payment or undertaking to pay in full is alleged without any allegation of destruction of the business as a result. The Board of Trade of San Francisco is apparently an association of merchants, manufacturers, et cetera, who promote cooperation of members of their class with respect to insolvent or non-paying debtors, an, in itself, legitimate purpose for such an organization. Compare Speegle v. Board of Fire Underwriters, supra, 29 Cal.2d at page 40, 172 P.2d at pages 870, 871. The means here alleged to have been used to oppose plaintiffs' attempt to avoid full payment of their debts, to wit, by truthfully informing the creditors of plaintiffs' ability to pay and by offering and rendering their services as to the collection of the claims by legal means are not unfair, if for the moment we exclude the question of the lack of license. The motive of gain injected by appellant in this subject is in itself not objectionable. Legal and medical advice are considered of high social usefulness although professional fees are charged. There is no allegation of any abuse in relation to charges. If the defendants had been qualified to act as a collection agency, there would have been no basis for considering their conduct as unjustifiable interference and the complaint would not have stated a cause of action.

The question remains whether the addition of the allegation that defendants, except the two attorneys, were not so qualified because of their lack of licensing is sufficient to perfect the statement of a cause of action for unjustifiable interference. No case from any jurisdiction has been cited by appellants or found by us in which it was held that an interference with contractual relations otherwise unobjectionable becomes actionable in damages solely because the actor had not obtained a license as required for the acts that constituted the interference. The absence of any authority to that effect is understandable. When the interference is otherwise wholly unobjectionable no indemnification is required to do justice to the person interfered with. Thus in the case before us any recovery by the recalcitrant debtors would be felt as undeserved. Even if the assignments were not legally valid, plaintiffs were not damaged thereby, because defendants received payment actually as the agents for the original creditors, who at any rate were satisfied. The imposition of liability on defendants could at most be justified as a further deterrent from infringement of the licensing requirement, an argument used to defend the unenforceability of the contracts of certain unlicensed persons. In the latter cases the unwillingness of the courts to lend their aid to the enforcement of forbidden contracts had to overcome their aversion to forfeitures. Here we are not asked to enforce illegal contracts but actively to impose as a sanction of the licensing regulation a liability which must result in an otherwise unjustified enrichment. Where there is neither statutory nor case authority which requires us to do so we shall not initiate a policy which we consider inequitable and undesirable.

Judgment affirmed.

DOOLING, J., concurs.

Hearing denied; CARTER and SPENCE, JJ., dissenting.

---

119 Cal.App.2d 737

VERDIER v. VERDIER et al.

Civ. 15713.

District Court of Appeal, First District,
Division 1, California.
Aug. 17, 1953

Proceeding upon motion to dismiss appeal on ground that notice of appeal was filed one day too late. The Superior Court, City and County of San Francisco, entered judgment against appellant, and appellant appealed. The District Court of Appeal, Bray, J., held that where judgment appealed from was entered October 17, 1952, and notice of appeal was filed December 16, 1952, notice of appeal was timely filed.

Motion to dismiss appeal denied.

Appeal and Error 🔑428(2)

Where judgment appealed from was entered October 17, 1952, and notice of appeal was filed December 16, 1952, notice of appeal was timely filed.

Heller, Ehrman, White & McAuliffe, F. Whitney Tenney, San Francisco, John D. Martin, Oakland, for appellant.

Morgan J. Doyle and Paul C. Dana, San Francisco, for respondent.

BRAY, Justice.

On this motion to dismiss the appeal on the ground that the notice of appeal was filed one day too late, we heretofore directed the superior court to determine the true date of entry of the judgment appealed from. See Verdier v. Verdier, 118 Cal.App.2d 279, 257 P.2d 723. Pursuant to such direction Hon. Herbert C. Kaufman, Judge of the San Francisco Superior Court, from and after a hearing held on July 22, 1953, found and determined that the true date of entry of judgment was October 17, 1952, instead of October 16th as theretofore certified, and made and filed an "Order Correcting Record of Entry of Judgment" showing October 17th as the true date. A certified copy of said order, together with a certificate of the clerk of said superior court certifying October 17th as the true date of entry, has been filed in this court. It appears therefrom that the notice of appeal was timely filed. Also a consent to the denial of respondent's motion to dismiss the appeal has been filed herein by respondent.

Respondent's motion to dismiss the appeal is hereby denied.

PETERS, P. J., and FRED B. WOOD, J., concur.

---

119 Cal.App.2d 805

STELLMAN v. STELLMAN.

Civ. 19620.

District Court of Appeal, Second District,
Division 1, California.
Aug. 21, 1953.

Action by wife for annulment of her marriage to defendant. The Superior Court, Los Angeles County, entered judgment denying annulment, and plaintiff appealed. The District Court of Appeal, White, P. J., held that evidence introduced on appeal, in form of divorce decree dissolving defendant's former marriage, which decree was granted subsequent to trial of annulment action and, consequently, was unavailable at time of such trial, conclusively established that at time of

purported marriage between plaintiff and defendant, defendant's prior marriage had not been dissolved or annulled, and was in full force and effect.

Judgment reversed and cause remanded with directions.

Divorce ⚷172

In wife's action for annulment, evidence introduced on appeal, in form of divorce decree dissolving defendant's former marriage, which decree was granted subsequent to trial of annulment action and, consequently was unavailable at time of such trial, conclusively established that at time of purported marriage between plaintiff and defendant, defendant's prior marriage had not been dissolved or annulled, and was in full force and effect. Rules on Appeal, rule 23(b); Code Civ.Proc. rule 956(a).

◆

Howard A. Levine, Los Angeles, for appellant.

No appearance for respondent.

WHITE, Presiding Justice.

This is an appeal by plaintiff from a judgment denying her an annulment of her marriage to defendant.

In the first cause of action of her complaint plaintiff alleged that she and defendant participated in a ceremony of marriage at Los Angeles, California, on September 10, 1949; that at the time of the said purported marriage defendant was the lawfully wedded husband of one Genevieve Reinhart, that said marriage between defendant and Genevieve Reinhart had not been dissolved or annulled, and was in full force and effect.

Defendant filed a general appearance, admitted service of the summons and complaint upon him, waived whatever rights he might have or thereafter acquire under the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C.A.Appendix, § 501 et seq., waived time to answer, notice of trial, and consented that the action might be heard as a default matter. Following entry of defendant's default, the cause proceeded to trial. Plaintiff testified that she participated in a marriage ceremony with defendant as aforesaid; that at the time of the purported marriage defendant gave his name on the marriage certificate as "Earl W. Edelman", and that she did not know him by any other name at that time; that subsequently thereto, in August, 1950, she learned that defendant's true name was Earl Stellman, instead of Earl W. Edelman, which fact was admitted to her by defendant, who stated to her that the reason for the change was that the Army "was looking for him".

Plaintiff further testified that in May, 1951, defendant was "picked up" by the Army for desertion, and subsequently tried and found guilty.

In April or May, 1952, plaintiff and defendant met in Los Angeles, at which time defendant stated to plaintiff that he wanted her to get an annulment, because, as he stated, he "wasn't divorced from his first wife, that he didn't want the Army to know, because if the Army knew, they would charge him with bigamy"; that he was married to a woman by the name of "Genevieve", and that he had never been divorced from her.

Plaintiff offered in evidence the marriage license of Earl Stellman and Genevieve Reinhart on May 30, 1941, at New London, Missouri.

Plaintiff further testified that on May 26, 1952, an official of the Criminal Investigation Department of the United States Army visited her at her work and informed her that her husband was married to three different women and never received a divorce, and that the Army was going to prosecute Mr. Stellman for bigamy.

Further proceedings consisted of the admission into evidence of a certified copy of a Certificate of Marriage of Ormsby County, Nevada, showing a marriage of the defendant, Earl A. Stellman and Nadine Frances Garrett on July 11, 1951, at Carson City, Nevada.

Plaintiff then offered into evidence defendant's notarized admission of undissolved prior marriage, dated September 5, 1952, which reads:

"To Whom It May Concern:

> "At the time I contracted the marriage to Mildred Schiffner, I was of the opinion I had been divorced from Genevieve Stellman. Later, I found out that she did not take any legal action against me and to this date, I am still legally married to Genevieve Stellman.
>
> "(Signed) Earl A. Stellman."

Upon conclusion of the trial, the court found that the allegations of plaintiff's first cause of action, that at the time of the purported marriage of plaintiff to defendant, the latter was the husband of Genevieve Reinhart; that said marriage had not been dissolved or annulled and was in full force and effect, were not true. Judgment was accordingly entered denying plaintiff an annulment of her marriage to defendant.

After the record on appeal was lodged in this court, appellant, pursuant to the provisions of Rule 23(b), Rules on Appeal, filed an application for leave to produce additional evidence in the form of a certified copy of the decree of divorce entered in that certain action in the Circuit Court of Cook County, Illinois, in Chancery, entitled "Genevieve Stellman v. Earl A. Stellman", and which decree was entered December 19, 1952.

Appellant's application to take additional evidence was granted. The aforesaid document was admitted in evidence and added to the record on appeal. This evidence was not available at the trial of the action with which we are here concerned because at that time the aforesaid decree of divorce of the Illinois court had not been secured.

We deem it unnecessary to discuss the sufficiency of the evidence adduced at the trial of the case at bar nor the inferences reasonably deducible therefrom because it is manifest that the foregoing additional evidence produced in this court indicates conclusively that at the time of the purported marriage between plaintiff Mildred Stellman and defendant Earl A. Stellman on September 10, 1949, said defendant was then the husband of Genevieve Reinhart, whom he married on May 30, 1941, and that said marriage was not dissolved until December 19, 1952.

To the end that this cause may be finally disposed of by this appeal without a new trial, and in the interests of justice, pursuant to the provisions of Section 956(a) of the Code of Civil Procedure, this court makes the following findings (Finding II being contrary to that made by the trial court):

I.

That it is true that plaintiff and defendant, as contracting parties participated in a ceremony of marriage at Los Angeles, California, on September 10, 1949, and ever since have been known as husband and wife; that there has been no other ceremony of marriage by or between them.

II.

That it is true that at the time of the said purported marriage, defendant was the husband of Genevieve Reinhart, also known as Genevieve Stellman, and that it is true that the marriage of said defendant and said Genevieve Reinhart had not been dissolved or annulled, and was in full force and effect.

The judgment is reversed and the cause remanded with directions to the court below to enter judgment annulling the marriage of plaintiff and defendant.

DORAN, J., and ROBT. H. SCOTT, J. pro tem., concur.

120 Cal.App.2d 45

PEOPLE v. GALWAY.

Cr. 785.

District Court of Appeal, Fourth District, California.

Aug. 27, 1953.

Defendant and another were charged with conspiracy to commit a crime by advertising that a drug would have effect in treatment of cancer and with conspiracy to do act injurious to the public health by delivery of such a drug. The Superior Court of San Diego County, William A. Glen, J., found defendant guilty on both counts and defendant appealed. District Court of Appeal, Barnard, P. J., held that evidence was sufficient to sustain verdict on both counts.

Affirmed.

1. **Druggists** ⚷2

Statute prohibiting advertisement of drug represented to have any effect in the treatment of cancer was broad enough to cover oral representations, in view of statutory provision defining advertisement as representations disseminated in any manner or by any means for the purpose of inducing the purchase of drugs. Health and Safety Code, §§ 26209, 26286.5, 26295.

2. **Conspiracy** ⚷47

Evidence was sufficient to sustain conviction for conspiracy. Health and Safety Code, §§ 26209, 26286.5, 26295; Pen.Code, § 182, subd. 5.

3. **Constitutional Law** ⚷90, 278(4)

Druggists ⚷2

Statutory provisions prohibiting the advertisement of a cure for cancer, provided the merit of the cure is not established, does not deny freedom of speech nor due process of law. Health and Safety Code, §§ 26286.5, 26273.

◆

Henry W. Hache, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant and a Mrs. Osburn were charged with conspiracy to commit a crime by advertising that a drug would have an effect in the treatment of cancer, in violation of sections 26286.5 and 26295 of the Health and Safety Code. In a second count they were charged with conspiring to commit a crime by conspiring to do an act injurious to the public health, in violation of section 182, subd. 5 of the Penal Code, by delivering to Sena Cassidy and George Reinke a drug for the cure of cancer and inducing said persons to apply such drugs externally, such acts being injurious to the public health, to wit, the health of those persons and others. A jury found both defendants guilty on both counts, and the defendant Galway has appealed from an order denying his motion for a new trial.

Mr. Reinke was a roomer at the home of Mrs. Cassidy. They first saw Mrs. Osburn at the funeral of Mr. Reinke's son. The next day, Mrs. Osburn called at their home ostensibly to console Mr. Reinke on the death of his son. In a conversation, mostly about cancer, she told them that she had nursed cancer, told a number of stories concerning cancer, and told them about a man who was curing cancer with a salve. Mrs. Cassidy told her about a bump on her arm that was beginning to bother her. Mrs. Osburn told Mrs. Cassidy she knew she had cancer the moment she looked at her. Mrs. Osburn looked at the bump and told Mrs. Cassidy that this man could cure a cancer, and induced Mrs. Cassidy to embark on the treatment. A day or two later, Mrs. Osburn brought the appellant, whom neither Mrs. Cassidy nor Mr. Reinke had previously seen, to their home and the treatment was begun shortly thereafter. Both the appellant and Mrs. Osburn told Mrs. Cassidy that she must have cancer because all lumps were cancer, and that the salve was the treatment for it. The appellant applied the salve to Mrs. Cassidy's arm "to draw out the cancer." The appellant noticed a brown spot on Mr. Reinke's right ear, which Mr. Reinke had not mentioned, and told him that it was a skin cancer and that he could take it off in ten days' time. Mr. Reinke told him that a doctor had looked at it and said it amounted to nothing. Since the salve treatment did not involve cutting Mr. Reinke agreed to it, and Mrs. Osburn assisted the appellant in applying the salve to Mr. Reinke's ear.

The appellant told these parties that they could pay whatever they could afford whenever they were able, and they paid the appellant and Mrs. Osburn several payments amounting to $30. The appellant and Mrs. Osburn continued to apply the salve to both of these parties over a period of several weeks. Mrs. Cassidy testified that after the treatment commenced the pain was so terrific she was unable to sleep at night. The fourth day she was "sick all over" and was unable to get up. There was an eruption on her arm and considerable suppuration. When told about the pain the appellant and Mrs. Osburn told Mrs. Cassidy that "when the cancer is out it will quit hurting"; that the suppuration was "the cancer coming out"; and that if she stopped using the salve she would have cancer elsewhere. The appellant told them that the salve was very expensive and indicated that it came from a foreign region but would not reveal its formula. Three weeks later, some small red spots appeared on Mrs. Cassidy's leg. The appellant told her there must be poison there and to put some salve on it, and keep putting it on. The more she applied the salve the worse the infection became. Mrs. Cassidy finally stopped using the salve and as the lump still remained on her arm she went to a hospital where she was told that she did not have cancer. When she returned the appellant wanted her to use another salve, but she refused. Appellant then asked her if she had any of the salve left. Instead of giving him the remainder of the salve, she and Mr. Reinke turned over the jars of salve they had been using to an inspector for the State Board of Health.

Mr. Reinke also had trouble sleeping after the treatment began and in about 24 hours after the first application his ear began burning so severely he could scarcely stand it. A bad odor emanated and wherever the salve was applied there was suppuration. In about five weeks a sizeable portion of his ear dropped off. The appellant then told him he was full of cancer and it was a good thing appellant saw him. At the time of the trial Mr. Reinke was still having trouble with his ear.

Two neighbors testified as to suffering and bad appearance they observed with respect to both patients while the treatments were still in progress. Several expert witnesses testified as to what drugs were found in the salve thus used on these persons, and as to the effects such drugs would have. Briefly summarized, it appears from this testimony that these salves contained three drugs which were either poisonous or a blistering agent and which would cause violent irritation with destruction of the tissues; that used in combination, as they were in these salves, these drugs would not only destroy tissue but break down the structure of cells and liquefy them; that they would destroy all live cells, making no differentiation between healthy and unhealthy cells; that used over a period of three months there would be considerable destruction of the tissues; and that they would destroy all living cells "with the possible exception of bone."

When apprehended, the appellant told a food and drug inspector that he had been warned about using this salve by a state officer two years before and had discontinued all cancer salve activity; that he had manufactured none during the past two years; that Mrs. Osburn had worked with him and helped him several times when he had treated patients; and that he had not furnished the salve to these individuals but someone gave it to them. He later said that Mr. Reinke and Mrs. Cassidy wanted some of the salve for their cancers and he gave it to them; that in treating internal cancer he applied the salve to the outer surface of the body and the salve would draw the cancer out; that he had cured many cancers in San Diego County; and that he had ceased all cancer activity following two warnings that it was illegal.

Mrs. Osburn testified that she had known the appellant for 20 months, and that the first time she met him she went with him to observe one of these cancer cases; that when complaint was made of Mrs. Cassidy's arm and Mr. Reinke's ear there was a discussion of cancer and she told them that she knew a man who had a salve that might be able to help them; that she understood from appellant that the salve was supposed to "draw the roots of the cancer to the surface"; that Mrs. Cassidy once gave her some money to give to the appellant; and that on two occasions she herself applied the salve to Mr. Reinke. The appellant testified that he never asked Mrs. Osburn to go out with him and treat anybody for cancer; that she went because she wanted to; that he diagnosed cancer by what the patient told him; that he had no formal education along the line of medicine; that it is a simple thing to cure cancer; and that "I can teach any 15-year old kid so that they can take off cancer."

The appellant first contends that the evidence is not sufficient to warrant a conviction on either count. It is contended that there is no evidence of any agreement or understanding between the appellant and Mrs. Osburn which contemplated advertising the drug in question or that they contemplated injury to Mrs. Cassidy or Mr. Reinke, or the public; and that on the other hand, the evidence shows that the defendants really believed they could help Mrs. Cassidy and Mr. Reinke after they were asked to do so. It is further argued in this connection that the term "advertising", as used in section 26286.5 of the Health and Safety Code, means only some form of written or printed advertisement, and that there was no evidence that these persons were injured or suffered harm in any way.

[1, 2] Section 26286.5 of the Health and Safety Code prohibits the advertisement of a drug or device represented to have any effect in the treatment of cancer; section 26295 makes a violation of any provision of that chapter a misdemeanor; and section 26209 defines "advertisement" as meaning, among other things, all representations "disseminated in any manner or by any means, for the purpose of inducing * * the purchase of drugs * * *." The statute is broad enough to cover oral representations, which were conclusively shown to have been made here. The evidence, with the reasonable inferences which may be drawn therefrom, was sufficient to show that the appellant and Mrs. Osburn were working together under some form of agreement or understanding for the purpose of representing that this salve would cure cancer, and of inducing people to undergo treatment at the appellant's hands for that purpose. There was ample evidence of injury to these parties resulting from the acts of the appellant and Mrs. Osburn working together.

A further contention, that the information failed to state a cause of action because the advertising referred to in the statute means only something that is printed or written, which affects only the first count, requires no further consideration.

[3] It is next contended that section 26286.5 of the Health and Safety Code is unconstitutional because it abridges free speech, and denies due process of law in that it prevents a defendant from establishing the truth of his claim with respect to the drugs being advertised. This contention is without merit. Section 26273 of that code removes the prohibition against advertising whenever the value of the drug in question is established in the manner provided by law. The appellant had an opportunity to establish the merit of his product and all the requirements of due process were met.

Appellant's final contention is that the court erred "in giving instructions on conspiracy, by lengthy and repetitious and contradictory instructions which were not segregated as to various phases of conspiracy, which had no place in this trial." While the instructions on conspiracy are lengthy, it is not pointed out in what respects they were repetitious or contradictory. We find nothing contradictory in them and no more repetition that was reasonably necessary to fully explain the law in this regard. Neither error nor prejudice appears in this connection.

The order denying appellant's motion for a new trial is affirmed.

MUSSELL, J., concurs.

119 Cal.App.2d 665

MORTON et al. v. SUPERIOR COURT IN AND FOR SAN MATEO COUNTY.

No. 15927.

District Court of Appeal, First District, Division 1, California.

Aug. 13, 1953.

Petition for an alternative writ of prohibition to prevent the Superior Court in and for the county of San Mateo from dissolving, modifying or changing its order staying operation of an administrative order in a proceeding for a writ of mandate. The District Court of Appeal held that the Superior Court has full power under statute to dissolve, modify or change such order so long as the mandamus proceeding is pending, if the public interest so requires.

Petition denied.

Mandamus 🔑171

Under code section authorizing court in which mandamus proceeding to inquire into validity of final administrative order is instituted to stay operation of such order, but providing that no such stay shall be imposed or continued, if court is satisfied that it is against public interest, Superior Court has full power, if required by public interest, to dissolve, modify or change stay order granted by it so long as mandamus proceeding is pending therein, so as to preclude issuance of alternative writ of prohibition to prevent such action by Superior Court. Code Civ.Proc. § 1094.5.

Alfred J. Harwood, San Francisco, for petitioner.

Louis B. Dematteis, Dist. Atty. of San Mateo County, James M. Parmelee, Deputy Dist. Atty., Redwood City, for respondent.

PER CURIAM.

The petition for an alternative writ of prohibition is denied because it is our opinion that under section 1094.5(f) of the Code of Civil Procedure the Superior Court has full power, if the public interest requires, to dissolve, modify or change a stay order once granted as long as the proceeding for mandate is still pending in that court. This conclusion is predicated upon the general intent of the section, and is suggested if not compelled by the language that the court in which the mandamus proceeding is pending has power to stay the operation of the administrative order "provided that no such stay shall be imposed or *continued* if the court is satisfied that it is against the public interest."

---

119 Cal.App.2d 712

MOFFETT v. MILLER et al.

Civ. 4591.

District Court of Appeal Fourth District, California.

Aug. 14, 1953.

Action against guarantors of payment of a note payable to plaintiff. The Superior Court of San Diego County, Charles C. Haines, Judge assigned, entered judgment of dismissal at close of plaintiff's evidence, and plaintiff appealed. The District Court of Appeal, Mussell, J., held that payee could not recover from guarantors without first proceeding against maker of note, where written demand that payee first sue maker had been made upon payee by guarantors.

Judgment affirmed.

Guaranty 🔑77(2)

Where guarantors, after notice of default in payment of note, made written demand upon payee to first sue maker of note, payee could not recover against guarantors without first proceeding against maker, in absence of showing that failure to do so was not prejudicial to guarantors. Civ. Code, §§ 2787, 2807, 2845.

George A. Griffin and Eugene A. Horton, San Diego, for appellant.

R. M. Switzler, San Diego, for respondents.

MUSSELL, Justice.

This is an action against defendants as guarantors of the payment of a promissory note payable to plaintiff and executed by "Role, Inc.". Each of the defendants guaranteed to pay one-third of the amount of the note, which was for $5,000, and was due on August 7, 1951. The note was not paid at the time of maturity or thereafter except for the payment of $300 on account. After maturity of the note, plaintiff gave notice to Role, Inc., Mr. Frank Thomas, president of the corporation, and to all three guarantors that the note was overdue and that he wanted payment. There was no other effort made by plaintiff to collect from Role, Inc. The defendant guarantors made demand in writing upon plaintiff to sue or first pursue the principal (Role, Inc.). However, the corporation was not sued upon the note or made a party to the instant action, which was filed February 19, 1952.

After plaintiff had presented his evidence at the trial, the defendants moved for a judgment of nonsuit on the ground that the evidence showed that demand was made upon the payee of the note by the guarantors "to pursue the principal debtor for any action that was brought against them, and that such demand was rejected and no pursuit made." This motion was granted and plaintiff appeals from the judgment of dismissal which was thereupon entered.

The question here involved was whether plaintiff was required, after demand made upon him by the guarantors, to proceed against the maker of the note before being able to secure a judgment against the guarantors. We conclude that this question must be answered in the affirmative.

The distinction between sureties and guarantors was abolished by the legislature in 1939 by Section 2787 of the Civil Code. Section 2807 thereof was amended in 1939 and now reads as follows:

> "A surety who has assumed liability for payment or performance is liable to the creditor immediately upon the default of the principal, and without demand or notice."

Section 2845 of the same code provides:

> "(Surety may require creditor to proceed against principal: Effect of neglect to proceed.) A surety may require his creditor to proceed against the principal, or to pursue any other remedy in his power which the surety can not himself pursue, and which would lighten his burden; and if in such case the creditor neglects to do so, the surety is exonerated to the extent to which he is thereby prejudiced."

In Bank of America Nat. Trust & Savings Ass'n v. McRae, 81 Cal.App.2d 1, 7, 183 P.2d 385, 389, it is said, quoting from 13 Cal.Jur. 110, sec. 22:

> " 'The liability of the guarantor of an absolute and unconditional guaranty is fixed when the principal obligation matures and is not predicated upon the exhaustion by the creditor of his remedies against the principal debtor, or the exhaustion of other security for the debt; and it is immaterial whether the debtor can or cannot pay the debt.' "

However, in that case the original notes involved matured in 1932, and as said by this court in Ingalls v. Bell, 43 Cal.App.2d 356, 365, 110 P.2d 1068, 1074 (decided in 1941):

> "The legislature in 1939 abolished all distinction between sureties and guarantors, sec. 2787, Civ.Code and a surety who has assumed liability for payment to a creditor is liable immediately upon the default of the principal and without demand or notice, sec. 2807, Civ.Code, and a surety may now, under section 2845 of the Civil Code, require his creditor to proceed against the principal, or to pursue any other remedy in his power which the surety cannot himself pursue, (and which would lighten his burden); and if in such case the creditor neglects to do so the surety is exonerated to the extent to which he is thereby prejudiced."

In State Athletic Com. of California v. Massachusetts Bonding & Ins. Co., 46 Cal.App.2d 823, 829, 117 P.2d 75, 79, the court, in commenting upon sections 2845, 2849 and 2850 of the Civil Code, said:

> "These code sections are the enactment of rules developed in equity to give relief from the common law doctrine which permitted the creditor to enforce remedies against the surety without reference to his rights against the principal."

In the instant case there is no pleading or proof on the part of plaintiff of a lack of prejudice to the guarantors justifying the action against them without proceeding against the principal.

Judgment affirmed.

BARNARD, P. J., concurs.

CITY OF LOS ANGELES v. BELRIDGE OIL CO.*

Civ. 19431.

District Court of Appeal, Second District,
Division 2, California.

Aug. 5, 1953.

Rehearing Denied Aug. 26, 1953.

Hearing Granted Oct. 1, 1953.

Suit by municipality to recover license taxes. The Superior Court, Los Angeles County, Roy L. Herndon, J., granted defendant's motion for summary judgment, and plaintiff appealed. The District Court of Appeal, Fox, J., held that in ordinance imposing business license tax, measured by gross receipts, on those "manufacturing and selling" or "selling," the quoted phrases, used in alternative and in contradistinction, evidenced intent to treat those engaged in pursuit primarily of creative nature but selling products of their manufacture separately from those engaged in callings of which selling alone is essence; and therefore corporation producing crude oil and natural gas from wells outside county would not be subject to tax measured by its gross receipts for products marketed by it under contract requiring segregation and delivery to purchasers at its field plants.

Affirmed.

1. Licenses 🔑11(1)

The term "business", as used in law imposing license tax on businesses, trades, professions, and callings, ordinarily means a business in trade or commercial sense, one carried on with a view to profit or livelihood.

See publication Words and Phrases, for other judicial constructions and definitions of "Business".

2. Evidence 🔑20(1)

It is a matter for judicial cognizance that in commercial world there is marked distinction between a business of manufacturing or productive nature and one in which selling, trading or dealing is fundamental feature.

3. Licenses 🔑15(3)

In ordinance imposing business license tax, measured by gross receipts, on those "manufacturing and selling" or "selling", quoted phrases, used in alternative and in contradistinction, evinced intent to treat those engaged in pursuit primarily of creative nature but selling products of their manufacture separately from those engaged in callings of which selling alone is essence; and therefore corporation producing crude oil and natural gas from wells outside county would not be subject to tax measured by its gross receipts for products marketed by it under contracts requiring segregation and delivery to purchasers at its field plants.

4. Licenses 🔑9(1)

Where substantial doubt exists as to whether or not particular business is included within descriptive or designating language of an ordinance imposing a license tax, that doubt must be resolved in favor of taxpayer.

◆

Ray L. Chesebro, City Atty., Bourke Jones, Asst. City Atty., and James A. Doherty, Deputy City Atty., Los Angeles, for appellant.

Wellborn, Barrett & Rodi, Vernon Barrett, F. C. L. Head, Los Angeles, for respondent.

---

* Subsequent opinion 271 P.2d 5.

FOX, Justice.

Plaintiff appeals from a judgment in an action to recover license taxes from defendant. The cause was decided upon stipulated facts, both parties moving for summary judgment. The motion of defendant company was granted.

Plaintiff's complaint, incorporating the complete license ordinance of the city of Los Angeles, prayed judgment in the amount of $9,768.30 as unpaid business license taxes owing for the years 1948–1950, inclusive. Plaintiff's claim is based on its asserted right to impose a business license tax on defendant measured by the gross receipts of the company during those years as a person engaged within the city in "selling goods, wares or merchandise at wholesale" as defined in section 21.166, Los Angeles City License Tax Ordinance.[1] Neither the amount of the gross receipts nor the computation of the amount of the tax is here in issue. The character of defendant's business activity, stipulated to by the parties and made a part of the complaint, will be more comprehensively set forth below. Defendant's answer, relying upon the stipulations relating to the nature of its operations, denies that it comes within the intended purview of section 21.166 for reasons which will subsequently be more fully discussed. As separate defenses, the answer also alleges that the City's right to a recovery for the years 1948 and 1949, or, alternately, for the year 1948 alone, is barred by the applicable limitations provisions of sections 339(1) and 338 (1) of the Code of Civil Procedure. By way of a fourth separate defense, defendant challenges the plaintiff's constitutional right to levy the claimed tax on defendant. The trial court granted defendant's motion for a summary judgment dismissing the action.

The stipulation as to facts presents a detailed survey of the over-all conduct of defendant's operations, and from it we extract only so much as is requisite to the adjudication of the issues presented. Defendant is engaged in the production of crude oil and natural gas, all of its wells being located in Kern County (designated herein as "the field"), which is the site of its field offices and the scene of all its physical operations. Defendant's head office is situated in the city of Los Angeles. Its various products are marketed under long-term contracts of sale at prices prevailing at the time the sales contracts are executed. The products covered by these contracts are segregated and delivered to the purchasers directly at the field plants and never enter the territorial limits of the city of Los Angeles while title remains in defendant. It is the City's contention that by the operation of section 21.166 of the licensing ordinance, it may levy a tax on defendant measured by the gross receipts derived from the sale of all its products produced and delivered in Kern County.

In support of its position, plaintiff focuses its attention on the phases of defendant's activities governed by its head office in the city of Los Angeles, where defendant carries on important managerial and administrative functions. Most of the working time of defendant's high-level officers—its president, two vice presidents (one of whom performs the duties of secretary), treasurer, four assistant secretaries, an assistant treasurer, purchasing agent and controller—is spent there. The board of directors of defendant company meets in Los Angeles, which is where management policies are generally formulated, though policy decisions may also be made in the field by conferences between the field manager and authorized company officers. The company's banking is done in Los Angeles. Belridge's president and treasurer spend all their time at the head office, while the vice presidents, purchasing agent, and controller spend between 60 an

---

[1] Section 21.166 reads in part:

"Every person manufacturing and selling any goods, wares or merchandise at wholesale, or selling goods, wares, or merchandise at wholesale, and not otherwise specifically licensed by other provisions of this Article, shall pay for each calendar year, or portion thereof, the sum of $8.00 for the first $20,000, or less, of gross receipts, and, in addition thereto, the sum of 40¢ per year for each additional $1,000 of gross receipts, or fractional part thereof, in excess of $20,000; * * *"

90 percent of their time there, the rest being devoted to work in the field. The equivalent of 16 full-time employees, constituting about 7 percent of the personnel, spend virtually all their working time at the head office, where approximately 7 percent of the company's expenses are incurred. Defendant's sales contracts are negotiated by the officers who work most of the time at the Los Angeles office, but the amount of time consumed in actual negotiations in the years 1947–1950 amounted to less than one half of one percent of their total working time. Approximately 15 percent of the time required for conducting negotiations leading to sales was consumed in Los Angeles, and an equal amount at the office of purchasers in San Francisco; the balance was handled by mail, telephone and telegraph communication between defendant's Los Angeles office and the purchasers' offices in San Francisco. Defendant signed the contracts at its head office. There is a readily available market in the field for Belridge's products and sales promotion occupied only a small part of defendant's business activities.

The head office is responsible for an extensive amount of clerical work and record keeping. Among the books and records kept there are the corporate stock records, the general and property ledger, cash and journal records, income tax, insurance and purchasing records, correspondence files, contracts, production summaries, and copies of various records, all prepared by the field office. Monthly billings to purchasers and payroll reports to federal and state agencies emanate from the head office. Defendant's obligations are all paid from the head office except emergency wage payments and disbursements for miscellaneous items, which are paid from a checking account in Bakersfield carrying an average balance of between $2,000 and $3,000. Other payroll checks for all field employees are written and signed at the head office and mailed to the field office for distribution, but the payrolls for such employees are prepared in the field office where all pertinent payroll data is kept, and which supplies the home office with the information for the individual paychecks it prepares. The head office makes all purchases, except those of an emergency nature, but these purchases are based on requisitions presented by the field office. All policy questions in connection with expenditures for normal operating purchases are determined at the field office, and though they may be very large in amount, are customarily paid by the head office as a matter of routine without special approval. Payment for the sales of all items sold by defendant are received from purchasers at the head office and deposited in Los Angeles bank accounts.

The cost of operating the head office has ranged from $161,000 to $242,000 during the years in question.

All of defendant's manifold activities incident to the operation of its oil field is concentrated within the borders of Kern County. In its extensive physical operations, it has employed, in the period here under consideration, a staff of between 191 and 250 workers, and its operating costs in the field have varied from $2,473,466 for the year 1947 to $3,111,321 in 1950. Its field operations are concerned with the problems of where and how to drill wells in order to achieve maximum production efficiency; the actual drilling and daily operation of the wells; the gathering of crude oil and natural gas there produced and the extraction of natural gasoline and liquefied petroleum gas; the delivery of the above substance to purchasers; the installation and maintenance of plant equipment and facilities and the making of all original accounting records related to the functions described. Two field warehouses are maintained containing an inventory of materials worth between $500,000 and $1,000,000. Records relating to the quantity and prices and receipt and disbursement of all items of the inventory are kept in the field, and inventories of this property are sent monthly and annually to the head office.

The field office is directed by a resident field manager, who is subject to orders only from the president and vice presidents. These orders are generally given him verbally by a vice president at the field but are sometimes communicated by letter or telephone from the head office. The field manager sometimes participates in formation of policy, but in this regard he ranks below the president and vice presidents.

The field engineering office keeps detailed records of the drilling reports of each well and of the production, repairs and all operations performed in connection with each individual well, of which it sends copies to the head office. A separate report is made to the head office of all labor, equipment and material used in the various operations for which the field office is accountable. Such records and reports, which are necessary for the billing of the purchasers of petroleum products, are sent to the head office.

All field employees are hired at the field office, where employment applications are filed and a copy sent to the head office. The field office keeps a record of each worker's employment history, and furnishes a labor distribution sheet on each employee to the head office covering the hours worked each day on each job, pay rate, and other matters. The union contract is negotiated, prepared and signed in the field by the company's two vice presidents, without any action thereon emanating from the head office except that the outcome is reported to the board of directors. The field office issues group insurance cards to its employees and processes claims thereunder for payment at the head office. The intricate and complicated problem of the assessment of Belridge's mineral rights is the responsibility of the field office, and is handled by a petroleum engineer stationed at the field who represents the company in discussions with Kern County taxation officials.

Defendant paid a license tax for the years 1948 and 1949 in the amount of $12 for each year, the minimum sum required under section 21.190 of the License Ordinance, after discussion with and at the request of representatives of the city clerk of Los Angeles. On January 4, 1950, defendant again paid the sum of $12, but an objection to such amount was made on January 24, 1950, whereupon defendant paid an additional sum of $161 under section 21.190, measuring the tax by the gross cost of maintaining the head office (see section 21.190(d)). It was not until the latter part of March, 1950, that plaintiff first indicated to defendant that its license tax payments should be based on its gross receipts.

Defendant's liability under section 21.190 is not here in issue, the question being defendant's liability, if any, under section 21.166 of the License Ordinance. The City contends that the judgment is erroneous on the theory that defendant company is a person engaged in selling goods, wares and merchandise at wholesale within the meaning of section 21.166, which imposes on such persons a tax measured by the gross receipts derived from such sales. This contention, in our opinion, cannot be sustained.

Our consideration is therefore addressed to the question of whether the language used in the ordinance under which a business license tax is claimed from defendant purports to describe and cover the particular business in which it is engaged. From a study of the phraseology and an analysis of the import of section 21.166, it is evident that defendant's business operations in Los Angeles were not intended to be included in the businesses mentioned as subject to the license tax imposed therein. This conclusion is fortified by an examination of the structure and purposes of the Los Angeles Business License Tax Ordinance as disclosed by its underlying policy.

Section 21.166 is one of three "catch-all" provisions found near the very end of the ordinance, which contains over 150 separate sections and subsections descriptive of specific kinds of businesses upon which is imposed a prescribed tax. In some sections the word "business" or a term of analogous significance is used, but other sections dealing with particular occupations omit reference to the word "business" or any equivalent term. Section 21.49, one of the general provisions of the ordinance which precedes the lengthy enumeration of the various categories of business within its purview, provides in part as follows: "* * * a license is required to be obtained by every person engaged in any of the businesses, trades, callings or professions specified in the following sections of this Article; * * *" From the catalogue of detailed and distinct varieties of businesses which next follow, it is plain that the purpose of the ordinance is to levy a tax upon the privilege of carrying on a designated occupation or business. Martin Ship Service Co. v. City of Los Angeles, 34 Cal.2d 793, 794, 215 P.2d 24.

[1] "The term 'business,' as used in a law imposing a license tax on businesses, trades, professions, and callings, ordinarily means *a business in the trade or commercial sense,* one carried on with a view to profit or livelihood." Cuzner v. California Club, 155 Cal. 303, 311, 100 P. 868, 871, 20 L.R.A.,N.S., 1095. (Italics added.) Among the listed occupations is the business of producing oil, which is covered by section 21.124, and reads in part as follows: "For every person producing oil from any well located in the City of Los Angeles, the sum of $2.00 per quarter for each such well producing four hundred (400) barrels or less of oil per quarter, plus ½ cent per barrel oil produced by each such well in excess of four hundred (400) barrels per quarter. * * *" This section, of course, patently applies to the type of business in which defendant is engaged. Union Pac. R. R. Co. v. City of Los Angeles, 53 Cal.App.2d 825, 830, 128 P.2d 408. However, it is here concededly inapplicable since by its explicit terms it operates only within the territorial limits of the municipality.

Following the exhaustive enumeration of occupations found in the license ordinance come the three catch-all sections. Section 21.167 requires every person selling goods, wares and merchandise at retail, and who is not specifically licensed, to pay a tax measured by gross receipts at the rate of 50 cents per $1,000. Section 21.190, under which defendant has until the commencement of this action paid its license tax, requires every person engaged in any trade, calling, profession, occupation, vocation or other means of livelihood not otherwise specifically licensed, to pay a tax measured by gross receipts at the rate of $1 per $1,000.[2]

[2, 3] The pertinent language of section 21.166, the catch-all provision here involved, reads as follows: "Every person manufacturing and selling any goods, wares or merchandise at wholesale, or selling goods, wares or merchandise at wholesale, and not otherwise specifically licensed by other provisions of this Article, shall pay * * *" Since defendant's production of oil takes place outside Los Angeles, plaintiff makes no claim that Belridge is a person "manufacturing and selling" within the language of section 21.116. It is plaintiff's position that, by the use of the term "selling goods, wares and merchandise," it was the intention of the framers of section 21.166 to include within its scope the business in which defendant is engaged. We are unable to agree that this is a fair, reasonable, or contemplated application of the language employed.

The language of section 21.166 is couched in the alternative and plainly discloses that its authors had two categories of business in mind. In the first instance, it refers to persons "*manufacturing and selling* any goods, wares, or merchandise at wholesale"; this is conjoined by a statement referring to persons "*selling* goods, wares or merchandise at wholesale." (Italics added.) The tax under the ordinance being an excise tax on the privilege of engaging in a particular kind of business, see McAdams Oil Co. v. Los Angeles, 32 Cal.App.2d 359, 364, 89 P.2d 729, it is clearly manifest that it was intended to reach both those engaged in a pursuit primarily of a creative nature who sell the product of their manufacture, as well as those engaged in callings of which selling alone is the essence. It is a matter for judicial cognizance that in the commercial world, there is a marked distinction between a business of a manufacturing or productive nature and one in which selling, trading or dealing is the fundamental feature. Kansas City v. Butt, 88 Mo.App. 237; Chattanooga Plow Co. v. Hays, 125 Tenn. 148, 140 S.W. 1068, 1069–70. As defendant points out, it is to be inferred that the words "manufacturing and" were intended to have some meaning. If the word "selling" of its own force were designed to embrace "manufacturing and selling," there would have been no reason to particularly mention "manufacturing and selling." It follows from a logical interpretation of the two terms chosen that "selling" as here employed was not intended to include businesses where an activity like manufacturing was the dominant nature of the enterprise and selling merely the function or medium by which its output is metamorphosed into realizable gain. See Chattanooga Plow Co. v. Hays, supra. The reasonableness of such a distinction was pointed out in the case of Davis v. Mayor and Council of Macon, 64 Ga. 128, where the court had under consideration the validity of a license tax ordinance exempting a farmer selling his own meat product from an occupation tax levied upon the selling of butcher's meat. It was there said: "The producer whose trade is incident to production, and the middleman whose trade is intermediary between the producer and the consumer, belong not to the same class but to different classes of subjects in a scheme of taxation. At least the difference is wide enough to justify, if not to compel, its recognition in shaping the scheme." And in an analogous connection, it was stated in American Sugar Refining Co. v. State of Louisiana, 179 U.S. 89, 21 S.Ct. 43, 45, 45 L.Ed. 102: "But from time out of mind it has been the policy of this government, not only to classify for purposes of taxation, but to exempt producers from the taxation of the *methods employed by them to put their products upon the market.*" (Italics added.) By spelling out this dichotomy, the framers of the ordinance wished to make certain that on the one hand manufacturers who necessarily sell would not be able to evade the effect of the statute on the grounds that selling is only an incidental aspect of their business. On the other hand, in using the term "selling," it is practical and reasonable to infer that the ordinance endeavors to take in all other business classifications of a merchandising or mercantile nature (those heterogeneous and diversified businesses which variously go under generic classifications such as merchant, trader, dealer, wholesaler, jobber, distributor, etc.) in which selling per se, rather than the manufacture, creation or production of goods, is the essential character of the business operation.

---

[2] Section 21.190, subdivision (d) provides for an allocation of income and reads in part as follows:

"When the gross receipts are derived from or attributable to sources both within and without the city, the license tax imposed by this section shall be measured by the gross receipts derived from or attributable to sources within this city. Such gross receipts shall be determined by an allocation upon the basis of pay roll, value and situs of tangible property, general expenses, or by reference to any of these or other factors, or by such other method of allocation as is fairly calculated to determine the gross receipts derived from or attributable to sources within this city. Gross receipts attributable to isolated or occasional transactions at places outside the city but within the State of California, where the licensee is not engaged in business shall be considered as gross receipts derived from or attributable to sources within this city. Gross receipts derived from or attributable to sources within this city include (a) gross receipts from tangible or intangible property located or having situs in this city and (b), when not contrary to law, gross receipts from any activities carried on in this city regardless of whether carried on in interstate, intrastate or foreign commerce. * * *"

Since defendant's production of oil takes place outside Los Angeles, plaintiff makes no claim that it is a person "manufacturing and selling," the language of section 21.166 most descriptive of defendant's business. Plaintiff urges, however, that defendant is engaged in "selling activities" within the city, and maintains that even though the greater part of Belridge's efforts are expended in the production of something to sell and a much lesser part in its so-called "selling activities," it must be considered as "selling goods, wares and merchandise" within the meaning of the ordinance. However, this disregards the fact that an examination of the context and general structure of the license ordinance discloses that the concept of "business" or "occupation" as distinguished from an ancillary activity, inheres throughout. Also it overlooks the significance of the words "manufacturing and selling" which are contained in section 21.166. While Belridge admittedly is engaged in "selling" in the sense that it markets the product it produces, that is not the dominant nature of its business; hence it cannot properly be characterized as a person "selling" in the sense the expression is used in section 21.166. It may be observed that Robert Louis Stevenson once wrote, in a cynical epigram: "Everyone lives by selling something." But, as has been previously pointed out, it is the occupation of selling, as a recognized and identifiable mercantile business, and not "selling activities" which are merely an incidental though important part of an integrated business such as manufacturing, to which the phrase "selling goods, wares and merchandise" applies in this context. See In re Holmes, 187 Cal. 640, 644–645, 203 P. 398.

Of some pertinency to this point is the *ratio decidendi* in the case of City and County of San Francisco v. Larsen, 165 Cal. 179, 181, 131 P. 366, 367, where a restaurateur sought to come within the license-tax exemption offered a person "who at any fixed place of business * * * sells or manufactures goods, wares, or merchandise". In discussing whether a restaurant keeper is either a seller or manufacturer of goods, the court stated: "It cannot be denied that the eating of food by a customer at a restaurant, in the regular course of business, involves a sale of the food eaten. The price of the food alone is usually not specified, but it is included in a lump sum, with the charge for service and use of dishes, chair, and table. It is nevertheless a sale of the food consumed, within the technical definition of that term.

"But this single point of coincidence does not necessarily bring the restaurant keeper within the class described in the exempting clause. We are not dealing solely with the question whether or not he does, in his business technically sell goods, but with the question whether or not, within the meaning of the provision prohibiting license taxes upon described places of business, he is a person who 'sells or manufactures goods, wares, or merchandise.' We must look to the phrase as a whole, consider its object and purpose, and give it a meaning according to the ordinary acceptation of the words used. When we speak of a place where the business of selling or manufacturing goods, wares, or merchandise is carried on, we do not usually think of restaurants in that connection. One who mixes and cooks foodstuffs is engaged in the business of manufacturing goods, if we use the words according to their literal meaning, but, if we mention manufacturers we should scarcely expect to be understood to refer to the keeper of restaurants. A restaurant keeper is not, according to ordinary usage, either a merchant or a manufacturer." So here we are convinced that when the term "selling" was used in the alternative and in contradistinction to "manufacturing and selling," the framers of the law were imposing a tax upon the privilege of carrying on a business distinct from one of a manufacturing nature, and of which selling was the paramount attribute. It was not intended to be a privilege tax on "selling activities" related to a manufacturing or producing business. The sale of the products of manufacture is an indispensable aspect of the business of manufacturing; the power to manufacture implies the power to sell what is produced. Commonwealth v. Thackra Mfg. Co., 156 P. 510, 27 A. 13. It was not the legislative intent to tax a business which in common parlance is universally spoken of as a manufacturing or production business under a designation not appropriate to it, nor is this justified by a rational view of the statutory language.

Plaintiff argues that the definition of the phrase "selling goods, wares, and merchandise" contained in section 21.08(t) expands the limits of its commonly accepted understanding to cover defendant's operations. This section provides (with italics added to stress the provisions plaintiff contends are here specially applicable):

"The phrase 'selling goods, wares and merchandise' shall, in addition to *any other meaning established at law,* be deemed to extend to and include in its application *persons who engage in the business of* fabricating, serving or *supplying for a price, tangible personal property furnished, produced* or made at the special order of purchasers or consumers, or *for* *purchasers or consumers who do or who do not furnish, directly or indirectly, the specifications therefor."* While this plainly evinces an intent to enlarge the ordinary comprehension of the phrase, it is far from disclosing any purpose to depart from all established meanings and traditional understandings of the expression. Rather, it reinforces our position that the ordinance recognizes the line of demarcation between *businesses* of a manufacturing and of a selling nature, but is here endeavoring to encompass certain peripheral or hybrid enterprises which do not too clearly lend themselves to characterization in the one sphere or the other. Thus the most cogent interpretation of the somewhat intricate language of the section appears to be that it was basically designed, as respondent suggests, to embrace such occupations as custom fabricators, restaurateurs and the like, which are in a borderland area of occupational classification so far as a catch-all provision covering the business of "selling" is concerned. This is clearly emphasized by the definition of "sale" and "sell" contained in the preceding section 21.08(s).[3] The addition in section 21.08(t) of the words "for purchasers or consumers who do or who do not furnish, directly or indirectly, the specifications therefor," when construed in connection with the words they immediately follow ("at the special order of purchasers or consumers") suggest no more than an intent to negate any intimation that custom purchasers or consumers would lose such status by omitting the furnishing of specifications for the merchandise. We cannot perceive that the circumscribed and guarded language of this clause was meant to apply to Belridge's business. Any such intention could have been expressed in more forthright and unequivocal language.

In further support of its thesis that defendant is engaged in "selling," or activities which are part of a selling business, plaintiff cites Natural Gas Co. of Virginia v. Commonwealth, 186 Va. 921, 45 S.E.2d 177, 178. That case presents no analogy to the case at bar. The question there presented was whether plaintiff, who was the local agent of a foreign corporation, came within the purview of a statute imposing a tax on "commission merchants," defined as "Every person * * * buying or selling for another any kind of merchandise on commission, * * *." Plaintiff advertised the product, solicited orders, made delivery from its own warehouse and remitted the proceeds, less commissions, to the foreign corporation. Plaintiff argued that it was a "broker" rather than a "commission merchant." The court found that plaintiff's activities in behalf of its foreign principal constituted selling for which it received a commission, thus bringing it within the statutory definition of that term, "commission merchant." But as the court points out, plaintiff's promotion, negotiation and completion of sales for its principal (its selling activities) constituted the "heart and soul of the contract" between the parties—or, in other words, the essence of its business.

[4] While we think the legislative intent clear, it is well recognized that where substantial doubt exists as to whether or not a particular business is included within the descriptive or designating language of an ordinance imposing a license tax, that doubt must be resolved in favor of the taxpayer. (53 C.J.S., Licenses, § 13, p. 495; 33 Am.Jur., Licenses, p. 329.) "In every case involving 'the interpretation of statutes levying taxes, it is the established rule not to extend their provisions, by implication, beyond the clear import of the

---

[3] Section 21.08(s) reads: "The words 'sale' and 'sell' shall be deemed to include and refer to: the making of any transfer of title, in any manner or by any means whatsoever, to tangible personal property for a price, and to the serving, supplying or furnishing, for a price, of any tangible personal property fabricated or made at the special order of consumers who do or who do not furnish directly or indirectly the specifications therefor. A transaction whereby the possession of property is transferred but the seller retains the title as security for the payment of the price shall likewise be deemed a sale. The foregoing definitions shall not be deemed to exclude any transaction which is or which, in effect, results in a sale within the contemplation of law."

language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen.' [Citations.]" Pioneer Express Co. v. Riley, 208 Cal. 677, 687, 234 P. 663.

In view of the foregoing conclusion it becomes unnecessary to consider other issues raised by counsel.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

---

120 Cal.App.2d 29

PEOPLE v. ROTH.

Cr. 4961.

District Court of Appeal, Second District, Division 1, California.

Aug. 27, 1953.

Defendant was convicted of felony, of petit theft with prior conviction and imprisonment for such offense. The Superior Court of Los Angeles County, Jesse J. Frampton, J., entered judgment, and defendant appealed. The District Court of Appeal, Drapeau, J., held that evidence was sufficient to sustain conviction.

Judgment affirmed.

1. Criminal Law ⚷300

Plea of not guilty puts in issue every material allegation in indictment or information. Pen.Code, § 1018.

2. Criminal Law ⚷1202(1)

In prosecution for petit theft with prior conviction and imprisonment for such offense, prior conviction was essence of crime charged, and, therefore, was put in issue by defendant's plea of not guilty. Pen.Code, § 1018.

3. Criminal Law ⚷300, 1202(1)

Defendant charged with particular offense and previous convictions may plead not guilty and put in issue every material allegation of information or he may plead not guilty of principal offense charged and confess the previous convictions. Pen. Code, § 1018.

4. Criminal Law ⚷1202(3)

In prosecution for petit theft with prior conviction and imprisonment for such offense, admissions made by defendant's counsel at trial and at preliminary examination plus certified copy of defendant's first conviction and judgment for imprisonment for petit theft was sufficient to establish prior conviction.

Lowell Lyon, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Ellis Peter Miller, Deputy Atty. Gen., for respondent.

DRAPEAU, Justice.

Defendant was convicted of a felony, petit theft with a prior conviction and imprisonment for the same offense. His application for probation was denied, and he was sentenced to state prison.

The only testimony before the trial court was that adduced on defendant's preliminary examination in the Municipal Court. He strolled into the stock room of Lou's garage, where he had no business to be. Garage employees saw him, chased and ran him down.

Like a barn-yard fowl with a delectable morsel, hotly pursued, he scattered spark plugs on the ground—$34 worth of them—for a city block or more. Sam Liebowitz, in charge of the stock room, and father of Lou the owner, ran puffing along behind, picking up spark plugs, each in its little paste board box.

Defendant did not take the stand and testify in his own behalf, either in the Superior Court or in the Municipal Court.

Just before the People rested their case in the Superior Court, the following took place:

"The Court: Let the record show the Court has read the testimony given at the preliminary hearing.

"Mr. McLarty: It is my understanding that the prior was stipulated to in the preliminary, and we enter into that stipulation at this hearing.

"The Court: To avoid any possibility of mistake on it, with respect to the prior conviction of petty theft as alleged in the information, do you admit or deny that?

"Mr. Larsen: We admit that.

"The Court: As charged?

"Mr. Larsen: Yes, your honor.

"Mr. McLarty: People rest, your honor."

In his brief on appeal, defendant concedes that the evidence was sufficient to support the finding of guilty by the trial judge. He contends, however, that the record does not sufficiently establish his prior conviction and imprisonment for petit theft, despite the admissions of it by his own counsel.

Defendant argues that because Section 1018 of the Penal Code provides "every plea must be put in by the defendant himself in open court", the admissions made by his counsel at his trial in the Superior Court and at his preliminary examination in the Municipal Court do not legally establish the fact of his prior conviction.

[1-4] Defendant overlooks the elementary principle of criminal law that a plea of not guilty by a defendant puts in issue every material allegation in the indictment or information. People v. Leong Fook, 206 Cal. 64, 273 P. 779; People v. Ross, 60 Cal.App. 163, 212 P. 627. His prior conviction was of the essence of the crime with which he was charged, and was therefore put in issue by his plea of not guilty. People v. McFarlan, 126 Cal.App. 777, 14 P.2d 1066. A defendant charged with a particular offense and previous convictions may plead not guilty and put in issue every material allegation of the information, or he may plead not guilty of the principal offense charged and confess the previous convictions. People v. Wheatly, 88 Cal. 114, 26 P. 95.

The judgment must be affirmed for another equally cogent reason. In evidence in the preliminary examination was a certified copy of defendant's first conviction and judgment of imprisonment for petit theft. The record of the preliminary examination was, by stipulation, before the trial judge in the Superior Court. Thus the People doubly proved their case.

The judgment is affirmed.

DORAN, Acting P. J., and ROBERT H. SCOTT, J. pro tem., concur.

119 Cal.App.2d 809

DICKSON v. CITY OF CARLSBAD et al.

Civ. 4813.

District Court of Appeal, Fourth District, California.

Aug. 21, 1953.

Rehearing Denied Sept. 14, 1953.

Hearing Denied Oct. 15, 1953.

Action for declaratory relief brought by County Treasurer to determine status of a sanitary district whose total land area had been incorporated into a new city of the sixth class just following the district's letting of a contract for a sanitary sewer system, and before district's dealings with the contractor had been completed. The Superior Court of San Diego County, C. M. Monroe, J., rendered judgment that the city and district should merge upon the delivery to the contractor of the recorded warrant, assessment and diagram, and intervenors, the assignees of the contractor, appealed. The District Court of Appeal, Mussell, J., held that contractual obligations of the sanitary district, following required statutory delivery of documents to contractor, would become those of the city.

Judgment affirmed.

1. Municipal Corporations 🔑39

There cannot be, at the same time, within the same territory, two distinct municipal corporations exercising the same powers, jurisdiction and privileges.

2. Municipal Corporations 🔑35

Contract entered into between a sanitary district and a construction contractor was governed by the law in effect at the time of the making of the contract, and the rights of the contractor could not be impaired by incorporation of city which included within its boundaries the entire territory of the district.

3. Municipal Corporations ⟹35

Where sanitary sewer district let contract for the construction of a sewer shortly before the entire area of the district was incorporated into a city of sixth class, district could not issue bonds to pay for the work, but upon delivery of the recorded warrant, assessment and diagram to the contractor, as required by statute, the district would be dissolved and the duties of the district, as formerly fixed, would become those of the city. Health and Safety Code, §§ 6400 et seq., 6518, 6540, 6545, 6900 et seq.; Streets and Highways Code, § 5374.

◆

Wm. Mackenzie Brown, Los Angeles, for appellants.

James Don Keller, Dist. Atty., and County Counsel in and for San Diego County, and Bertram McLees, Jr., Deputy, San Diego, for plaintiff and respondent.

T. Bruce Smith, Carlsbad, for respondent City of Carlsbad.

MUSSELL, Justice.

This is an action for declaratory relief. The defendant Carlsbad Sanitary District, located in the county of San Diego, was formed on April 22, 1929, under and pursuant to the Sanitary District Act of 1923, Health and Safety Code, Division 6, Part 1, and at all times since has functioned as a sanitary district.

On February 25, 1952, after proceedings were duly taken, the sanitary board adopted a resolution declaring its intention to order the construction of a sanitary sewer system in the district, and after proceeding pursuant to the provisions of the "Improvement Act of 1911", awarded a contract for the work on June 9, 1952. The contractors assigned the proceeds and benefits of the contract, including the warrant, diagram and assessment and bonds, representing unpaid assessments to be issued in payment for said work, to the intervenors herein. After these proceedings in reference to said work and improvement and on July 16, 1952, the defendant city of Carlsbad was incorporated as a city of the sixth class and the entire Carlsbad Sanitary District was included within the boundaries of the city.

At the time of the filing of the original complaint herein, there was on deposit in the treasury of the county of San Diego to the credit of the sanitary district certain funds amounting to the sum of $4,427.03. The district also then had outstanding certain demands for current operating expenses.

The county treasurer filed this action in order to have his duties clarified, to ascertain the status of the district and its funds, and to ascertain his duties in respect to said funds and property and in respect to the proceedings had under the "Improvement Act of 1911".

The trial court rendered judgment holding that the sanitary district was not dissolved and did not merge with the defendant city upon its incorporation upon July 16, 1952, but that the governing board and other officers "are empowered and shall continue to be empowered until the dissolution and merger of said district as hereinafter declared to operate the sanitation system of said district and to perform all duties required by law in connection with the proceeding under and pursuant to the 'Improvement Act of 1911' described in the complaint in intervention on file herein; that plaintiff, as treasurer of the county of San Diego shall continue to perform for said Carlsbad Sanitary District until such dissolution and merger all services required by the Sanitary District Act of 1923 (Part 1 of Division 6 of the Health and Safety Code)." The judgment further provided that "Upon the delivery to the contractors, or their agents or assigns, of the recorded warrant, assessment and diagram, as required by Section 5374 of the Streets and Highways Code, for the proceeding under and pursuant to the Improvement Act of 1911 described in the complaint in intervention on file herein, said Carlsbad Sanitary District shall merge with said city of Carlsbad, its funds and property shall become the funds and property of said city, and said district shall be dissolved, subject to a showing of such delivery to this court and the making of a supplemental finding and order by this court establishing the merger; that thereafter said city of Carlsbad and its officers shall perform all functions required by law in connection with the completion of all matters, including the making of any necessary reassessments, required by the Improvement Act of 1911 for the proceeding described in the complaint in intervention on file herein, the authority of Beryl D. Phelps as engineer of said district and as engineer of work for said proceeding shall cease, and the authority and duty of plaintiff Delavan J. Dickson as ex officio treasurer of said district shall cease."

This appeal is taken by the intervenors, assignees of the contractors, who, in their complaint in intervention, sought an adjudication as to the rights and obligations of the officers and directors of the sanitary board and of the council and officers of the city of Carlsbad in relation to the performance of the contract for the construction of the said sewer system.

The appellants contend (1) that the Carlsbad Sanitary District could not be dissolved until all of the obligations of the improvement contract had been fulfilled by the officers of the district, including the execution and delivery of bonds in payment for the work; and (2) that a sanitary district formed under the "Sanitary District Act of 1923", being Division 6, Part 1, of the Health and Safety Code, is not automatically dissolved by the mere incorporation of co-extensive territory in a city of the sixth class; and may only be dissolved in the manner set forth in Sections 6900–6904 of the Health and Safety Code.

The principal question here to be determined is the effect of the incorporation of the city of Carlsbad upon the Carlsbad Sanitary District.

[1] In Re Sanitary Board of East Fruitvale Sanitary District, 158 Cal. 453, 111 P. 368, 370, a proceeding was instituted by the sanitary board of the district to determine the right of the board to issue bonds and the validity of such bonds. There the city of Oakland annexed adjacent territory which included all of the area embraced within the sanitary district. The annexation was completed on December 8, 1909, and prior thereto, on December 3, 1909, the sanitary board passed an order that the bonds of the district be issued in connection with the construction of a sewer system. The court stated the rule there applicable as follows:

> "It is a well-settled doctrine that 'there cannot be at the same time, within the same territory, two distinct municipal corporations exercising the same powers, jurisdiction, and privileges.' 1 Dillon Mun.Corp. (4th Ed.) § 184; King v. Pasmore, 3 Term R. 199, 243; [Inhabitants of Township of] Bloomfield v. Glen Ridge, 54 N.J.Eq. 276, 283, 33 A. 925.
>
> "Accordingly, it is generally held that, where one municipal corporation is annexed to another, the annexing city takes over the functions of the annexed municipality, and the latter by virtue of the annexation is extinguished, and its property, powers, and duties are vested in the corporation of which it has become a part. 28 Cyc. 217; [Town of] Mt. Pleasant v. Beckwith, 100 U.S. 514, 528, 25 L.Ed. 699; Adams v. Minneapolis, [20] Gil. 438, 20 Minn. 484; People v. [Board of] Supervisors, 94 N.Y. 263; Stroud v. Stevens Point, 37 Wis. 367; Schriber v. Langlade, 66 Wis. 616, 29 N.W. 547, 554."

And on page 459 of 158 Cal., on page 371 of 111 P.:

> "To hold that a sanitary district retains its existence and powers notwithstanding the annexation of its territory to the city would lead to the existence within the territory annexed of two distinct local governmental bodies claiming to exercise the same powers over the same territory. Such a condition would produce intolerable confusion, if not constant conflict. We find nothing in the statute indicating an intent to so provide. It is true that the sanitary district act contains one or two expressions which might seem to indicate that a sanitary district may cover in whole or in part territory within the boundaries of a municipal corporation."

It was also there stated that the court was not confronted with the question of the validity of bonds already issued before annexation, nor with the manner in which the courts would protect the undoubted rights of creditors whose claims accrued before annexation. It was held that with the annexation the powers of the sanitary district and of the district sanitary board ceased, as did the power of the district to issue such bonds.

In Pixley v. Saunders, 168 Cal. 152, 160, 141 P. 815 (decided in 1914) it was held that in enacting the sanitary district acts, the legislature had in mind the sanitation of any territory which might conveniently be served by a single system, whether wholly unincorporated or not, and that a sanitary district formed under said act preserves its identity and retains its powers over the whole territory, *except in the event of its complete absorption of a municipality.* (Italics supplied.)

[2, 3] In the instant case, at the time of the incorporation of the city of Carlsbad, the sanitary district and the assignors of the intervenors herein were parties to a contract executed under the authority of the "Improvement Act of 1911". As contended by the appellants, the rights of the contractors are governed by the law in force at the time the contract was made and could not be impaired by the incorporation of the city. Ede v. Knight, 93 Cal. 159–161, 28 P. 860; Jeffreys v. Point Richmond Canal Etc. Co., 202 Cal. 290–293, 260 P. 548. Since under the authority of the East Fruitvale District case, supra, the Carlsbad district was not authorized to issue bonds in payment for the work, the trial court correctly decreed that upon delivery to the contractors or their agents or assigns of the recorded warrant, assessment and diagram as required by Section 5374 of the Streets and Highways Code, the Carlsbad Sanitary District was dissolved and that thereafter the city of Carlsbad and its officers should perform all functions required by law in connection with the completion of all matters required by the "Improvement Act of 1911". This ruling does not impair the obligation of the contract involved. There is no showing that the performance of future acts in connection therewith cannot be accomplished by the city and its officers. Appellants argue in this connection that they will be deprived of the experience, surety bond protection and collection facilities of the county treasurer's office. However, there is no showing that the city treasurer could not adequately perform the duties required under the act or that he is not adequately bonded, or that the city engineer is not qualified to perform the duties of engineer of the work. It appears that the obligation of the unissued bonds of the proceeding under the "Improvement Act of 1911" initiated by the Carlsbad Sanitary District will in no substantive way be impaired by the performance of the duties of their enforcement by the city of Carlsbad rather than by the sanitary district.

The effect of the judgment was to provide that the incorporation of the city should not be effective as against the intervenors by interfering with their contractual rights until the recorded warrant, assessment and diagram were delivered to them in accordance with their contract, and that after that was done, the required functions should be performed by the officers of the city. The rulings of the cited cases were followed insofar as applicable and insofar as this could be done without impairing the obligation of the intervenors' contract. While some of the language of the judgment with respect to the time at which the dissolution of the district and its merger with the city takes place is not technically accurate, the meaning and effect of the judgment is clear and no prejudice appears.

Appellants contend that the East Fruitvale Sanitary District and Pixley v. Saunders cases, supra, are inapplicable to the instant case as they were decided under the Sanitary District Act of 1891 and not under the "1923 Act". However, neither of these statutes contain a specific legislative declaration of the effect on a sanitary district of the inclusion of all of its territory in a subsequently incorporated city, and each act contains substantially similar provisions with respect to dissolution of such districts. Stats.1891, p. 223, Health and Safety Code, § 6900 et seq.

It is further argued that it was the legislative intent that a sanitary district organized under the "1923 Act" and a municipal corporation may have dual existence and authority in their respective fields and that this is shown by the provisions of sections 6518 and 6540 of the Health and Safety Code requiring the consent of the legislative body of the city for use of the city streets and Section 6545 providing, in effect, that no assessment or bond levied or issued (under the special improvement act) shall become a lien and no person shall be deemed to have notice thereof until a certified copy of the assessment and diagram is recorded in the office of the superintendent of streets of the city if the improvement district or any part thereof is in such incorporated territory. However, Section 5 of the 1891 act provided for the laying of sewers and drains in public streets upon obtaining the consent of the municipality and it must be presumed that the court in the East Fruitvale District case, supra, considered this provision of the act in determining a legislative intent contrary to the contention of appellants.

Judgment affirmed.

BARNARD, P. J., concurs.

---

119 Cal.App.2d 717

SCHMIDT v. MACCO CONST. CO. et al.

Civ. 15400.

District Court of Appeal, First District,
Division 1, California.

Aug. 17, 1953.

Rehearing Denied Sept. 16, 1953.

Hearing Denied Oct. 15, 1953.

Landowner's action against excavators for breach of written contract under which excavators promised to grade land "within one-half foot of final grade to a useful contour for residential sites". The Superior Court, County of San Mateo, Strother P. Walton, J., entered judgment on verdict for landowner for $17,500 and denied excavators' motion for entry of judgment notwithstanding verdict and excavators appealed and landowner cross-appealed. The District Court of Appeal, Peters, P. J., held that admission of evidence of prior negotiations showing that by grading "within one-half foot of final grade to a useful contour for residential sites" parties meant removal of 40,000 cubic yards of material was proper.

Judgment affirmed.

1. Appeal and Error 🔑295

A motion for a new trial is a condition precedent to urging inadequacy of damages upon appeal.

2. Appeal and Error 🔑289, 292

Fact that plaintiff, who failed to move for a new trial, is thus precluded from urging inadequacy of damages on appeal does not prevent plaintiff from urging errors in admission of evidence and errors in instructions, even though such errors, if they be errors, also resulted in improper reduction of damages.

3. Appeal and Error 🔑281(1)

A motion for a new trial is not generally a condition precedent to an appeal.

4. Contracts 🔑245(2)

A written contract containing the entire agreement of the parties supersedes all prior and contemporaneous negotiations.

5. Evidence 🔑455

If written contract containing entire agreement of parties is uncertain or ambiguous, parol evidence is admissible to show what the parties meant by the uncertain or ambiguous word or phrase used in the written contract.

6. Evidence 🔑448

Before parol evidence is admissible, trial court must determine, as question of law, that written contract is ambiguous or uncertain.

7. Evidence 🔑448

Fact that trial court did not expressly rule that contract was ambiguous before admitting parol evidence, but merely, over objection, admitted the evidence, was not error.

8. Evidence 🔑448

Unless court can to a certainty and with sureness, by a mere reading of document, determine which is the correct interpretation, extrinsic evidence becomes admissible as an aid to interpretation.

9. Contracts 🔑170(1)

Construction given contract by acts and conduct of parties with knowledge of its terms before any controversy has arisen as to its meaning is entitled to great weight and will, when reasonable, be adopted and enforced by the court.

10. Appeal and Error 🔑1050(1)

In landowner's action against excavators for breach of contract under which excavators agreed to grade and fill a portion of land, admission of evidence relating to prior contract between excavators and landowner's predecessor showing existence of the agreement and location of right of way then granted was not prejudicial in view of fact that contract between landowner and excavators mentioned predecessor's contract and predecessor's contract was read to jury by landowner's counsel.

11. Evidence 🔑450(7)

In landowner's action against excavators for breach of contract under which excavators agreed to grade land "within one-half foot of final grade to a useful contour for residential sites," admission of evidence of prior negotiations between landowner and excavators showing that by grading "within one-half foot of final grade to a useful contour for residential sites" parties meant the removal of 40,000 cubic yards of material was proper.

12. Contracts 🔑176(1)

The interpretation of a written contract, where parol evidence is not or cannot be admitted, becomes a question of law, but where parol evidence is properly admitted, and such evidence is conflicting, question of interpretation becomes one of fact and not of law. Code Civ.Proc. § 2102.

13. Contracts 🔑353(6)

Giving of instruction that construction of written contract under which landowner leased right of way to excavators and excavators agreed to grade landowner's premises "within one-half foot of final grade to a useful contour for residential sites" and to fill part of premises was one of fact and not of law was not error, in view of ambiguity of phrase "within one-half foot of final grade to useful contour for residential sites." Code Civ.Proc. § 2102.

14. Contracts 🔑176(2), 353(6)

In a case involving several clauses of a contract, some clear and some ambiguous, interpretation of unambiguous clauses is one of law and only the interpretation of ambiguous clauses is one of fact and the jury should be so instructed.

15. Appeal and Error 🔑1067

In landowner's action against excavators for breach of contract under which excavators agreed to grade premises of landowner "within one-half foot of final grade to useful contour for residential sites," failure to instruct that "useful contour" clause was the only clause that should be interpreted by jury was not prejudicial, in view of fact that the only controversy involved such clause.

16. Appeal and Error 🔑216(2)

Where plaintiff failed to offer instruction defining extent of ambiguity or to limit jury's powers on the subject, plaintiff could not, on appeal, urge error because of failure of trial court to point out to jury what clauses of contract were clear and what were ambiguous.

17. Trial 🔑295(10)

Court's statement in instruction that it expressed no opinion "as to what materiality of the facts are" was not prejudicial in view of fact that, when read in context and with other instructions given, the instruction, to a reasonable mind, could only mean that court was expressing no opinion as to the facts.

18. Appeal and Error 🔑882(12)

Where plaintiff offered instructions similar to those given by court on its own motion, doctrine of invited error applied and plaintiff could not, on appeal, complain of instructions given.

19. Trial 🔑296(2)

Even though giving of instruction that "when through mistake or accident, a written contract fails to express the real intention of the parties, such real intention is to be regarded, and the erroneous parts of the writing disregarded," was not warranted by the evidence, giving of such instruction was not prejudicial in view of other instructions.

20. Trial ⚷296(2)

Instruction that intention of parties to written contract must be ascertained "from the writing alone, if possible," subject to other rules of interpretation later to be given, and that language of contract governs "if the language is clear and explicit, and does not involve an absurdity," was not objectionable, in view of other instructions, as permitting jury to disregard completely words of contract.

21. Contracts ⚷175(3)

In landowner's action against excavators for breach of contract under which excavators agreed to grade premises of landowner "within one-half foot of final grade to a useful contour for residential sites," evidence established that parties contemplated the excavation of about 40,000 cubic yards and that they contemplated an excavation that would cost or would be worth about $13,500.

22. Appeal and Error ⚷878(6)

Defendants who had no appeal pending could not complain that judgment was excessive.

James W. Harvey, Walter K. Olds, San Francisco, Dorothy E. Handy, San Francisco, of counsel, for plaintiff-appellant.

Delancey C. Smith, San Francisco, for respondents.

PETERS, Presiding Justice.

Plaintiff brought this action against the defendants for breach of a written contract under which defendants agreed to grade and fill a portion of plaintiff's land. The complaint prayed for $250,000 damages. The jury brought in a verdict of $17,500. The trial court denied a motion for entry of judgment notwithstanding the verdict. The defendants appealed from that order. The plaintiff moved to dismiss defendants' appeal, and also cross-appealed from the judgment. Subsequently, defendants abandoned their appeal, and, upon their request, it was dismissed. Thus, there is left for consideration only plaintiff's appeal from the judgment in his favor, it being his main contentions that the written contract was clear, definite and certain; that the trial court erroneously admitted parol evidence to explain some of the contract provisions; that this error in the admission of evidence resulted in plaintiff being awarded what he claims to be inadequate damages; and that the trial court erroneously instructed the jury in several respects.

[1-3] It is the theory of plaintiff that in awarding him but $17,500 the jury must have disregarded the terms of the written contract and must have based its verdict on the parol evidence claimed to have been erroneously admitted. Defendants urge that this is but an indirect manner of contending that damages are inadequate, and point out that plaintiff cannot urge inadequacy of damages because of his failure to urge said ground in a motion for a new trial. It is the law that such a motion is a condition precedent to urging inadequacy of damages on appeal. Alexander v. McDonald, 86 Cal.App.2d 670, 195 P.2d 24. But the rule that prevents plaintiff from now urging inadequacy of damages, does not prevent him from urging errors in the admission of evidence and errors in the instructions, even though su[illegible] errors, if they be errors, also resulted [illegible] improper reduction of the damages. [illegible] for a new trial is not, gener[illegible] a condition precedent to an appeal. Generally speaking, any error of law can be raised on an appeal even though a motion for a new trial has not been made. A plaintiff may appeal, of course, when he is awarded less than his demand. Maxwell Hardware Co. v. Foster, 207 Cal. 167, 277 P. 327. For these reasons, plaintiff is not precluded from urging the points relating to the claimed erroneous admission of evidence and the claimed erroneous instruction.

We turn now to a consideration of the evidence, that most favorable to defendants being binding on this court. Plaintiff is a contractor and subdivider. Since early in 1946 he has owned a tract of undeveloped land located in San Mateo County in a hilly area near other developing subdivisions. The tract consists of two parcels described by the parties as units "A" and "B." Prior to 1946 the property was owned by the Colemans.

The defendants, operating as joint adventurers, in 1944 entered into a contract with San Francisco, the state, United Air Lines and the army to extend the existing runways at the San Francisco Airport. This contract required defendants to secure and deposit some 4,000,000 cubic yards of dry fill at the airport. In order to carry out this contract the defendants found it expedient, if not indispensable, to secure a right-of-way over the property then owned by the Colemans. The defendants, for a cash consideration not disclosed, secured from the Colemans a right-of-way over the land for the construction of a haul road and for the location of some of the piers for an overpass over the state highway. It was contemplated that the haul road would be constructed over the Coleman property for a distance of some four miles, and should be specially constructed for the use of fifty-two ton or heavier equipment which cannot lawfully travel on state highways. While the Colemans still owned the property, the overpass and the approaches to it had been constructed, requiring some cutting and filling. This overpass would be useless unless defendants could construct the haul road on the Coleman property, and from a practical standpoint such a haul road across the Coleman property was almost a necessity to defendants.

When plaintiff purchased the Coleman tract defendants started negotiations to secure a right-of-way from him for the haul road. These negotiations took place over a period of some time and finally resulted in the execution of a written contract on May 25, 1946. The trial court, over objection, admitted evidence as to these prior negotiations. It is this evidence of the prior negotiations, and the evidence as to the prior arrangement with Coleman, that plaintiff contends was admitted in violation of the parol evidence rule.

By the terms of the written contract the plaintiff leased to the defendants the property from June 2, 1946, to June 1, 1949. The contract refers to defendants' fill contracts, and to defendants' "agreements with the former owners of the property * * * for use of certain portions of such property and for right-of-way over portions of same," and granted to defendants the right to construct the designated right-of-way. A power line right-of-way was also granted.

The source of the present controversy is to be found in the excavation provisions of the written contract, which provisions represent the consideration to be received by plaintiff for the lease. For purposes of description the entire property is referred to as the "Schmidt" land, and in describing what work was to be done the grading and filling work required is segregated between units "A" and "B." Admittedly, the parties knew exactly what they wanted done on parcel "A," which was a small parcel, and admittedly all the work that the contract required defendants to perform on "A" was in fact performed. The present controversy involves the non-performance of work on parcel "B."

The key paragraphs relating to the required grading to be done by defendants on both parcels read as follows:

"2. In consideration of the foregoing Macco-MK agrees as follows:

"(a) Macco-MK will grade the land of Schmidt easterly of the proposed extension of Junipero Serra Boulevard to the El Camino Real in accordance with map prepared by James & Waters, Civil Engineers, dated April, 1946, to which map reference is hereby made and a copy of which is attached to this agreement and made a part hereof, without cost to Schmidt. The work to be done by Macco-MK pursuant to this clause of this paragraph is generally described as recontouring of the area in the northwesterly portion of the property; filling existing drainage ditches; and excavating proposed new drainage ditches shown on the map. The work to be done does not include any grubbing of the area but does include clearing smaller trees and brush but no clearing of trees with a diameter of more than eight (8) inches; any grading and/or paving of streets or roads, or any other street work of any kind; or the construction of any drainage structures shown, or located, or required by the map. The area described in this subparagraph (a) shall be known for purposes of this agreement as unit 'A,' and such work shall be commenced within sixteen (16) days after Schmidt has requested Macco-MK to proceed therewith, and shall be prosecuted with due diligence to completion within sixty (60) days.

"(b) Macco-MK will also grade and fill without cost to Schmidt that portion of land of Schmidt west of the proposed Junipero Serra Boulevard and east of Skyline Boulevard within ½ foot of final grade to a useful contour for residential sites. A map showing approximate final contours will be furnished by Schmidt to Macco-MK within 45 days after the date hereof and this portion of the land of Schmidt shall be known as unit 'B.' The work to be done by Macco-MK is more particularly set forth in paragraph 2, subdivision (a) hereof, and said work to be done hereunder on Unit 'B' shall commence within fifteen (15) days after notice to Macco-MK from Schmidt, or in any event within ten (10) days after the completion of the grading provided to be done in unit 'A' as above set forth and will complete the work within seventy-five (75) days after commencing same."

The prior negotiations, all admitted over objection, were to the following effect: Plaintiff was compelled to testify that he knew about the prior Coleman agreement. He was then asked about his conversations with Tucker, project manager of defendants, prior to the execution of the written contract. He testified that they discussed what was meant by "useful contour for residential sites"; that unit "B" was to correspond with unit "A" in having fifty-foot lots with ditches filled and graded with dirt from "A"; that Tucker told him that he did not care how much earth was cut from "B" because defendants could use all of it as fill at the airport, and if the dirt could be secured from "B" it would save defendants four miles of hauling. Plaintiff denied that he then knew that the dirt from "B" was unacceptable as fill at the airport, and claimed that he did not learn that fact until six months after the contract was executed. His own counsel had him testify on redirect that he had told Tucker that he wanted "B" developed the same as "A," and wanted fifty-foot residential lots on both parcels, and that Tucker had replied that the defendants would haul all the dirt desired from plaintiff's lands.

Tucker admitted that prior to the execution of the written contract, he and plaintiff had visited Millbrae Highlands, a neighboring developed subdivision, and that plaintiff had then stated that he wanted to develop his subdivision in a similar way. Tucker, over objection, was permitted to testify that plaintiff did not want a cash payment for the right-of-way because of income taxes, and that plaintiff, for this reason, refused a cash offer of $13,500 for a right-of-way for three years, requesting instead an equivalent amount of grading, principally on "A," but with "some" on "B." Plaintiff wanted two drainage ditches filled on "A," the brush removed therefrom, a new ditch excavated, and a knoll recontoured. But plaintiff also wanted some additional consideration, and this resulted in further negotiations. These other demands were brought out by plaintiff on cross-examination of Tucker. Several suggestions were made by plaintiff, one of which was that defendants buy him an additional 500-foot strip of land to add to his present holdings. Then the parties discussed the possibility of defendants doing some grading on "B," but no specific agreement was reached as to the nature of this work until May 18, 1946, when a written memorandum, hereafter discussed, was executed. Tucker was positive that the parties definitely understood and agreed about the nature and the extent of the work to be done on "A."

So far as using dirt from "B" as a fill at the airport is concerned, Tucker, on direct examination of defendants' counsel, contradicted plaintiff. Tucker stated that plaintiff had offered dirt from "B" for such purposes but that he had rejected it because it was not suitable under the airport specifications. Also on direct examination, and therefore subject to objection, Tucker testified that on May 18, 1946, he had a conversation with plaintiff; that plaintiff stated that he wanted to get the agreement settled; that he wanted the knoll on the top of the hill located on "B" removed, and the dirt placed in a canyon; that plaintiff stated he wanted to develop the whole area like Millbrae Highlands. The plaintiff had not then had a map prepared describing the finished subdivision as to "B," and the parties agreed that plaintiff should have such a map prepared and that forty-five days was a reasonable period for such purposes. It was also agreed that no work on roads should be done by defendants, but defendants should remove the brush, leaving all trees over eight inches in diameter for plaintiff. At the conclusion of this conversation Tucker, in the presence of plaintiff, telephoned his superior in San Francisco and explained what plaintiff wanted. The superior asked him: "Are you sure you are not agreeing to do a lot more work than the $13,500?" When Tucker stated that he was sure of that fact, the superior officer authorized Tucker to close the deal.

A written memorandum dealing only with "B" was then prepared, and this memo was used as a basis for the formal contract executed a week later. Tucker wrote out this memo in longhand and plaintiff made various corrections to it. This memo, although first used in part by defendants for impeachment of plaintiff, was introduced into evidence by plaintiff upon his cross-examination of Tucker. The memo provided that defendants would "rough grade" to within a half foot of "a usable contour for residential sites." The word "rough" was omitted in the final contract and a provision for filling added. The memo provided that no grading for streets or house sites would be done. In the formal contract in clause "(a)" incorporated into "(b)" the provision as to house sites was omitted. There were other minor differences. The last clause of the memorandum was completely omitted from the final contract. It reads: "The above work is to be done in lieu of that proposed by Max Schmidt, wherein he required a 500 foot right-of-way on the north line of the property."

After the written contract was executed defendants ultimately performed their obligations as to unit "A," during which work defendants handled between 70,000 and 75,000 cubic yards of dirt. As to unit "B," the contract provided that plaintiff within forty-five days was to furnish a map showing "approximate final contours." The plaintiff ultimately submitted three maps to defendants, and defendants submitted one to plaintiff, but the parties were unable to agree that any of such maps were in accordance with the agreement. As a result, the work on "B" was never performed, and this action resulted.

The first map submitted by plaintiff as to unit "B" was the so-called F.H.A. map, a tentative subdivision map prepared by F.H.A. engineers. Plaintiff had this map as early as May, 1946, but although he told Tucker about it, he did not show it to him prior to the signing of the contract. Tucker stated that plaintiff had told him he would revise this map within the forty-five day period. Plaintiff testified that this map, unrevised, was submitted to defendants no later than June 5, 1946, but Tucker testified that it was not submitted until at least two weeks or perhaps two months later. Plaintiff testified that Tucker told him the map was unacceptable because it called for too much work, and requested plaintiff to have prepared another map. While Tucker denied that he had said that the work called for by the F.H.A. map was too extensive, he admitted that such was the fact and that he had had that idea when he rejected it. He testified that he had rejected the map because it contained insufficient data. No proposed contour lines were indicated, only existing contours being set forth. No data at all for grading was set forth. Defendants' expert Hutchison agreed with Tucker, and testified that the F.H.A. map was unusable without more engineering data. Plaintiff, while admitting that no proposed contour lines were shown, believed that an engineer could compute the yardage to be excavated.

Plaintiff withdrew the F.H.A. map and later (August, 1946, according to plaintiff;

November, 1946, according to Tucker) submitted the so-called Jones map, prepared for the Estes Engineering Company by Jones, a landscape engineer. Both plaintiff and Tucker agreed that Tucker rejected this map because it called for too much work, although there is some evidence that Tucker also stated then that any dirt removed from "B" could not be used at the airport. This map shows existing and proposed contours and proposed streets, and 90% of unit "B" could have been usefully developed under it. This plan called for a general flattening out of the area and would require the moving of about 1,000,000 cubic yards of dirt. Tucker testified, over objection, that this was not in accord with the prior negotiations of the parties; that the Jones map called for moving forty times as much dirt as the parties had agreed was to be moved; that, among other things, it provided for a seventy-five foot cut never before discussed; that the parties in their prior negotiations had only talked about removing the knoll and for certain fill work; that the work contemplated would have required the handling of but about 20,000–25,000 cubic yards of soil. It will be remembered that the written contract provided that defendants were to perform the work on "B" within seventy-five days. Tucker testified that to move a million cubic feet of soil, as required by the Jones map, would take three million dollars of equipment and would take even then at least six months. All parties knew that such equipment was not then owned or available to defendants, and that most of defendants' equipment was tied up on the airport job. Tilley, one of plaintiff's experts, admitted that "B" could not be economically graded under the Jones map.

The Jones map was withdrawn, and on January 21, 1947, the so-called Deutsch map was delivered by plaintiff to Tucker, and an addition to it was delivered February 8, 1947. According to plaintiff, Tucker took one look at the map and rejected it as calling for too much work, and stated that defendants would prepare a map. Tucker testified that he had defendants' engineers study the map for a week, and then told plaintiff that the map called for too much work because, among other things, it called for 700,000 cubic yards of fill that would have to be imported. According to Tucker, when he told plaintiff that the map was unacceptable, and that defendants' engineers would prepare a map, plaintiff told him to go ahead because he had failed in his attempts to present an acceptable map.

Defendants thereafter prepared the so-called Hutchison map and presented it to plaintiff in August or September of 1947. After a week's study, plaintiff told Tucker that his engineers were of the opinion that the plan set forth in this map was unworkable. Plaintiff's objections were mainly predicated upon the fact that some of the proposed building lots had banks of twenty or thirty or more feet along the proposed roads, so that plaintiff felt they were not usable for development of small residential sites. Plaintiff testified that when he voiced these objections to Tucker, the latter told him to take it or leave it, and the negotiations ended. This conduct was relied upon by plaintiff at the trial as a repudiation, and the jury apparently so found, also impliedly finding, pursuant to proper instructions, that there had been a waiver of the map provision contained in the contract.

Plaintiff's only objection to the Hutchison map was that it did not provide for useful contours for residential sites because the banks by the proposed streets would be too high. His experts corroborated him.

Tucker testified that the Hutchison map called for 27,000 cubic yards of cut and 38,000 cubic yards of fill. He admitted that the plan did not call for any cutting upon the roadway sites, claiming that such cutting should be done by plaintiff. Hutchison testified that his map was based on a study of the entire area in order to correlate the street layout with the adjoining development. He testified that his map called for general levelling off the area by grading the knoll and filling two adjacent ravines, which would require 40,000 cubic yards of excavation.

At least one of plaintiff's experts believed that unit "B" was not suitable for mass subdivision purposes, but others believed it could have been developed as was "A." Defendants' experts believed that to develop "B" like "A" would be entirely too expensive, and that "B" could only be used for "hand tailored building sites."

Plaintiff attempted to prove his damages caused by the claimed breach of contract in two different ways, one by showing or attempting to show loss of improved value, and the other by evidence of the cost of doing the work. It should be mentioned that the court and jury, with consent of both litigants, viewed the property in question.

The testimony as to loss of improved value was at best fragmentary and apparently not believed by the jury. But the evidence as to the cost of doing the work was more complete. One Robert Tilley presented a map, admitted only to show damages, which he claimed set forth a proper and economical development of the property into 180 building lots, and which also showed the proposed road work. This witness admitted, however, that he could not give an estimate of the cost of doing the work called for by his plan without further study. Fred Sperry, an excavating contractor, did give some mathematical evidence as to the cost to plaintiff of doing the work. While he admitted that there was no going rate generally for doing excavation work, because of the varying factors involved, he did testify that at the time of trial (October of 1951) the cost would be fifty cents a cubic yard, and that in 1947 it would have cost between forty and forty-three cents per cubic yard. This last was testified to by him as being a "rough estimate."

Lee Hamm, another expert, refused to fix a definite price for excavation, but did testify that 1947 grading costs were twenty-five per cent to thirty per cent lower than those existing in 1951.

Plaintiff offered, and the trial court gave, an instruction on damages based upon the cost theory. We have no way of knowing how the jury arrived at its verdict of $17,500. Apparently, it believed that the parties had agreed that defendants would excavate from unit "B" about 40,000 cubic yards of soil. If Sperry's figure of forty-three cents per cubic yard was accepted, this would make a cost of $17,200. The cost for maps, etc., would easily raise that to $17,500. This probably was the theory of the jury.

The basic contention of plaintiff is that the trial court erroneously and prejudicially admitted parol evidence relating to the prior Coleman contract, and relating to the negotiations leading up to the execution of the written contract of May 25, 1946. The contention is that since the contract was ultimately reduced to writing, it superseded all prior negotiations and circumstances. It is then contended that the written contract is clear and explicit on its face, and that the parol evidence varied the terms of the written contract. Based on these premises, the conclusion necessarily follows that the parol evidence should not, over objection, have been admitted.

[4, 5] The basic premise of this argument is unsound. It is of course the law that a written contract containing the entire agreement of the parties supersedes all prior and contemporaneous negotiations. In re Estate of Gaines, 15 Cal.2d 255, 100 P.2d 1055; United Iron Works v. Outer Harbor, etc., Co., 168 Cal. 81, 141 P. 917; Parker v. Meneley, 106 Cal.App.2d 391, 235 P.2d 101. But those cases, and many more that could be cited, all recognize that if the contract is uncertain or ambiguous, parol evidence is admissible to show what the parties meant by the uncertain or ambiguous word or phrase used in the written contract.

In the instant case the controversy hinges upon the operative phrase of the written contract providing that defendants were required to "grade and fill * * * within ½ foot of final grade to a useful contour for residential sites." Is that phrase so clear, explicit and certain that it was error to admit extrinsic evidence to explain it? The parol evidence produced by the defendants was to the effect that they were to excavate about 40,000 cubic yards of soil. Plaintiff urges that this evidence completely disregards and is contrary to the "useful contour" provision of the contract.

[6, 7] At the inception of this argument over the admission of this parol evidence plaintiff argues, correctly, that before parol evidence is admissible the trial court must determine, as a question of law, that the contract is ambiguous or uncertain. Universal Sales Corp. v. California, etc., Mfg. Co., 20 Cal.2d 751, 128 P.2d 665; Brant v. California Dairies, Inc., 4 Cal.2d 128, 48 P.2d 13; Sass v. Hank, 108 Cal.App.2d 207, 208, 238 P.2d 652. Plaintiff then complains that the trial court, before admitting this evidence, did not expressly rule that the contract was ambiguous. The complete answer to this argument is that the law does not provide how the trial court shall make the required determination of ambiguity. The plaintiff was contending that the contract was clear and certain. The defendants contended that it was not. Defendants offered extrinsic evidence of the meaning of the contested phrase on the theory that it needed explanation. When the trial court, over objection, ruled that the evidence was admissible it necessarily ruled that the contract was ambiguous. That is the only form of determination of that issue that need be made.

On the main issue as to whether the contract is clear and certain it is quite obvious that it is not. Without the map that the contract provided plaintiff should later produce (a requirement that the jury found had apparently been waived), it is impossible to determine with certainty and sureness without extrinsic evidence what portions of unit "B" should be graded or filled, or what the parties meant by the ambiguous phrase "useful contour for residential sites." By a mere reading of the contract the court could not determine, nor could an engineer say, just what work was required of defendants on unit "B." This being so, the extrinsic evidence was admissible not to vary the terms of the written contract but to ascertain what the parties really intended by its ambiguous provisions.

[8] The rules applicable to this problem were recently summarized by Mr. Justice Bray, speaking for this court, in the case of Bartel v. Associated Dental Supply Co., 114 Cal.App.2d 750, 251 P.2d 16. At page 752 of 114 Cal.App.2d, at page 17 of 251 P.2d, he stated: "Generally, the rule is that 'If the language of the instrument is clear and explicit the intention of the parties must be ascertained from the writing alone', and 'Parol evidence is admissible only where the language used is doubtful, uncertain or ambiguous and only then in cases where the doubt appears upon the fact of the contract.' Eastern-Columbia, Inc., v. System Auto Parks, Inc., 100 Cal.App.2d 541, 545, 224 P.2d 37, 40. Unless a court can 'to a certainty and with sureness, by a mere reading of the document, determine which is the correct interpretation * * * extrinsic evidence becomes admissible as an aid to interpretation * * *.' MacIntyre v. Angel, 109 Cal.App.2d 425, 429, 240 P.2d 1047, 1050."

At page 753 of 114 Cal.App.2d, at page 18 of 251 P.2d, the summary continues as follows: "As well said by Mr. Justice Dooling in Body-Steffner Co. v. Flotill Products, Inc., 63 Cal.App.2d 555, 561–562, 147 P.2d 84, 88, '* * * where extrinsic evidence is offered to explain inconsistent provisions in a contract courts should not strain to find a clear meaning in an ambiguous document, and having done so exclude the extrinsic evidence on the ground that as so construed no ambiguity exists * * *.' Mr. Presiding Justice Peters said in Wells v. Wells, 74 Cal.App.2d 449, 169 P.2d 23, 27: 'Much can be said in support of the rule that parol evidence is not only admissible to explain an ambiguity appearing on the face of the document but is also admissible to show that what appears to be a perfectly clear agreement, in fact meant something entirely different to the parties.' See, also Jegen v. Berger, 77 Cal.App.2d 1, 7, 174 P.2d 489.

[9] "In Barham v. Barham, 33 Cal.2d 416, at pages 422–423, 202 P.2d 289, at page 293, Mr. Justice Spence succinctly sums up the rules concerning the interpretation of agreements: 'When the language

used is fairly susceptible to one of two constructions, extrinsic evidence may be considered, not to vary or modify the terms of the agreement but to aid the court in ascertaining the true intent of the parties (citation), not to show that "the parties meant something other *than* what they said" but to show "what they meant *by* what they said." (Citation.) Where any doubt exists as to the purport of the parties' dealings as expressed in the wording of their contract, the court may look to the circumstances surrounding its execution—including the object, nature and subject matter of the agreement (citation)—as well as to subsequent acts or declarations of the parties "shedding light upon the question of their mutual intention at the time of contracting." (Citation.) To this latter point, it is said that "a construction given the contract by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight and will, when reasonable, be adopted and enforced by the court." (Citations.)'" See, also, Decter v. Stevenson Properties, Inc., 39 Cal.2d 407, 247 P.2d 11; Union Oil Co. v. Union Sugar Co., 31 Cal.2d 300, 188 P. 2d 470.

Under these rules extrinsic evidence was clearly admissible to explain the contract. We turn now to a consideration of plaintiff's specific assignments of error. It must be determined whether the evidence objected to and admitted was directed to an interpretation of the challenged clause.

[10] Plaintiff first objects to all of the evidence relating to the prior contract between defendants and Coleman. The only testimony admitted merely mentioned the existence of the agreement and the location of the right-of-way granted. The amount of consideration given by defendants to Coleman was, on objection, excluded. Why plaintiff objects to this evidence is not clear. The written contract itself recited the existence of the prior Coleman agreement, and the Coleman contract was in fact read to the jury by plaintiff's counsel. The location of the right-of-way was an immaterial factor, and even if erroneously admitted, could not possibly have been prejudicial. The fact that "a" consideration had been paid to the Colemans, without specification of amount, merely confirmed what the jury would have obviously inferred—e. g., that defendants had paid the Colemans a consideration for the agreement. There was no prejudicial error committed in the admission of this testimony.

[11] Plaintiff next complains of the admission of all of the testimony relating to the preliminary negotiations between plaintiff and Tucker. Besides objecting to much specific testimony that even if erroneously admitted could not possibly have been prejudicial, plaintiff does list several items of testimony which, if erroneously admitted, would clearly have been prejudicial. Thus, Tucker was permitted to testify, or plaintiff was compelled to testify, that plaintiff did not want the $13,500 cash consideration proffered to him because of income tax problem; that plaintiff wanted an "equivalent" amount of grading on "B" as was provided for "A"; that plaintiff did not feel that the work on "A" was sufficient consideration and wanted "some" work on "B"; that plaintiff suggested that the knoll on "B" be removed and the dirt placed in an adjacent ravine; that in the conversation with plaintiff just before the written memorandum was prepared, Tucker called his superior who asked him if he was sure that he was not agreeing to do more excavation than would be covered by $13,500; that the Jones map was not in accord with prior negotiations, called for more work than had been agreed upon, forty times as much excavation, and a new seventy-five foot cut, etc.

It is obvious that in the absence of the map, all of this evidence was pertinent and relevant as to what the parties meant by grading "within ½ foot of final grade to a useful contour for residential sites." If the parties had agreed that this meant the removal of about 40,000 cubic yards of material, obviously the contract did not require the removal of a million cubic yards of material. All of this evidence was reasonably relevant to interpreting the challenged clause. Aside from the fact that plaintiff on direct examination of his witnesses or on cross-examination of the witnesses for defendants introduced some material evidence on these matters, all of the challenged evidence was admissible for the reasons already stated.

[12, 13] Plaintiff next attacks the instructions. His basic contention, aside from attacks on specific instructions, is that the court erroneously instructed that the construction of the written contract was one of fact and not of law. This contention is merely another way of stating that the written contract was clear and certain, and that its interpretation should be based on the written contract and not on the parol evidence. Of course, the interpretation of a written contract, where parol evidence is not or cannot be admitted, becomes a question of law, Code of Civ.Proc. § 2102; In re Estate of Platt, 21 Cal.2d 343, 131 P.2d 825, but when, as here, parol evidence is properly admissible, and such evidence is conflicting, the question of interpretation becomes one of fact and not of law. In re Estate of Rule, 25 Cal.2d 1, 152 P.2d 1003, 155 A.L.R. 1319; Universal Sales Corp. v. California, etc., Mfg. Co., 20 Cal.2d 751, 128 P.2d 665; Crillo v. Curtola, 91 Cal.App.2d 263, 204 P.2d 941; Overton v. Vita-Food Corp., 94 Cal.App.2d 367, 210 P.2d 757.

[14–16] The plaintiff properly contends that the trial court did not point out to the jury what clauses of the contract were clear and what were ambiguous, and contends that this should have been done. It is true that, in a case involving several clauses of a contract, some clear and some ambiguous, the interpretation of the unambiguous clauses is one of law and only the interpretation of the ambiguous clauses is one of fact, and that the jury should be so instructed, but the failure to so instruct in the instant case was not prejudicial. Here, as the case was tried, it was obvious that, so far as the interpretation of the contract was concerned, the only controversy involved the "useful contour" clause. That was the clause defining defendants' duties. When the trial court properly admitted parol evidence to explain that clause, and thus ruled that the clause was ambiguous, the interpretation of that clause became one of fact for the jury and not a question of law for the court. While the instructions should have explicitly stated that only this ambiguous clause should be interpreted by the jury, since the case was tried on the theory that this was the basic clause in dispute, the failure to do so could not possibly have adversely affected plaintiff. Moreover, plaintiff's trial counsel offered no instructions to define the extent of the ambiguity or to limit the jury's powers on this subject. In the absence of an offer of proper instructions plaintiff is in no legal position to complain. Viera v. Gordon, 113 Cal.App.2d 700, 248 P.2d 981.

[17] The court did use some unfortunate language in one of the preliminary instructions on this subject. After first properly stating that the court expressed no opinion on what facts were proved or not proved the court also stated that it expressed no opinion "as to what the materiality of the facts are." The use of the word "materiality" was unfortunate. Obviously, the court should admit no evidence that is not material. By admitting it, over objection, the court necessarily determined that it was material. What the court was attempting to say was that it was not determining that such evidence was or was not decisive on the issue of interpretation. But the improper use of the term could not possibly have misled the jury or prejudiced the plaintiff. When read in context, and with the other instructions given, the instruction, to a reasonable mind, could only mean that the court was expressing no opinion as to the facts.

[18] It should also be pointed out that many of the challenged instructions (which need not be discussed in detail) were given by the court of its own motion, but that plaintiff offered similar instructions which were refused because they were already covered by the instructions given on the court's own motion. As to these instructions, even if erroneous, the doctrine of invited error applies. Blythe v. City and County of San Francisco, 83 Cal.App.2d 125, 188 P.2d 40; Connor v. Pacific Greyhound Lines, 104 Cal.App.2d 746, 232 P.2d 500; see cases collected 4 Cal.Jur.2d p. 422, § 557.

[19] There was one instruction that should not have been given. It reads: "When, through mistake or accident, a written contract fails to express the real intention of the parties, such real intention is to be regarded, and the erroneous parts of the writing disregarded." The instruction, while it somewhat awkwardly expresses a correct abstract principle of law, should not have been given because there was no evidence of "mistake or accident." Defendants, on the oral argument, conceded that the instruction should not have been given for that reason. While it has been held, under some circumstances, that even a correct instruction on an abstract question of law not involved in a case may be prejudicial because it may have misled the jury, that is not so in the present case. The other instructions as a whole clearly and without substantial ambiguity told the jury what the issues before the jury were. The jury could not possibly have believed that the issues of accident or mistake as to the terms of the written contract were before them.

[20] One of the instructions told the jury that the intention of the parties to a written contract must be ascertained "from the writing alone, if possible," subject to other rules of interpretation later to be given, and another read that the language of the contract governs "if the language is clear and explicit, and does not involve an absurdity." Plaintiff interprets these instructions as permitting the jury, in ascertaining the intent of the parties, to disregard completely the words of the contract if it was not "possible" to ascertain it from the contract alone, or if the contract words were not "clear and explicit." While these instructions were not happily worded, it is clear that plaintiff's construction is strained and unnatural. The court was telling the jury to interpret intention "if possible" from the contract alone, if the terms were "clear and explicit," and to resort to the parol evidence only if it found to the contrary. If parol evidence were considered it was to be used to interpret the words of the contract, as the later instructions clearly stated. The jury, at least three times, was told that the writing was the primary guide to interpretation, and that the extrinsic evidence was admitted as a guide to interpreting that writing. We find no prejudicial error in the instructions given or refused.

[21, 22] It should be pointed out that, once it is determined that the trial court properly admitted the parol evidence of the prior negotiations for the purpose of interpreting the "useful contour" clause, none of the minor errors here shown to exist could possibly have been prejudicial. This is so because although the evidence is conflicting, the great weight of the evidence (and the jury apparently so found) is to the effect that the parties contemplated that only the knoll on "B" should be removed and the ravine filled requiring the excavation of a limited amount of material, that is, about 40,000 cubic yards. Plaintiff wants damages for the failure to remove a million cubic yards. The parol evidence shows that this was never intended. The parties had in mind an amount of excavation that would cost or be worth about $13,500. Plaintiff has secured a judgment for $17,500. This amount, the jury could well have found, was in excess of the amount of work contemplated by the parties. The defendants, having no appeal pending, cannot and do not claim the judgment is excessive. But these facts are quite relevant in determining whether the minor errors in the instructions were prejudicial. It is obvious that they were not.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

119 Cal.App.2d 703

WETSEL et al. v. SUPERIOR COURT IN AND FOR EL DORADO COUNTY.

Civ. 8469.

District Court of Appeal, Third District, California.

Aug. 14, 1953.

Hearing Denied Oct. 8, 1953.

Original proceeding by timber purchasers against holders of unpatented placer mining claim for writ staying further proceedings in respondent Superior Court until validity of entry of claim holders on claim and their title thereto has been finally determined by the government. The District Court of Appeal, Schottky, J., held that, where Bureau of Land Management sold standing timber on land covered by unpatented placer mining claim after claim owners had posted and recorded notice of location of claim, and, after claim holders had brought trespass action against timber purchasers, bureau filed contest of validity of claim owner's entry under their mining claim, proceedings in trespass action would be stayed until contest has been determined.

Judgment in accordance with opinion.

1. Mines and Minerals 🔑29(1)

Paramount fee remains in the government until it has issued its patent, but as to everyone else, estate acquired by perfect mining location possesses all attributes of title in fee, and so long as requirements of law with reference to continued development are satisfied, character of tenure remains that of a fee.

2. Mines and Minerals 🔑29(1)

Locator of mining claim has right to exclusive use of surface thereof, and, if someone else dispossesses him and makes use of surface, such trespasser is liable for reasonable value of use together with any other damage trespasser may have caused to locator.

3. Mines and Minerals 🔑40

Where contest to determine validity of mining location had been filed by Bureau of Land Management, question whether land was mineral in character or whether there had been sufficient discovery of mineral to characterize land as mineral were questions of fact to be determined by General Land Office, and final decision of such office upon such question would be conclusive.

4. Action 🔑69(7)

Where Bureau of Land Management sold standing timber on land covered by unpatented placer mining claim after claim owners had posted and recorded notice of location of claim, and, after claim holders had brought trespass action against timber purchasers, bureau filed contest of validity of claim owner's entry under their mining claim, proceedings in trespass action would be stayed until contest has been determined.

G. Gard Chisholm, Jackson, Russell A. Harris and William E. Dopkins, Sacramento, for petitioners.

Charles L. Gilmore, Sacramento, for real parties in interest.

SCHOTTKY, Justice.

Petitioners filed in this Court a verified petition for a writ staying further proceedings in the respondent Superior Court until the validity of the entry of the said Keith V. O'Leary and Donald K. Moore on the real property described in said complaint and their claim of right or title thereto as a placer mining claim shall be finally determined by the United States of America.

The petition alleged in substance as follows:

That one O'Leary and one Moore were holders of an unpatented placer mining claim to the land in controversy, by a contract between petitioners and the United States, petitioners were granted the right to cut timber upon the land in question, remove and sell same;

That on July 11, 1952, O'Leary and Moore, who are the real parties in interest, filed a complaint against petitioners in the Superior Court of El Dorado County alleging a trespass on the part of petitioners in entering upon the land in question and in cutting, removing and selling the timber thereon, seeking damages therefor;

That on August 7, 1952, the Bureau of Land Management of the Department of Interior of the United States served O'Leary and Moore with a Notice of Contest as to the validity of their entry upon the land in question under their unpatented placer mining claim. This proceeding was instituted upon the grounds: "(1) that the land embraced in the claim is non-mineral in character; and (2) that minerals have not been found within the limits of the claim in sufficient quantities to constitute a valid discovery;"

That on November 12, 1952, the petitioners herein petitioned the Superior Court of El Dorado County to stay the proceedings instituted before it by O'Leary and Moore against the petitioners herein until a final determination of the proceedings before the United States Department of Interior, Bureau of Land Management; that this was denied by the trial court;

That on November 28, 1952, the contest before the Bureau of Land Management was set for hearing on January 7, 1953; that after the hearing was finally held before the Bureau, O'Leary and Moore defaulting, on February 19, 1953, a decision was rendered wherein it was held that O'Leary's and Moore's mining claim was invalid because: (1) The land embraced in the claim is non-mineral; and (2) minerals have not been found within the limits of the claim in sufficient quantities to constitute a valid discovery; that default judgment was entered accordingly and the contestees, O'Leary and Moore, were given thirty days within which to appeal;

That after the above decision, on or about February 26, 1953, the Secretary of the Department of the Interior of the United States of America ordered and directed that O'Leary and Moore be allowed to submit evidence bearing upon the validity of their entry on and title to the real property in question, but that a final determination of said proceedings is still pending and undisposed of, and the right to determine the validity of O'Leary's and Moore's claim rests solely with the United States of America; that notwithstanding this, the respondent has set the action presently pending between petitioner and O'Leary and Moore for trial on June 1, 1953, and there can be no final determination of the issues in such pending action until such time as the United States of America has rendered a final decision in respect to the validity of the entry on and claim of title to the real property in question by O'Leary and Moore.

Upon the filing of the petition this Court ordered that proceedings in the case of O'Leary, et al. v. Wetsel, et al., pending in the Superior Court in El Dorado County be stayed until the further order of this Court and directed that said court and Keith V. O'Leary and Donald K. Moore, the real parties in interest, show cause why said order should not be made permanent.

O'Leary and Moore filed an answer in which they denied certain allegations of the petition, and then set forth a separate defense in substance as follows:

That in June, 1950, Moore inquired of the District Land Office, Bureau of Land Management, Sacramento, and was informed that the land in question was public land, mineral in character, and open to mining location; that thereafter the real parties in interest, on June 13, 1950, went upon the land and discovered mineral thereon, to wit, gold, and did post thereon a Notice of Location of the Kay Placer Mining Claim, same then being recorded, and ever since they have been in continuous possession under said mining location, mining and developing same; that notwithstanding knowledge of this by petitioners, petitioners applied to the Regional Administrator, Bureau of Land Management, to purchase the standing timber thereon, and thereafter, pursuant to the orders of the Regional Administrator, an unknown employee from said office went upon the land and measured the timber thereon, saw the posted notice, and visited the county recorder and saw the record of the mining claim, finally reporting same to the Regional Administrator;

That notwithstanding the knowledge by petitioners and the Regional Administrator of the mining claim and possession of it by the real parties in interest, and without any proceedings or notice whatsoever, a contract was entered into selling to petitioners 290,000 board feet of Ponderosa pine then standing on the Kay Placer Mining Claim;

That pursuant to said contract and with full knowledge of the prior location and ownership of the real parties in interest of said standing timber, petitioners wilfully, unlawfully and forcibly, against the will and without the consent of the real parties in interest, went upon the land and cut and removed all merchantable standing timber; that upon discovering this the real parties in interest filed the action in respondent court;

That subsequent to this and acting in excess of jurisdiction, the Bureau of Land Management served the real parties in interest with Notice of Contest, and notwithstanding the further absence of jurisdiction a hearing was held by the District Land Office, Bureau of Land Management, without the presence of the contestees (real parties herein) or their attorney, wherein it was decided that the real parties in interest herein had no valid claim to said land, and were thereby deprived of the premises, said decision later being set aside by the Secretary of the Interior;

That notwithstanding the absence of jurisdiction, and the prior exclusive jurisdiction of the respondent court, the Regional Administrator instituted all the foregoing proceedings;

That if respondent court has no jurisdiction over the cause, and the real parties herein have no claim to said land, but themselves are and have been naked trespassers, then the United States and not petitioners herein is the real party petitioner as the owner of the land since petitioners are without interest.

The facts as they appear from the petition and answer, and the exhibits attached thereto, are not in dispute. O'Leary and Moore posted a Notice of Location of Placer Claim on June 13, 1950, and recorded same, and within 90 days thereafter recorded a Statement of Markings of Boundaries and Performance of Required Discovery Work. Thereafter, on December 12, 1951, the Bureau of Land Management of the United States entered into a contract with petitioners to sell them 290,000 board feet of Ponderosa pine then standing on the land described in said notice of location and petitioners went upon said land and cut and removed all merchantable standing timber. Thereafter, on July 11, 1952, O'Leary and Moore filed an action in the Superior Court against petitioners for trespass and damages. On August 7, 1952, the Bureau of Land Management of the Department of the Interior of the United States served O'Leary and Moore with a Notice of Contest as to the validity of their entry upon the land in question under their unpatented placer mining claim, alleging that the land was non-mineral in character and minerals had not been found within the limits of the claim in sufficient quantities to constitute a valid discovery. Then followed the proceedings described in the petition and answer, and hereinbefore set forth.

It is the position of petitioners that the Bureau of Land Management having filed a contest of the mining location of the real parties in interest, and said contest not having been finally determined, the respondent Superior Court should not proceed to trial in the action filed by the real parties in interest. They argue that a final determination by the Bureau of Land Management that the land covered by the mining location of the Kay mining claim was non-mineral in character and that minerals had not been found on it in sufficient quantities to constitute a valid discovery would prevent any recovery by O'Leary and Moore in their action against petitioners.

Respondent and the real parties in interest in reply contend that O'Leary and Moore had a valid placer mining claim and that petitioners without right trespassed upon said claim and cut and removed the timber therefrom.

In the instant proceeding which is merely to stay further proceedings in the respondent Superior Court until the validity of the said placer mining location has been finally determined by the Bureau of Land Management of the Department of Interior of the United States, we cannot pass upon the issues involved in the case before the Superior Court or upon the issues involved in the proceeding before the Land Department.

[1,2] It appears that O'Leary and Moore posted a Notice of Location of the Kay Placer Mining Claim on June 13, 1950, and recorded same. Eighteen months

afterward the Bureau of Land Management entered into an agreement with petitioners for the sale of the standing timber on said land and petitioners went upon said land and removed said standing timber. It seems somewhat strange that the Bureau would enter into such an agreement when the notice of location was posted on a tree on said land (as appears from the exhibits), and was recorded in the office of the County Recorder, before the validity of the mining location was either attacked or its invalidity determined. For as was stated in Watterson v. Cruse, 179 Cal. 379, at page 382, 176 P. 870, at page 872:

> "* * * While the paramount fee remains in the government until it has issued its patent, yet as to every one else—'the estate acquired by a perfected mining location possesses all the attributes of a title in fee, and so long as the requirements of the law with reference to continued development are satisfied, the character of the tenure remains that of a fee.' 2 Lindley on Mines, 3d(Ed.) § 539; Merritt v. Judd, 14 Cal. 59; Hughes v. Devlin, 23 Cal. 501; Buchner v. Malloy, 155 Cal. 253, 100 P. 687." See, also, Chittim v. Belle Fourche Bentonite Products Co., 60 Wyo. 235, 149 P.2d 142, 148.

And as this Court said in Smpardos v. Piombo Construction Co., 111 Cal.App.2d 415, at page 419, 244 P.2d 435, at page 438:

> "* * * Under the authorities cited, the locator of a mining claim has the right to the exclusive use of the surface of said mining claim, and if someone else dispossesses him and makes use of the surface of said claim we see no escape from the conclusion that the trespasser is liable for the reasonable value of the use of said property, together with any other damage that said trespasser may have caused to the locator. If this were not so the locator's right to the possession of his claim would indeed be a precarious one."

[3] It would seem to us that the correct and orderly procedure would have been to contest the validity of the mining location and have the contest determined before authorizing the removal of the timber therefrom. In the instant case the Government did not file any contest of the mining location of O'Leary and Moore until after they had filed their action in respondent court against petitioners. However, we are not here concerned with the propriety of the action of the Bureau of Land Management. It is conceded that they did have the right to contest the validity of the mining location of O'Leary and Moore and that the Bureau of Land Management has authority to pass upon the validity of said mining location. The contest having been filed by the Bureau of Land Management, the question of whether or not the land was mineral in character or whether there had been a sufficient discovery of mineral to characterize the land as mineral are questions of fact to be determined by the General Land Office, Johnson v. Drew, 171 U.S. 93, 18 S.Ct. 800, 43 L.Ed. 88; Cameron v. United States, 252 U.S. 450, 40 S.Ct. 410, 64 L.Ed. 659; 36 Am.Jur., Mines and Minerals, § 13, and the final decision of General Land Office upon the mineral or non-mineral character of land is conclusive. As stated in Gage v. Gunther, 136 Cal. 338, at pages 343–344, 68 P. 710, at page 712:

> "The land department of the United States has been created as the tribunal for determining the right under the laws of the United States of any person to receive a patent for any of the public lands, and that tribunal is vested with jurisdiction to determine all questions of fact that may arise in any controversy respecting such right. As a necessary result therefrom, the determination by this tribunal of any question of fact is conclusive upon all other tribunals wherever such questions may be presented. The character of the land, whether it is subject to entry under the laws invoked therefor, the qualifications of the entryman, the extent of the improvement or reclamation made by him, whether such improvement is a sufficient compliance with the statutory provisions for entitling him to a patent, or whether it

> has been made within the time prescribed by statute, or, if not, whether the reasons offered by him are sufficient to condone such failure, or any default on his part, whether he has been guilty of laches, or exercised sufficient diligence,—are all questions of fact, to be submitted to and determined by the land department, and the issuance of a patent for the land is a final determination by that tribunal of the existence of all facts depending upon testimony which are necessary to entitle him to the patent, and, in the absence of fraud, mistake, or imposition, such facts are not subject to a re-examination in any other tribunal."

[4] Respondent and the real parties in interest have cited numerous cases in which the state courts have, in proceedings involving the possession of a mining claim, decided the question of the character of the land, the sufficiency of the discovery and the validity of the claims. But these were all controversies between different claimants through different notices of location. In such cases the United States Government was not a party and nothing in such cases could affect the rights of the government as the owner of the paramount title. Here the United States Government is contesting the validity of the mining location, and a finding by the respondent court contrary to the final decision of the Land Department would be of no effect. Under such circumstances we do not believe that the respondent court should proceed with the trial of the action by O'Leary and Moore against petitioners until the Government's contest of the mining location has been finally determined.

The case of Potter v. Randolph, 126 Cal. 458, 58 P. 905, is quite similar in principle to the instant proceeding. Plaintiff brought a quiet title action against defendants. Plaintiff claimed title from the United States under a commuted homestead entry, and a duplicate receipt for a patent dated prior to the commencement of the action. At the time of the action there was a contest pending before the government as to whether the land in question was more valuable for mineral than for agricultural purposes. There the trial court held the proceedings before it in abeyance until a final determination had been made by the Land Department, and then quieted title in the plaintiff, basing its judgment upon the determination of the issues before the Land Department. Defendant appealed, contending that the trial court should have, upon their motion, dismissed the action because it had no jurisdiction to try the cause a special tribunal having been created by Congress to determine such matters exclusively. In upholding the action by the trial court the Supreme Court stated at pages 461–462 of 126 Cal., at page 906 of 58 P.:

> "* * * The land department of the United States is not a special tribunal organized to determine who is the owner of land. The department is the medium through which parties may acquire the title of the United States. Its functions are mostly administrative, and only incidentally judicial. It determines the existence or non-existence of alleged facts, to enable it to select the person who is entitled to purchase. The proceeding is to acquire title, not to determine who has it. The title, when acquired, will, however, for many purposes, date back to the first step in the procedure. The court very properly then delayed the trial until the question as to the character of the land was determined by the land department, which alone had the power to decide that controversy. The court had jurisdiction of the action, but could not try that particular controversy which was involved in the action. * * *
>
> * * * * * *
>
> "The land department having decided that the land was more valuable for agricultural than for mining purposes, the court was bound by the conclusion, and properly refused to consider the evidence upon that subject offered by defendants."

In view of the foregoing we have concluded that action No. 7350, filed by O'Leary and Moore v. Wetsel, et al. in the Superior Court, should not be tried until the contest by the Government of the placer mining claim located by O'Leary and Moore has been determined, and it is therefore ordered that proceedings in said action be stayed until the United States of America has rendered a final decision as to the validity of the placer mining claim location of O'Leary and Moore.

VAN DYKE, P. J., and PEEK, J., concur.

119 Cal.App.2d 831

In re NOONAN'S ESTATE.

MURPHY et al. v. KATZ et al.

Civ. 15186.

District Court of Appeal, First District, Division 2, California.

Aug. 24, 1953.

Estate proceeding involving question whether certain alleged first cousins were entitled to inherit from decedent's estate. The Superior Court, City and County of San Francisco, entered decree determining that such persons were not first cousins of decedent, and alleged first cousins appealed. The District Court of Appeal, Dooling, J., held that where newly discovered evidence, in form of affidavit of relative who had no pecuniary interest in case, disclosed that opponents who had each introduced evidence tending to deny relationship of other to decedent had visited one another at home of their spinster aunt and relationship of alleged first cousins to decedent was corroborated by other evidence, justice required that such newly discovered evidence should be considered by court in reaching ultimate decisions.

Decree reversed.

1. Appeal and Error ⇨989

The weighing of evidence is function of trial judge and appellate court is powerless to usurp that office however strongly it may feel that had it been in place of trial judge it would have decided conflicts in evidence otherwise.

2. New Trial ⇨102(1)

The law requires a strong showing of diligence in order to justify the granting of motion for new trial on ground of newly discovered evidence.

3. New Trial ⇨102(3)

Where attorney for an alleged first cousin of decedent was informed of possible existence of surviving cousins of decedent, prosecuted inquiries for over 2 months and learned that cousins were dead but that one had left surviving a daughter, procured execution of affidavit based on daughter's information relative to relationship of alleged first cousin to decedent, there had been sufficient showing of diligence to justify granting of new trial, in estate proceeding involving question whether certain persons were first cousins of decedent.

4. New Trial ⇨104(1)

A new trial may be denied where newly discovered evidence is merely cumulative.

5. Courts ⇨87

It is the primary function of courts to see that justice is done among litigants.

6. New Trial ⇨108(2)

In estate proceeding involving question whether alleged first cousins were entitled to inherit from decedent's estate, where after determination that such persons were not first cousins, newly discovered evidence in form of affidavit of relative who had no pecuniary interest in case, disclosed that opponents who had each introduced evidence tending to deny other's relationship to decedent had visited one another at home of their spinster aunt and relationship of alleged first cousin was corroborated by other evidence, justice required that newly discovered evidence should be considered by probate court in reaching ultimate decision.

◆

Andrew F. Burke and Henry J. O'Connor, San Francisco, for appellants.

Lamson, Jordan & Walsh, San Francisco, for respondents.

DOOLING, Justice.

On this appeal the appellants attack the determination of the probate court that they are not first cousins of the decedent on his mother's side and hence equally entitled to inherit with the three respondents who are first cousins, two on his father's and one on his mother's side.

The decedent, John David Noonan, died intestate with no nearer relatives surviving him than first cousins. In proof of her claim of heirship respondent, Agnes Sullivan Coffey, submitted an affidavit in which she stated that she was the daughter of Catherine Murphy Sullivan, and the granddaughter through her mother of John Murphy and Mary Hayes Murphy; and that the decedent was the son of Mary Murphy Noonan, who was the sister of affiant's mother and the daughter of John Murphy and Mary Hayes Murphy. She listed as the only children of her said grandparents six persons, the other four being named as Margaret Murphy, who "died a spinster in Oswego some time around 1925"; William Murphy, "who died many years ago in Iowa"; Ellen Murphy Regan; and "——— Murphy, (male) who died a great many years ago in Ireland leaving no issue." She stated that Ellen Murphy Regan had nine children, Mary, Adelaide, Joseph, William, Margaret and Dennis, all of whom died in Oswego; Katherine, who died in Rochester; and Harriet and Ella, who died in Minnesota. She listed one brother and four sisters, the children of her own mother and father, four of whom died in Oswego, the latest, Mary, in 1930.

The appellant Margaret Murphy O'Kennedy in her affidavit claimed a descent with the decedent from common grandparents, Jeremiah Murphy and Mary Ellen Hayes (also spelled Heas) Murphy. She listed eight children as having been born to these grandparents: Mary Murphy Noonan, the mother of the decedent; John Murphy, the father of the affiant and of Ellen Murphy (another of the appellants), living in Ireland, and of two other children deceased; William Murphy who died without issue in Iowa"; Catherine Murphy who "died in infancy"; Margaret Murphy who "never married and died at Oswego, New York, on May 17, 1921"; Ellen Murphy Regan; Anne Murphy Sullivan; and Timothy Murphy. As children of Timothy Murphy living at the time of decedent's death (all in Ireland) she listed Anne Murphy Sheehan, Timothy Murphy, Elizabeth Murphy McCarthy and Jeremiah Murphy (since deceased). She also named two children of Ellen Murphy Regan: Kate Regan Lewis who "died at Rochester, New York", and Dennis J. Regan, who "died at Oswego, New York."

It will be seen from a comparison of the testimony contained in these two affidavits that while they coincide remarkably in many particulars, they each exclude the possibility of heirship in the other. The name of the grandfather given by Mrs. Coffey is "John"; the name of the grandfather given by Mrs. O'Kennedy is "Jeremiah". The names of the grandmother "Mary Hayes" and "Mary Ellen Heas" or "Hayes" are not necessarily inconsistent, especially when we remember the penchant of the Irish for pronouncing "tea" as "tay". While Mrs. Coffey lists a "——— Murphy, (male)", who might be the John Murphy who is Mrs. O'Kennedy's father, she asserts that he "died a great many years ago in Ireland leaving no issue", which, if believed, would exclude Mrs. O'Kennedy. While Mrs. O'Kennedy lists a Catherine, which is the name given to her mother by Mrs. Coffey, Mrs. O'Kennedy asserts that Catherine "died in infancy", which, if believed, would exclude Mrs. Coffey. Likewise no Timothy is found in Mrs. Coffey's affidavit, unless it be "——— Murphy (male)" who "died without issue", thus excluding the four appellants, children of Timothy; and the Anne Murphy Sullivan listed by Mrs. O'Kennedy, does not appear among the children of her grandparents listed by Mrs. Coffey.

The similarities in other respects, however, are equally striking. Both have a spinster Aunt Margaret Murphy who died in Oswego in the 1920's; both have an Aunt Ellen Murphy Regan and each coincide in the names and place of death of two of her children, Katherine or Kate who died in Rochester and Dennis, who died in Oswego; the five Christian names given by both as children of the grandparents Murphy are the same and both agree that William died in Iowa. Were this all of the evidence we would be bound under the conflict of evidence rule to accord finality to the finding of the probate judge in favor of Mrs. Coffey and against the appellants, despite the similarities in the two affidavits above pointed out.

However, appellants, in addition to the affidavit of Mrs. O'Kennedy, introduced the affidavits of two daughters of Dennis Regan, Emma Regan O'Brien and Mary Regan Belknap. Before dealing with these affidavits we reiterate that both Mrs. O'Kennedy and Mrs. Coffey listed among their aunts Ellen Murphy Regan and both agreed that Ellen Murphy Regan had a son Dennis Regan, who died in Oswego, New York.

Through her affidavit Emma Regan O'Brien deposed that she is a daughter of Dennis J. Regan, who died in Oswego on April 22, 1924; that the parents of her father were Jeremiah Regan and Ellen Murphy Regan; that her grandmother, Ellen Murphy Regan, had a sister, Margaret Murphy, who resided in Oswego, who never married and died in Oswego on May 17, 1921. She frequently discussed with her grandaunt, Margaret Murphy, the family history and knows that she had a sister, Catherine Murphy, who married a man named Sullivan and had a daughter, Agnes Sullivan, who married a man named Coffey; that she had a sister who married William Noonan and was the mother of John David Noonan, the decedent; that she had three brothers, Timothy, William and John; that John married a woman named Julia Shanahan or O'Shannon and had two living children, Ellen Murphy in Ireland and Margaret Mary Murphy who married O'Kennedy. The affidavit of Mary Regan Belknap was to like effect adding that she was the administratrix of the estate of her grandaunt, Margaret Murphy, and that from information given by said Margaret Murphy "I know as part of the history of the immediate family of my paternal grandmother, Ellen Murphy Regan, that Mary Murphy Noonan, mother of John David Noonan, the decedent above named, was a sister of my said grandmother, and of my said grandaunt, Margaret Murphy, and that she had a sister Catherine Murphy, who married a Mr. Sullivan and was the mother of Agnes Sullivan, who later married a Mr. Coffey; also that said Mary Murphy Noonan had three brothers, to wit: Timothy Murphy, William Murphy and John Murphy, and * * * John Murphy married Julia 'Shanhan' or 'O'Shannon', and had two living children, who were Ellen Murphy * * * and Margaret Murphy, who married John Joseph Karby O'Kennedy * * *."

[1] These affidavits, if believed, establish without question that appellants O'Kennedy and her sister Ellen Murphy are first cousins of respondent Coffey and of the decedent. Appellants argue that these two affiants are disinterested witnesses, being cousins once removed of the decedent and hence not entitled to inherit from him, that their testimony is unimpeached and uncontradicted and it was an abuse of discretion for the probate judge to disregard it. Respondents reply that their testimony is not only inconsistent with the affidavit of respondent Mrs. Coffey but equally with the affidavit of appellant Mrs. O'Kennedy; and it is obvious that if the affidavits of Mrs. O'Brien and Mrs. Belknap are correct the affidavits of Mrs. O'Kennedy and Mrs. Coffey are both false in certain particulars. The weighing of evidence is the function of the trial judge and on appeal we are powerless to usurp that office however strongly we may feel that had we been in his place we would have decided the conflicts otherwise.

However on motion for new trial the appellants produced for the first time the affidavit of a third witness, Ruth Miller Laing, and asked the court to grant a new trial on the ground of newly discovered evidence. As to the facts leading to the discovery of Ruth Miller Laing, Mr. Andrew F. Burke, one of appellants' attorneys, filed an affidavit in support of the motion for new trial in which he deposed that in a letter from Mrs. O'Brien dated December 12, 1950 he was informed that Mrs. O'Brien had a maternal aunt, Anne Murphy, who married one Sullivan and had three daughters the issue of her marriage with Sullivan, two of whom might be living. "This was the first information I had ever received of the fact that Anne Murphy, maternal aunt of the decedent, had left any children surviving her. * * * Recognizing the fact that if any of said daughters of said Anne Murphy Sullivan had survived the decedent, she would be a first cousin of the decedent, and, as such, be an heir of the decedent, I, immediately * * * commenced an investigation to ascertain whether either of the two daughters of said Anne Murphy Sullivan, not known by Mrs. O'Brien to be living or dead * * * was actually living or dead. I prosecuted my inquiries * * * for more than two months and finally in the early part of February, 1951, I learned (that the daughters were dead) * * * also, that the second of said daughters, Anne Sullivan Miller, had died in 1921, but had left her surviving a daughter Ruth Miller Laing. After further investigation and inquiry, I learned in the latter part of February 1951, that said Ruth Miller Laing was living in Fairfield, Connecticut. I immediately got in touch with her, and through the aid of information supplied by her, I prepared an affidavit for execution by her * * * I did not learn of the facts stated in said affidavit of said Ruth Miller Laing, nor even know of the existence of said Ruth Miller Laing * * * prior to the making of the court's decision * * * or the making of the final decree of distribution * * * and could not reasonably have learned either of said facts or of the existence of said Ruth Miller Laing prior to any of said happenings."

[2, 3] We have quoted at such length from Mr. Burke's affidavit because of the strong showing of diligence which the law requires to justify the granting of a motion for new trial on the ground of newly discovered evidence. 20 Cal.Jur., New Trial, § 59, p. 84. Under the circumstances of this case we are satisfied that Mr. Burke's showing of diligence is sufficient.

[4] The affidavit of Mrs. Laing shows her to be the daughter of Anne Sullivan Miller who in turn was the daughter of Anne Murphy Sullivan. It asserts that Agnes Sullivan Coffey (respondent herein) is the daughter of Catherine Murphy Sullivan and that Margaret Murphy O'Kennedy (appellant herein) is the daughter of John Murphy; that John Murphy (Mrs. O'Kennedy's father) was a brother of affiant's grandmother, Anne Murphy Sullivan; that Agnes Sullivan Coffey's mother, Catherine Murphy Sullivan, was a sister of the same grandmother and that Mrs. O'Kennedy and Mrs. Coffey are first cousins of one another and of the decedent, John David Noonan. So far this affidavit is only cumulative of those of Mrs. O'Brien and Mrs. Belknap and falls under the settled rule that a new trial may be denied where the newly discovered evidence is merely cumulative. 20 Cal.Jur., New Trial, § 62, p. 94.

However the affidavit of Mrs. Laing contains other evidence not theretofore before the court which impresses us as highly important in character. We quote from her affidavit: "prior to her marriage, said Margaret Murphy O'Kennedy lived in Oswego, New York, with a maiden aunt, Margaret Murphy, who was a sister of her father and was a sister, also, of my maternal grandmother, Anne Murphy Sullivan; also that while said Margaret Murphy (later O'Kennedy) was living with her aunt, Margaret Murphy, said Mary Sullivan Keefe (sister of said Agnes Sullivan Coffey) lived just a block away from the home of said Margaret Murphy, in Oswego, New York, and that she and her sister, Agnes Sullivan Coffee (sic), frequently visited the home of said Margaret Murphy and there met their cousin, Margaret Murphy (later O'Kennedy), and that both of them were well acquainted with said Margaret Murphy (later O'Kennedy)."

Thus through this newly discovered evidence the two opponents, Mrs. O'Kennedy and Mrs. Coffey, are brought together face to face as cousins visiting with one another at the home of their spinster aunt, Margaret Murphy. Whatever shadow of doubt might have existed as to whether the spinster aunt Margaret of each was the same person, or if the same person whether one or the other was falsely claiming her as an aunt, is thereby resolved.

There are many features of the case which tend to corroborate the appellant's witnesses, of which we will here mention only the following: The Murphy family of Mrs. O'Kennedy and Mrs. Coffey revolves about Oswego. Not only the spinster Aunt Margaret, but the claimants Mrs. O'Kennedy and Mrs. Coffey, and many of the other relatives mentioned by each lived at one time or died in Oswego. The cousins Harriet and Ella Regan mentioned by Mrs. Coffey as having died in Minnesota were the aunts of the witnesses Mrs. O'Brien and Mrs. Belknap, were at the funeral of the mother of the decedent, John D. Noonan, and are mentioned in a newspaper account of her funeral: "Among those from a distance attending the last sad rites were * * * her nieces, the Misses Ella L. and Harriet B. Regan of Minneapolis." Furthermore the bridesmaid at Mrs. O'Kennedy's wedding in Oswego was Katherine D. Keefe, identified as a niece of Mrs. Coffey's, the daughter of her sister Mary.

[5, 6] Absent wholesale perjury of a group of witnesses with no pecuniary interest, of which we can find no evidence in the record, the proof of appellants' relationship to respondent Mrs. Coffey and to the decedent, when the additional facts sworn to by Mrs. Laing are added to those already in the record, appears almost overwhelming. It is the primary function of the courts to see that justice is done among litigants and an examination of this record so strongly suggests that justice has not been done in this case that the newly discovered evidence should be considered by the probate court in reaching its ultimate decision. Otherwise it appears that a grave injustice may be worked on the appellants. We content ourselves, as expressing our conclusion, with a quotation from Spiers v. Spiers, 176 Cal. 557, 563, 169 P. 73, 75: "While this court seldom interferes with the discretion of the trial court in denying a motion for a new trial for newly discovered evidence, yet, in view of the peculiar nature of the question involved, we believe this to be one of the exceptional cases in which the action of the court below in refusing a new trial should be overruled." See also Bowler v. Roos, 213 Cal. 484, 2 P.2d 817; Blewett v. Miller, 131 Cal. 149, 63 P. 157; Spear v. United Railroads, 16 Cal.App. 637, 117 P. 956.

The decree appealed from is reversed.

NOURSE, P. J., concurs.

---

119 Cal.App.2d 863

PEOPLE v. SILVA.

Cr. 940.

District Court of Appeal, Fourth District, California.

Aug. 25, 1953.

Hearing Denied Sept. 24, 1953.

Defendant was convicted of grand theft. The Superior Court of Orange County, Robert Gardner, J., entered judgment and also order denying new trial, and defendant appealed. The District Court of Appeal, Barnard, P. J., held that evidence was sufficient to sustain conviction.

Judgment and order affirmed.

1. False Pretenses 🔑49(1)

Evidence was sufficient to sustain a conviction for grand theft.

2. Criminal Law 🔑406(1)

In prosecution for grand theft, where most of evidence, including contracts with bank and sales contracts turned over to bank, upon which prosecution was based, and testimony of persons involved in each of such transactions, had been received before evidence of defendant's admissions was offered, admission in evidence of such admissions without otherwise establishing the corpus delicti did not constitute prejudicial error.

3. Criminal Law 🔑870

Where evidence sustained conviction for grand theft, motion for an advisory verdict was properly denied.

4. Criminal Law 🔑371(3, 12), 372(9)

In prosecution for grand theft, testimony, which was given by 10 witnesses who were involved in other offenses not involved in prosecution, but which covered period of time involved in offenses upon which prosecution was based, were properly admitted as tending to show motive, scheme, plan, or system and defendant's intent.

5. Criminal Law 🔑814(15)

In prosecution for grand theft involving contracts with bank and sales contracts assigned to bank, evidence did not warrant giving of refused instruction that witnesses, who had signed various contracts as purported purchasers, were accomplices as matter of law.

6. Criminal Law 🔑511(7)

In prosecution for grand theft based on defendant's contracts with bank and sales contracts assigned to bank, even if witnesses, who had signed various contracts as purported purchasers were accomplices, their testimony was sufficiently corroborated by extrajudicial admissions of defendant.

7. Criminal Law 🔑829(3)

In prosecution for grand theft based upon defendant's contracts with bank and sales contracts assigned to bank, refusal to give defendant's requested instructions that false pretense must relate to past or existing fact and not to promise to perform in future and that defendant must not be found guilty if notes executed by purchasers, under such contracts, were binding upon them, or if bank had made and relied upon its own investigation before crediting any funds to defendant's concern was not error in view of other instructions given.

8. Criminal Law 🔑673(5)

In prosecution for grand theft, evidence warranted instruction which explained that evidence of other crimes had been received for limited purpose only, explained such purpose, and told jury that such evidence must not be considered for any other purpose.

Meyer & Dreizen, Santa Ana, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with nine separate counts of grand theft. He pleaded not guilty to each count and later was allowed to change his plea by pleading guilty to three of the counts. Still later, he was permitted to again change his plea and pleaded not guilty as to all counts. The jury found him guilty as charged on six counts, and not guilty on the other three. His motion for a new trial was denied, judgment was entered sentencing him to prison on each of the six counts, the sentences to run concurrently. He has appealed from the judgment and from the order denying a new trial.

The appellant was the president of a corporation which he and three other men organized. No stock was issued, no directors' meetings were held, and two of the other men dropped out. The firm, which was then apparently operated as a partnership by the appellant and one of the other men, sold appliances and did some construction work. In the spring of 1951, an agreement was signed by a bank and the appellant as president of this corporation, by which the bank agreed to purchase conditional sales contracts and other evidences of debt representing the sales of new merchandise and services, and the corporation agreed, among other things, that all contracts offered to the bank would be valid contracts with bona fide purchasers; that the articles covered had been delivered and completely installed; and that all things would be as represented in the contracts offered to the bank. In October, 1951, another document of a similar nature was signed by the bank and the appellant as president of the corporation, providing for similar warranties.

A number of such conditional sales contracts were assigned to the bank by the appellant, and accepted, the proceeds being credited to the corporation's account in the bank. All of the counts of the complaint involved transactions of that nature except one, in which the contract sold to the bank purported to be one whereby the corporation agreed to do certain work in the remodeling of a house on specified terms and with a specified down payment. It was the theory of the prosecution that the appellant thus secured funds for the use of the corporation by fraud in thus representing to the bank that the merchandise described in the conditional sales contracts had been delivered to the purchasers; and that, with respect to the construction contract he represented that the work contracted for had been completed. It was the theory of the defense that the bank made an independent investigation with respect to the purchasers named in the conditional sales contracts, and did not rely on the representation made by the appellant; that the debts represented by the conditional sales contract were valid obligations of the purchasers, and the bank could have collected thereon; that the bank held on reserve a certain amount of money belonging to the corporation; and that the transactions showed no intent to defraud on the part of the appellant.

It would serve no useful purpose to review all of the evidence with respect to the individual counts. It conclusively appears that the appellant signed and turned over to the bank, under the previous written agreement, the five conditional sales contracts here involved and received credit for the balances appearing to be due thereon. These contracts had all been signed by the ostensible purchasers of the appliances but none of the appliances described were ever delivered to the supposed purchasers. In most instances, some of the blank spaces had not been filled in when the supposed contracts were delivered to the appellant by the persons who signed them, and the blanks were filled in before the appellant delivered them to the bank. In one instance, one appliance was substituted for another in the contract. In one instance the purchaser ordered a freezer of a certain make, the appellant's firm had never had a freezer of that make, and the distributor of that freezer had never sold one with the serial number which was inserted in the contract. Most of the contracts listed down-payments when no down-payment had been made. In one instance, the purchaser cancelled his order but the contract was turned into the bank. When the purchaser received the payment book from the bank he gave it to the appellant and the appellant told him that he had used the money and was going to make the payments himself. The purchaser never made any payments but the bank records showed that six monthly payments were made. Another purchaser had not received the merchandise and when he received the payment book from the bank he gave it to the appellant and the appellant said he would make the payments. The evidence clearly indicates that the misrepresentations made in all five of these incidents were knowingly made by the appellant. In the other count, involving the construction contract, it appears from the appellant's testimony, as well as from the other evidence, that it was never intended that appellant's firm should do any of the work involved. The owner of the house was a friend of the appellant, and the appellant intended to get the money from the bank through the use of this contract and other documents, and loan the money to the friend as it was needed. The appellant sold the papers to the bank and furnished the bank a certificate signed by his friend stating that the work had been completed. He did this with full knowledge that the work had not yet been done, and while he received a credit of $2500 from the bank he gave his friend $800 only, and testified that he was unable to make later payments which he intended to make.

In addition to the transaction involved in the various counts of the complaint evidence was received of ten other incidents of a similar nature. While some of the circumstances varied in details, almost exactly the same plan of operation was disclosed therein.

Prior to the trial the appellant, on two occasions, made voluntary statements to members of the district attorney's staff. He admitted that he had signed the agreements with the bank, that he understood that the bank bought his contracts with the understanding that the merchandise had been delivered to the purchasers, and that he had inserted certain things in the contracts. He further stated that when his company was short of cash he arranged with some of his salesmen to have them sign contracts so he could get money from the bank on them, and intended to pay the bank back when he had the money; that some of the contracts were signed in blank and he filled them out, took them to the bank and got the money; that the material mentioned in the contracts was not delivered to the salesmen and it was never intended that it should be; that he turned in one contract without knowing whether or not the merchandise had been delivered; that in the case of another contract the corporation was not supposed to deliver the appliance; that he made some payments on several of the contracts; that on several of the transactions he had a criminal intent; that on some of the contracts he filled in blanks without knowing whether the goods had been delivered or not; that he offered to run the construction contract through the bank and give his friend the proceeds but after one payment he was unable to send any more; that the balance went into his company; and that he knew the work had not been finished when he delivered the completion certificate to the bank. The appellant's testimony at the trial also confirms many of the material facts involved, and in other respects clearly justifies inferences which support those facts.

The appellant first contends that the evidence was not sufficient to support the verdicts. It is argued that no intent to defraud appears; that no false representation was made as to past and existing facts; that the bank made an independent investigation and therefore did not rely on any representation made by the appellant; that the evidence did not show any representation that the merchandise had been delivered to the purchasers; that the conditional sales contracts merely stated that the merchandise had been accepted by the purchaser; that the conditional sales contracts were valid and enforceable against the persons who signed them; that the bank collected some payments on the contracts and could have proceeded against the purchasers for the rest of the amounts due; and that if any crime was committed the purchasers involved in the counts on which he was convicted were all accomplices, and their testimony was not corroborated by any other evidence except by the testimony of other accomplices.

[1] None of these contentions are sustained by the record. While some slight investigation was made by the bank as to the credit standing of some or all of the supposed purchasers, no investigation was made with respect to whether or not the merchandise had been delivered. There was ample evidence that the bank relied on the representation that delivery had been made in accordance with the written agreement, and did not exclusively rely on the possibility of any other source of payment. It can hardly be said that the various contracts were valid and enforceable when the goods contracted for were not delivered, and when many of them were signed with a complete understanding that nothing was being purchased. Assuming that some of the supposed purchasers were accomplices their testimony was sufficiently corroborated by the voluntary admissions of the appellant, by his testimony at the trial, and in part by other evidence. The verdict was further supported by evidence of the appellant's admissions and by some of his testimony, with the reasonable inferences therefrom. The matters relied upon by the appellant in this connection constitute, at best, mere conflicts in the evidence.

[2, 3] Appellant's further contentions that the court committed prejudicial error in admitting the admissions of the defendant without otherwise establishing the corpus delicti, and in not granting his motion for an advisory verdict require little consideration. Most of the evidence, including the contracts with the bank, the sales contracts turned over to the bank, and the testimony of persons involved in each of

the transactions, was received before the evidence of admissions by the appellant was offered. The evidence being sufficient to support a conviction, the motion for an advisory verdict was properly denied.

[4] It is next contended that the court erred in refusing to strike the testimony of some ten witnesses who were involved in the other offenses of which evidence was received. It is argued that this evidence had no bearing on the issues involved in this case, and that the testimony of some of these witnesses varied in some details from the facts testified to by the witnesses directly involved in these charges. These witnesses testified with respect to similar transactions taking place between August, 1951, and February, 1952, the same period of time covered by the charges involved in the various counts of the complaint. Such evidence was admissible as tending to show motive, scheme, plan or system, and on the issue of intent. No question of remoteness was involved and no error appears in the court's rulings in that connection.

[5, 6] Several objections are raised with respect to the instructions. It is first contended that the court erred in refusing to instruct the jury that the witnesses who had signed the various contracts, as purported purchasers, were accomplices as a matter of law. No evidence is pointed out which would justify the giving of that instruction. The most that can be said is that there is a conflict in this regard, with respect to some of such witnesses. The instruction was properly refused, and the court submitted to the jury under proper instructions the question as to whether such witnesses were accomplices. Moreover, aside from other matters, the testimony of the accomplices, if such they were, was sufficiently corroborated by the extrajudicial admissions of the appellant.

[7] It is next contended that the court erred in not giving three instructions requested by the appellant. These instructions were to the effect that in such a case a false pretense must relate to a past or existing fact, and not merely to a promise to perform some act in the future; that the defendant must be found not guilty if the jury found that the notes executed by the purchasers were binding upon them; and that he must be found not guilty if it was found that the bank made and relied upon its own investigation before crediting any funds to the account of the corporation. These instructions were refused as covered, and were sufficiently covered by an instruction given which fully explained that the false pretense involved must be a fraudulent representation of an existing or past fact, that the representation made must be relied on, and that if the other party makes an independent investigation and relies thereon rather than on any representation made to him by the accused person, the latter would not be guilty of obtaining such property by means of false representation or pretense. The instructions, as a whole, were sufficient to cover the issues as presented by the evidence, and no prejudice appears.

[8] Complaint is further made of an instruction which explained that evidence of other crimes had been received for a limited purpose only, explaining that purpose, and telling the jury that such evidence must not be considered for any other purpose. The objection raised is that the instruction failed to specify what such other crimes were, and was prejudicial to the appellant because the matters testified to by such witnesses were not crimes, as was inferred by the instruction. The instruction was called for by the evidence produced, the nature of the acts shown by the testimony was fully apparent to the jury, and no possible prejudice appears.

The judgment and order are affirmed.

MUSSELL, J., concurs.

SCHWARTZ v. SLENDERELLA SYSTEMS OF CALIFORNIA, Inc.*

Civ. 19671.

District Court of Appeal, Second District, Division 1, California.

Aug. 27, 1953.

Hearing Granted Oct. 22, 1953.

Action by oLs Angeles retailer of apparel for women of more than average proportions against operator of reducing salons in Pasadena and Beverly Hills to restrain operator's use of trade-name used by retailer. The Superior Court of Los Angeles County, Arnold Praeger, J., entered judgment adverse to retailer, and retailer appealed. The District Court of Appeal, Robert H. Scott, J. pro tem., held that use by operator of trade-name "Slenderella" through permission of assignee of holder of U. S. patent trade-mark covering such word, did not constitute infringement of retailer's prior use of such term.

Judgment affirmed.

1. Trade-Marks and Trade-Names and Unfair Competition 🔑70(3)

In interest of fair dealing, courts of equity will protect person first in field doing business under a given name to extent necessary to prevent deceit and fraud upon his business and upon public. Business and Professions Code, § 14400.

2. Trade-Marks and Trade-Names and Unfair Competition 🔑68(1)

No inflexible rule can be laid down concerning what conduct will constitute unfair competition, and each case is, in a measure, law unto itself, but universal test question is whether public is likely to be deceived. Business and Professions Code, § 14400.

3. Trade-Marks and Trade-Names and Unfair Competition 🔑75

Before equity will grant its aid, on ground of existence of unfair competition, there must be some connection between products in question and reasonable likelihood of confusion, since there is always a remote possibility of some confusion arising from use of same word in connection with different businesses.

4. Trade-Marks and Trade-Names and Unfair Competition 🔑70(3)

Use by operator of reducing salons in Pasadena and Beverly Hills of trade-name "Slenderella", through permission of assignee of holder of U. S. patent trade-mark covering such word, did not constitute infringement of retailer's prior use of such term in his business of selling, in Los Angeles, of apparel for women of more than average proportions. Civ.Code, §§ 2466, 2468; Business and Professions Code, § 14400; Code Civ.Proc. § 1960, subd. 2.

5. Trade-Marks and Trade-Names and Unfair Competition 🔑98

Where goods, services or businesses of litigants are not in actual competition, junior appropriator of trade-mark or tradename or trade symbols ordinarily is not actually diverting custom and trade from complaining party, and, therefore, diversion of trade and resulting direct loss of sales or actual monetary loss cannot be basis of relief. Business and Professions Code, § 14400.

6. Trade-Marks and Trade-Names and Unfair Competition 🔑93(3)

In action by Los Angeles retailer of apparel for women of more than average proportions against operator of reducing salons in Pasadena and Beverly Hills to restrain operator's use of tradename used by retailer, evidence was sufficient to sustain trial court's conclusion that showing had not been made that operator's activities would prove detrimental to good name and reputation of retailer because of economic instability of defendant. Business and Professions Code, § 14400.

◆

Samuel Maidman, Los Angeles, for appellant.

Newlin, Holley, Tackabury & Johnson, and Hudson B. Cox, Los Angeles, for respondent.

ROBERT H. SCOTT, Justice pro tem.

Plaintiff appeals from an adverse judgment in an action in which he sought an injunction to restrain defendant corporation from using the name "Slenderella". The facts are not in dispute and both parties state that they are as follows:

Ever since July 13, 1939, appellant has been engaged in the business of selling women's apparel at retail at two locations in the City of Los Angeles, County of Los Angeles, State of California, operating under the tradenames "Slenderella" and "Slenderella of Hollywood". Appellant specializes in and sells large and half-size women's apparel and accessories. Large-size garments are specially designed for the woman of more than average or standard proportions, and half-size are specially designed for the short, heavy-set woman.

---

* Subsequent opinion 271 P.2d 857.

On July 14, 1939, appellant filed a certificate in the office of the County Clerk of the County of Los Angeles, State of California, of doing business under said fictitious firm names pursuant to Sections 2466 and 2468 of the Civil Code of the State of California, and on August 2, 1944, and August 8, 1944, the Secretary of State of the State of California issued to appellant certificates of registration covering tradenames "Slenderella" and "Slenderella of Hollywood."

Since 1939, appellant has consistently identified the goods sold by him by the use of said tradenames in local newspaper advertising, direct mail advertising to a list of approximately 17,500 customers, and by affixing labels to approximately fifty to sixty per cent of all his merchandise. By reason of appellant's experience and the great care exercised by him in his business and the high standards set by him under the said tradenames, he has established a good reputation, and his goods, wares and merchandise have become known to the users and prospective users thereof by the names "Slenderella" and "Slenderella of Hollywood".

Respondent is a California corporation incorporated in the State of California on June 8, 1951, under the name "Silooette Systems of California, Inc." which name was changed to "Slenderella Systems of California, Inc." on or about January 14, 1952. Respondent is engaged in the business of operating slenderizing and weight reducing salons specializing in weight reduction, diet control and posture correction for women, with two branches in the City of Los Angeles, one in the City of Pasadena and one in the City of Beverly Hills, all within the County of Los Angeles, State of California.

Respondent is one of a number of affiliated companies operating in various parts of the United States under the tradename "Slenderella Systems", and the earliest use of the tradename "Slenderella" by any of the affiliated companies was after December 1, 1951. One of the affiliated companies, Slenderella Systems, Inc., a Delaware corporation, acquired by assignment a United States patent trademark "Slenderella" previously registered by one Erika Schneider under Registration No. 386,714, dated April 22, 1941. This trademark registration was adopted and used for sugarless foods for health purposes, specifically, candies.

Respondent has used the tradename "Slenderella" by permission of its affiliated company, Slenderella Systems, Inc., a Delaware corporation, since January 2, 1952, which is approximately two and one-half months prior to the filing of the complaint herein.

Prior to appellant's use of the tradename "Slenderella", it had been used and abandoned by one Henry Semaria in connection with certain retail stores located in Sacramento and San Francisco, California. There was also one other prior use of the tradename "Slenderella" by one J. P. Schwarze, of Los Angeles, California, who, in the year 1933, was engaged in the manufacture of wheat flour. There is no showing that the tradename "Slenderella" was used after that time except by the appellant, and at the time of the trial only appellant and respondent were using said tradename in California. Since respondent commenced the use of the tradename "Slenderella", said tradename has been advertised by it in the metropolitan newspapers of Los Angeles, and up to May 31, 1952, respondent had spent a sum in excess of $15,000 for such advertising. Respondent's affiliated companies or corporations maintain uniformity in their general advertising throughout the various states in which they operate.

Respondent's business consists of a slenderizing course for women, and it sells no women's apparel or clothing accessories, nor does it manufacture any thereof, or own or operate any dress shops or women's apparel shops.

Appellant is not engaged in the business of weight reduction, diet control or posture correction.

Since the inception of respondent's business in California under the tradename "Slenderella", the following incidents have occurred:

1. Employees in appellant's establishment have received numerous telephone calls intended for the respondent.

2. That the said misdirected telephone calls have continued since the listing of respondent's name in the Central Telephone Directory of Los Angeles.

3. That many of the appellant's customers and prospective customers have inquired as to appellant's ownership or connection with respondent's establishments, which requires the taking of time in the explanation by appellant and his employees to these inquiries.

4. That certain of appellant's customers and prospective customers have gone to the respondent's locations in Hollywood and Beverly Hills believing that appellant had opened women's clothing shops at the said locations.

5. That customers and prospective customers have stated to appellant and his emloyees that since appellant is in the weight-reducing business, they would rather first reduce their weight before purchasing large or half-size apparel from the appellant.

6. That the appellant and his employees have been asked on recurring occasions to quote prices for reducing treatments, necessitating the taking of time to make explanations.

7. That the appellant is considering opening a branch store in Beverly Hills upon the termination of his lease of the Hollywood store.

8. That some mail, not including numbered street addresses, intended for the respondent's establishments, have been received by appellant.

The trial court made findings consistent with the facts above stated and found in addition thereto that confusion arising from similarity of names resulted principally from inattention and carelessness on the part of persons so confused. It further found:

"9. The respective businesses operated by plaintiff and defendant respectively are non-competitive and are in unrelated fields and the use by defendant of the trade name 'Slenderella' in the metropolitan area of Los Angeles and elsewhere has not occasioned damage or injury to the plaintiff and has not resulted in the deception or misleading of the public.

"10. Notwithstanding that at the time of the adoption and use of said name in California by defendant it was advised and knew of plaintiff's use of said name in connection with his business, defendant's adoption and use of the trade name 'Slenderella' was in good faith and without design or intent to capitalize upon plaintiff's prior use of said name in his non-competitive and unrelated business."

It then concluded:

"2. That the use by defendant of the trade name 'Slenderella' does not infringe upon plaintiff's use of said name in his non-competing and unrelated business and does not constitute an unfair or improper use of said name.

"3. That plaintiff's use of the name 'Slenderella' has not resulted in its acquiring any secondary meaning in the mind of the public.

"4. That plaintiff is not entitled to protection against the use of the trade name 'Slenderella' by defendant in connection with its slenderizing and reducing treatment business, including the sale and distribution to its patrons of mints and bulking compounds under said trade name", and rendered judgment accordingly.

In urging a reversal of the trial court's decision in the instant case, plaintiff declares: "* * * it must be borne in mind that even though the goods and services of the appellant and respondent are dissimilar, nevertheless each of the parties caters to the same class of the public, namely, women who do not enjoy the benefits of a standard figure and who must either wear large or half-size apparel or take reducing courses with the hope of acquiring a standard size figure. Notwithstanding the fact that competition need not be proved, it is not difficult to perceive that both appellant and respondent are competing for the same purchasing dollar."

The foregoing must be considered, however, in the light of the allegation in plaintiff's complaint: "* * * that plaintiff and his business have been the subject of ridicule and derision by reason of the apparent inconsistency in having a business catering to the apparel needs of larger-sized women, while at the same time conducting a business specializing in the weight reduction of larger-sized women."

There is an obvious difference in the state of mind of the woman resolutely seeking a reducing salon and one who accepts ample proportions as reasonable and proper and only requiring suitable clothing. Use of the same tradename by the parties in this case could not reasonably be expected to change the mind of a prospective client or customer. Where weight reduction was sought, plaintiff's wares would not satisfy, and when larger sized apparel was desired, a weight reducing salon would be no substitute.

[1, 2] In the interest of fair dealing, courts of equity will protect the person first in the field doing business under a given name to the extent necessary to prevent deceit and fraud upon his business and upon the public. No inflexible rule can be laid down as to what conduct will constitute unfair competition. Each case is, in a measure, a law unto itself. The universal test question is whether the public is likely to be deceived. Winfield v. Charles, 77 Cal.App.2d 64, 71, 175 P.2d 69; see also American Distilling Co. v. Bellows & Co., 102 Cal.App.2d 8, 25, 226 P.2d 751; MacSweeney Enterprises v. Tarantino, 106 Cal. App.2d 504, 512, 235 P.2d 266.

Section 14400, Business and Professions Code, provides: "Any person who has first adopted and used a trade name, whether within or beyond the limits of this State, is its original owner." H. Moffat Co. v. Koftinow, 104 Cal.App.2d 560, 564, 232 P. 2d 15. The rules of unfair competition are based, not alone upon the protection of a property right existing in the complainants, but also upon the right of the public to protection from fraud and deceit. American Philatelic Society v. Claibourne, 3 Cal.2d 689, 698, 46 P.2d 135.

While "* * * a similarity which would be likely to deceive or mislead an ordinary unsuspecting customer is obnoxious to the law", Academy of Motion Picture, etc., v. Benson, 15 Cal.2d 685, 692, 104 P.2d 650, 653, the record in the case now before us does not show that prospective customers of plaintiff were deceived or misled into going to defendant's salon and taking reducing treatments when their purpose and intention was to obtain larger sized garments. There is no intimation that they could secure such garments or any wearing apparel from defendant or would be led away from the plaintiff's places of business when the momentary confusion as to identity was cleared away, as it inevitably would be.

[3, 4] "* * * before equity will grant its aid there must be some connection between the products in question * * * a mere possibility of confusion of identity is not sufficient, * * * there must exist a reasonable likelihood of confusion, since there is always a remote possibility of some confusion arising from the use of the same word in connection with different businesses", 52 Am.Jur. p. 579. The conclusion of the trial court on this aspect of the case is well grounded in fact, and the inferences based on those facts no doubt were warranted by a consideration of the natural and usual propensities and passions of prospective customers, "the course of business" and "the course of nature." Section 1960, sub. 2, Code of Civ.Proc.

In the case of Cole of California v. Grayson Shops, 72 Cal.App.2d 772, at page 776, 165 P.2d 963, 965, cited by plaintiff, we find a penetrating judicial analysis of one aspect of feminine psychology. This might be regarded as supporting our conclusion that prospective customers will decide which of the two parties to this action they will patronize after they have given intelligent consideration to the respective merits of the sartorial luxury of extra large garments and of the Spartan demands of a weight reducing program, and not because of "a passing whimsical emotion".

Plaintiff expresses great concern over the probability which he forsees that defendant through the "whittling away" or "dilution" process will depreciate and destroy a valuable property right of plaintiff and urges that this property right is entitled to protection.

[5] "Where the goods, services, or businesses of the litigants are not in actual competition, a junior appropriator of a trademark or tradename or trade symbols ordinarily is not actually diverting custom and trade from the complaining party. Consequently it has been recognized that in this situation diversion of trade and the resulting direct loss of sales or actual monetary loss cannot be the basis of relief. However, the courts have also recognized that diversion of trade and the attendant direct loss of sales is not the only injury which may result, but that other injuries may follow, such as an injury to the complaining party's reputation and goodwill, the forestalling of the normal potential expansion of his business, or the 'whittling away' or 'dilution' of his trademark or tradename or symbols. * * *

"Where the goods, services, or businesses of the litigants are not in actual competition, the right to injunctive relief has frequently been rested upon the necessity of preventing injury to the complaining party's reputation and good will." (Citing cases.) 148 A.L.R. 66.

"The issue in each case is whether the goods, services or businesses of the actor (defendant) and of the other (plaintiff) are sufficiently related so that the alleged infringement would subject the goodwill and reputation of the other's (plaintiff's) trademark or tradename to the hazards of the actor's (defendant's) business." Restatement of Torts, Vol. 3, p. 599. "It is easy to visualize", plaintiff asserts, "that should financial difficulties beset the junior appropriator (defendant)—which is always a possibility in these fast-moving and changing times—with consequent public notoriety, the good name established by the senior user (plaintiff) would be adversely affected. This, a court of equity should seek to prevent."

The trial court had before it plaintiff's business record as stated by his own counsel:

"That for the year 1947 the gross volume was $74,238.83; the advertising expenses were $3,430.21; that the net profits for that year were in the sum of $6,073.43.

"That the sales for the year of 1948 were in the sum of $112,925.80; the expenditure for advertising was $4,399.66; and net profit for the period was $3,590.54.

"That the sales for 1949 were in the sum of $96,664.47; there were advertising expenses during that year of $2,069.65 and the net loss was $511.50.

"That for the period 1950 the figures show sales of $88,567.66; advertising expenditures of $1,868.91; and a profit for the period of $441.65.

"The statement for the period ending December 31, 1951, shows sales of $89,160; advertising expenditures of $1,488.27; and net profit for the period of $3,815.72."

[6] Defendant discloses that for the first five months of 1952 defendant's businesses spent $15,145.28 for advertising. On the record before it the trial court was justified in concluding that there was no sufficient evidence to show defendant's activities would prove detrimental to the good name and reputation of plaintiff because of economic instability of defendant.

As another matter which he believes should be considered, "appellant (plaintiff) contends that the tradename 'Slenderella' is a fanciful and distinctive word; it is not generic or geographic." See 24 Cal. Jur. 618 et seq.; 52 Am.Jur. 542, Sec. 56. He also urges that the names used by plaintiff have "acquired a secondary meaning, particularly in Southern California where are located the respondent's establishments". See 52 Am.Jur. 554, Sec. 72; 63 C.J. 393 et seq. These contentions find their answer in the adverse determination by the trial court on all of the issues raised by plaintiff and covered by the trial court's findings of fact and conclusions of law, and its specific holding as to the latter point "that plaintiff's use of the name 'Slenderella' has not resulted in its acquiring any secondary meaning in the mind of the public".

As part of his closing argument, plaintiff's counsel was permitted to file with the record on appeal a thoughtful article entitled "Injunctive Protection of Trade Names in California", appearing in the May, 1953, issue of "Dictum", published by Southwestern University Law Students Association. We have considered the authorities cited therein and the many other cases and textual analyses offered for our consideration by both parties, in addition to those mentioned above.

Our conclusion is that the findings of the trial court and judgment based thereon are correct both as to facts and as to law applicable thereto.

Judgment affirmed.

WHITE, P. J., and DORAN, J., concur.

119 Cal.App.2d 816

ALEXANDER et al. v. MITCHELL, Mayor, et al.

No. 15787.

District Court of Appeal, First District, Division 1, California.

Aug. 24, 1953.

Hearing Denied Oct. 22, 1953.

Petition for writ of mandamus to compel city clerk to examine and certify, and mayor and councilmen to pass or submit to the electorate, an ordinance. The District Court of Appeal, Bray, J., held that where city council determined that public convenience and necessity required district assessment proceedings to acquire and improve two off-street parking projects, the people of the municipality could not make the proceedings subject to referendum and by initiative repeal projects already started.

Alternative writ discharged and petition for peremptory writ denied.

1. Statutes ⚷302, 342

Initiative and referendum deal with reserve powers of the people and should be liberally construed wherever that reasonably can be done.

2. Eminent Domain ⚷1

The right of eminent domain is a matter of statewide concern and cannot be abrogated by the people of a municipality.

3. Eminent Domain ⚷1

Under statute vesting power to make determination of convenience and necessity in eminent domain proceedings in members of legislative body of a city, neither the people of community nor members of legislative body could do away with power of eminent domain. Code Civ.Proc. § 1241.

4. Eminent Domain ⚷1

A city has no inherent power of eminent domain, and exercises it only because authorized by state legislature.

5. Municipal Corporations ⚷46

Where city charter, provided that city council shall have all powers appropriate to municipal corporations, not prohibited by constitution or charter and that all powers granted to city shall be exercised by the council, the taking away of council's right to determine whether public necessity and convenience required off-street parking projects could only be done by charter amendment and not by ordinance.

6. Municipal Corporations ⚷46

Any attempt to amend a charter other than by the method prescribed in Constitution is void. Const. art. 11, § 8.

7. Municipal Corporations ⚷108.2, 108.6

Constitutional provisions placing determination of necessity for public improvement districts in city council, and authorizing city to pledge revenues from parking meters to pay for parking facilities whenever, under laws of state, city was authorized to construct parking lots, precluded people of municipality from abolishing, by the power of initiative and referendum, city council's district assessment proceedings to acquire parking lots. Const. art. 11, § 18¼; art. 13, § 17; Streets and Highways Code, §§ 31500 et seq., 32500 et seq., 33800 et seq.

8. Municipal Corporations ⚷108

Neither initiative nor referendum will lie except in matters of municipal affairs.

9. Municipal Corporations ⚷108.3

Where city electors filed an initiative ordinance, the essential provisions of which were found to be void, the fact that ordinance contained severability clause which could only apply to section reaffirming general rights of people would not require the submission of ordinance to electors.

◆

Aaron M. Sargent, San Francisco, for petitioners.

Arnold Rumwell, City Atty., Palo Alto, Kirkbride, Wilson, Harzfeld & Wallace, San Mateo, for respondents.

BRAY, Justice.

Petition for writ of mandamus to compel respondent city clerk to examine and certify, and respondent mayor and councilmen of the city of Palo Alto, to pass or submit to the electorate, a certain ordinance.

Questions Presented.

1. May the people of a municipality abrogate the right of eminent domain, or is that right a matter of statewide concern?

2. May the people of a municipality declare that off-street parking places may not be acquired and improved by district assessment proceedings?

3. May the people of a municipality, contrary to state law, make assessment district proceedings subject to referendum, and may they by initiative repeal such projects already started?

4. Must an initiative ordinance invalid in most part be submitted to the electors because it contains a severability clause?

Record.

Petitioners claim to be qualified electors of Palo Alto and signers and circulators of the initiative petition hereafter described, and to represent the 2041 alleged electors who signed the petition. Palo Alto is a charter city. On February 20, 1953, petitioners filed said petition with respondent city clerk. It is conceded that the number of signatures, if the signers are qualified electors, is numerically sufficient under the Palo Alto Freeholders' Charter to require submission of the proposed ordinance at a special election. At the council meeting of March 2d, respondent city clerk, without examination of the signatures, presented the petition and asked for instructions. The council thereupon adopted a resolution instructing said clerk to file the petition, and directing that no further action be taken either by the clerk or the council.

Filed with the petition is an affidavit setting forth the history of the installation in Palo Alto of public parking meters and the planning of municipally operated off-street parking places and opposition thereto. This history culminated in the adoption by the council of Resolutions of Preliminary Determination 2381 and 2382. The first resolution determined that public convenience and necessity required the acquisition and improvement of University Avenue District Off-Street Parking Project No. 52–13 at an estimated cost of $250,000. The second resolution made a similar finding as to University Avenue District Off-Street Parking Project No. 52–14 to cost $1,150,000. Each project is to be financed by bonds against the respective district.

The Proposed Ordinance.

It is denominated "An Ordinance to Protect Referendum Rights and Prohibit Eminent Domain in Parking Lot Proceedings." It is divided into three parts: Part I, "Initiative and Referendum." Section 1, "Declaration of Rights." It reaffirms and declares that all political power is derived from the people who have direct legislative power in municipal affairs. This power is expressly reserved for them in the California Constitution, the Freeholders' Charter, and is based on freedoms secured by the Declaration of Independence and the United States Constitution. Section 2, "Findings." It is found and determined (a) that proceedings for the selection, location and acquisition of sites for off-street motor vehicle parking places raise questions of direct interest and concern to the entire community. Referendum rights are involved. The issues are not limited to parties residing, or owning property or doing business within proposed assessment districts. (b) There is a general community interest in all parking lot projects because of their direct relation to (1) zoning classification, (2) community planning, (3) public safety, (4) traffic congestion, (5) tax exemption, (6) tax burden, and (7) public credit. (c) The operation of a municipal off-street parking place is a semi-commercial enterprise, and its area is not a part of the public street system of the city. Section 3, "Referendum." All acts, ordinances and resolutions of the council designating or selecting sites for off-street parking are declared to be subject to referendum. Future measures of this type shall contain a clause reserving referendum rights. All ordinances and resolutions adopted in violation of this requirement are declared to be invalid.

Part II, "Eminent Domain," Section 4, "Findings." It is found and determined (a) That there is no public necessity justifying or requiring the exercise of the right of eminent domain by the city or any board, commission, officer or agency thereof, to acquire off-street parking sites. (b) Any land required for this purpose can be obtained by negotiation and purchase at its fair market value without use of the drastic power of condemnation. (c) These findings do not apply to proceedings to acquire parking areas adjacent to land occupied by public buildings.

Part III, "Miscellaneous," Section 5, "Repeal." All resolutions, ordinances and other acts of the council respecting the "University Avenue Parking Lot Project" (Resolutions 2381, 2382 and the several modifications, amendments and revisions thereof) are repealed and rescinded. Section 6, "Operation." The ordinance supersedes and takes precedence over any and all ordinances, resolutions and other acts of the council in conflict therewith. It is retroactive and applies to pending actions as well as proceedings hereafter. The findings of fact are legislative determinations and binding as such, and are conclusive in all respects as provided by the Constitution and laws of this State. Section 7 is a severability clause.

Objectives of Proposed Ordinance.

It has three main objectives: 1. It finds, in effect, that off-street parking is such a matter of general concern that it may not be done by district assessment proceedings or if so done the proceedings are subject to referendum. 2. It finds, in effect, that eminent domain proceedings cannot be applied to the acquisition of off-street parking sites, except when such sites are adjacent to public buildings. 3. It repeals all proceedings of the city council concerning off-street parking heretofore had, particularly the resolutions starting the two University Avenue District projects.

1. Eminent Domain.

Petitioner claims that the people of a community have reserved the right to take away from the city council, to whom the right has been given by charter, the right to determine the necessity for the use of eminent domain in the acquisition of off-street parking sites. As hereafter pointed out with reference to the same claim made as to assessment districts, the removal of such right, if the power exists, could only be done by charter amendment and not by ordinance.

[1-4] While the initiative and referendum deal with the reserved powers of the people and should be liberally construed to uphold the power wherever that reasonably can be done, Collins v. City & County of S. F., 112 Cal.App.2d 719, 247 P.2d 362, nevertheless the right of eminent domain is a matter of statewide concern and being such cannot be abrogated by the people of a municipality. A city has no inherent power of eminent domain. City of Los Angeles v. Koyer, 48 Cal.App. 720, 192 P. 301; Mackay v. City of Los Angeles, 136 Cal. App. 180, 28 P.2d 706. It exercises it only because authorized by the State Legislature. Section 1241, Code of Civil Procedure, vests the power to make the determination of convenience and necessity in the members of "the legislative body of a * * * city". Those members could not do away with the power of eminent domain; neither can the people of a particular community. The legislative body, the council, can determine whether in a par-

ticular instance the public convenience and necessity require its exercise, but it could not determine, as this ordinance attempts to have the people do, that as to all off-street parking sites hereafter to be acquired the power need not be exercised. Such a finding, in effect, is an attempt to completely abrogate that power,—a vastly important power. Moreover, to make a blanket finding that any land required in any off-street parking project can be acquired by negotiation and purchase at its fair market value without condemnation is on its face absurd. The effect of the abandonment of the right of eminent domain would mean that if the city desires to acquire sites, the city would have to pay any price the owners might ask or else abandon the project. The very fact that the city can condemn in many instances causes the owner to accept the fair market value. Thus, it is an attempt by indirection to do away with all off-street parking altogether.

In Riedman v. Brison, 217 Cal. 383, 18 P.2d 947, 949, mandamus was sought to compel the submission of an initiative ordinance to have the city withdraw from a water district. It was held that the statute which provided the power to make the determination of convenience or necessity to withdraw from the district vested such power in the members of the " 'legislative body' of the city," and not in the people. Because this was a power delegated by the Legislature it was not a municipal affair, and only as to municipal affairs can the initiative provisions of a charter apply.

2. Elimination of District Assessment Proceedings.

[5, 6] Petitioner contends that the people have reserved to them all legislative rights; that the determination of whether the public necessity and convenience requires the acquisition and construction of off-street parking projects is a legislative matter; therefore the people may take away from the council the right to make such determination and make it themselves. Disregarding the state question involved and assuming the correctness of the contention, the taking away from the council of the right to make such determination cannot be done by ordinance; it could only be done by a charter amendment. The charter gives "home rule" and provides that the city of Palo Alto, by and through its council and other officials, "shall have and may exercise all powers necessary and appropriate to a municipal corporation" which are not prohibited by the Constitution or the charter itself, and that all powers granted to the city shall, except as herein otherwise provided, be exercised by the council. Pursuant to these provisions, Palo Alto adopted its Improvement Procedure Code which provides for the procedure and financing of special assessment projects. The resolutions were adopted pursuant to the procedure code. Thus, pursuant to its charter which gives the city complete "home rule" the council has merely exercised powers given it in the charter by enacting the code and these resolutions. Section 8 of Article XI of the Constitution provides the exclusive method for amending city charters, and any attempt to amend a charter other than by that method prescribed in section 8 is void. Uhl v. Collins, 217 Cal. 1, 17 P. 2d 99, 85 A.L.R. 1370; Garver v. Council of City of Oakland, 96 Cal.App. 560, 274 P. 375.

[7] As the determination of the necessity for the use of eminent domain is a matter which the people of the state have granted only to the council of a municipality and have not reserved to the people thereof, so, too, has the determination of the necessity for construction of public improvements by the district assessment plan been limited to such councils. Section 17 of Article XIII of the Constitution provides: "All proceedings undertaken by *any chartered city* * * * for the construction of any public improvement, or the acquisition of any property for public use, or both, where the cost thereof is to be paid in whole or in part by special assessment * * * shall be undertaken only in accordance with the provisions of law governing: * * * and particularly in accordance with" certain provisions of the "Special Assessment Investigation, Limitation and Majority Protest Act of 1931 * * *" "Notwithstanding any provisions for debt limitation or majority protest * * *" if after the giving of notice, etc., the *legis-*

lative body of any chartered city determines by a fourth-fifths vote of its members that the public convenience and necessity require such improvements or acquisitions the debt limitation and majority protest shall not apply. "Nothing contained in this section shall require the *legislative body* * * * to prepare or to cause to be prepared, hear, notice for hearing or report the hearing of any report as to any such proposed construction or acquisition or both." (Emphasis added.) It is obvious from a study of this section that the Constitution places the determination of the necessity for public improvement districts in the city council and that such fact is inconsistent and cannot coexist with the exercise by the people of a municipality of the powers of initiative and referendum. The delegation of this power to the governing body of a municipality (here the city council) only appears in the acts dealing with parking districts: the Vehicle Parking District Law of 1943, Streets and Highways Code, § 31500 et seq.; the Parking Law of 1949, Streets and Highways Code, § 32500 et seq.; the Municipal Parking Revenue Bond Law of 1949, Streets and Highways Code § 33800 et seq.; the Parking District Act of 1951. The following language from Chase v. Kalber, 28 Cal.App. 561, 153 P. 397, although there directed to street improvement district projects, is equally applicable to off-street parking projects: "This proposition, it is true, is to be considered only in aid of the ascertainment of the intention of the people as to the scope of those powers or of determining whether they intended certain limitations in the exercise thereof or that certain acts of a legislative character should not be made amenable thereto; for, in examining and ascertaining the intention of the people with respect to the scope and nature of those powers, it is proper and important to consider what the consequences of applying it to a particular act of legislation would be, and if upon such consideration it be found that by so applying it the inevitable effect would be greatly to impair or wholly destroy the efficacy of some other governmental power, the practical application of which is essential, and perhaps, as in the case of the power to compel the improvement of streets, indispensable, to the convenience, comfort, and well-being of the inhabitants of certain legally established districts or subdivisions of the state or of the whole state, then in such case the courts may and should assume that the people intended no such result to flow from the application of those powers, and that they do not so apply." 28 Cal.App. at pages 569–570, 153 P. at page 400.

"It must become obvious upon a moment's reflection that the hearings thus contemplated and, in fact, expressly provided for, could not be accorded property owners if proceedings in street improvement or any of the essential acts involved therein were subject to the test or conditions of either the initiative or the referendum." 28 Cal. App. at page 573, 153 P. at page 401.

"Moreover, the effect of applying those powers to such proceedings would be to delay, to the great inconvenience of the public, street improvement. Indeed, under such circumstances, it would be difficult, if not impossible, to make progress in street improvement in the cities and towns of the state, and from that situation the public would not alone suffer, but such cities and towns themselves would be seriously handicapped in the march of progress which is now of the spirit of the times." 28 Cal. App. at page 574, 153 P. at page 402.

As said in McNeil v. City of South Pasadena, 166 Cal. 153, 155–156, 135 P. 32, 33, 48 L.R.A.,N.S., 138: "The improvement, regulation, and control of the highways within a municipality call for the exercise of a delegated governmental power, a function which the municipality itself, neither by ordinance nor by contract, can surrender or impair. * * * It is its duty to exercise those powers upon every proper occasion. It could as well attempt to surrender all or part of its police powers as to attempt to bind itself not to perform the administrative duty and trust in regard to its public streets imposed upon it by general law."

Yet this surrender, both as to its power to create parking place districts and its right of eminent domain as applied thereto, is the very purpose of the proposed ordinance.

In 1950 section 18¼ was added to Article XI of the Constitution. It provides that whenever under the laws of the state any city or district (among other public bodies) is authorized to construct or acquire parking lots, garages or other automotive parking facilities and for the payment of the costs of any thereof, to issue bonds or other securities payable in whole or in part from revenues of such parking facilities, the public body of the territory in which such parking facilities are situated is authorized to pledge as additional security for the payment of such securities any or all revenues from its street parking meters. This recognition of the power of *districts* as well as of other public bodies to issue bonds for the payment for parking facilities, as well as the grant of power to pledge revenues from street parking meters, is as said in Chase v. Kalber, supra, 28 Cal.App. 561, 153 P. 397, referring to powers granted and systems established for street improvement, inconsistent and cannot coexist with the powers of initiative and referendum, nor were they intended by the people to come within either.

In Dwyer v. City Council, 200 Cal. 505, 253 P. 932, it was held that under the Berkeley City Charter an ordinance reclassifying certain property designated in the comprehensive citywide zoning ordinance was subject to a referendum. The court pointed out that although residents of the particular locality rezoned might be more immediately and apparently affected, the electors of the entire municipality had a substantial interest in the citywide zoning scheme, and that the zoning law from its beginning was treated by the council as a general, comprehensive plan molded and balanced with reference to the city as a whole, and that that fact distinguished the situation from street improvement cases. Moreover, in Hurst v. City of Burlingame, 207 Cal. 134, 277 P. 308, where the court held that a zoning ordinance could not be adopted by initiative, due, among other things, to the impossibility of complying with the Zoning Act of 1917, the court considered the Dwyer case and held that the question of the operation of the initiative law to proceedings affected by the Zoning Act was not considered therein.

In Hopping v. Council of City of Richmond, 170 Cal. 605, 150 P. 977, where the court held referendum applicable to a resolution of the city council dealing with the location and construction of a city hall, because they were matters of citywide interest, the court recognized the rule applicable here saying 170 Cal. at page 617, 150 P. at page 981: "There may be grounds for excluding from the operation of these powers legislative acts which are special and local in their nature and in which the entire body of citizens who shall exercise the power of referendum and initiative is not interested, such as resolutions to make local improvements and the like."

3. Referendum.

[8] The ordinance purports to make all off-street parking assessment district proceedings subject to referendum. Petitioners claim that by inherent right of the people to do anything the city council can do and because such proceedings are not local in their nature but of citywide concern, the people can make such proceedings subject to referendum. Just as initiative will not lie except in matters of municipal affairs, so, too, referendum will not lie. The power to determine the necessity and advisability of parking district proceedings has been delegated to the governing body of the city, not to the people. Such power is not inherent in the city. It comes only from the Legislature and to the particular body to which the Legislature has committed the power. To support their contention that such a district is of citywide concern only, petitioners contend that such off-street parking projects are not similar to street improvement projects which have been held to be local in nature, and therefore not subject to referendum. See Chase v. Kalber, supra, 28 Cal.App. 561, 153 P. 397; Starbuck v. City of Fullerton, 34 Cal.App. 683, 168 P. 583; St. John v. King, 130 Cal.App. 356, 20 P.2d 123. Practically all the arguments they make to distinguish off-street parking projects from street improvement projects would apply to the latter, and yet the latter have been held to be local in

character. Thus, the selection and location of most streets affects the convenience of every member of the city; traffic congestion is increased or reduced by their selection; persons outside the proposed district use the streets of that district; streets affect zoning classifications; the property taken for streets goes off the tax rolls; the maintenance of parking meters on the streets is a semi-business enterprise. There can be but little question that while off-street parking projects are matters of city-wide concern in the same sense that anything done by a municipality is, essentially they are primarily of local interest just as street and sewer projects are.

City of Whittier v. Dixon, 24 Cal.2d 664, 151 P.2d 5, 153 A.L.R. 956, holds that the Vehicle Parking District Act of 1943 is a general law expressly providing municipalities with the power of eminent domain to acquire parking lots. "Just as public streets can be used for the parking of motor vehicles, property can be acquired for the same use. Moreover, public parking places relieve congestion and reduce traffic hazards and therefore serve a public purpose. * * The levy of a special assessment is justified if the improvement is a public one and the property to be assessed will receive a special benefit." 24 Cal.2d at page 667, 151 P.2d at page 7. It is a matter of common knowledge that in all our cities, large and small, due to congestion caused by the increase in the use of motor vehicles, downtown business and property values are decreasing. If in the judgment of the city council it is of public convenience and necessity, and a majority of the property owners in a given area desire to form an assessment district to pay for the cost of acquiring and constructing an off-street parking project, it is obviously a matter of concern to them rather than to the whole city, which will not be called upon to pay any portion of such cost. In City of Whittier v. Dixon, supra, 24 Cal.2d 664, 151 P.2d 5, it was held that parking places tend to stabilize a business section and thereby benefit the property in its vicinity so as to justify the levy of a special assessment. This, in effect, may be a holding that parking places are portions of the public streets. If they are not, they are so similar in use and purport as to come within the same rule. Petitioners have set forth in their history of the background leading up to the commencement of these proceedings, the recommendations of a citizens' committee that moneys from street parking meters be used for the acquisition and construction of off-street parking places. The proceedings for the University Avenue projects adopted by the council limit the payment of their costs to the districts. No general fund or tax is involved.

There is nothing in the proceedings or in the proposed ordinance which requires a discussion of what the situation would be if the city's moneys were to be contributed to the district improvement.

What the people cannot do by referendum they cannot do by initiative. The decisions in Chase v. Kalber, supra, 28 Cal.App. 561, 153 P. 397, and the other cases above cited apply to the attempt to repeal the off-street parking district proceedings already commenced.

Attempting to take away from the city council the power of determining the necessity for the use of eminent domain granted to it by the Legislature is somewhat analogous to the situation in Simpson v. Hite, 36 Cal.2d 125, 222 P.2d 225. There a proposed initiative ordinance was presented to the Los Angeles County Board of Supervisors, which repealed the resolution of the board designating and pursuant to which the county had acquired a site for municipal and superior court buildings, declaring the will of the people that such site be used for parking or some other useful purpose, and designating another site for the courts' building or buildings. In denying the right of initiative the court pointed out that the Legislature by state law required the board of supervisors to provide suitable quarters for courts, thereby declaring the legislative policy that the board should provide the quarters, thereby including the selection of the site, as well as the character and size of the building or buildings. Therefore it is beyond the power of the electorate of the county to repeal or amend the state policy. While the court held that prescribing the policy and duty was the legislative act of the state and carrying out the policy was an administrative function delegated to the board, while in our case the carrying out of the policy of eminent domain delegated to the council is a legislative matter, nevertheless the principle applies here. "Where a series of acts by a board are all directed to the end of carrying out a duty imposed on the board by the law of the state, and where it is sought by a citizens' committee of the county to interrupt the process through repeal by the initiative of one or more of the steps theretofore taken by the board, the acts sought to be repealed are to be judged, as legislative or administrative, not as isolated acts but in their true relationship as a part of the entire project. * * * The initiative or referendum is not applicable where 'the inevitable effect would be greatly to impair or wholly destroy the efficacy of some other governmental power, the practical application of which is essential * * *.' (Chase v. Kalber, 1915, 28 Cal.App. 561, 569–570, 153 P. 397 [improvement of city streets]; see Hunt v. Mayor & Council of Riverside, 1948, 31 Cal.2d 619, 628–630, 191 P.2d 426.) Similarly, where a state act specifies the steps to be taken by a local body in enacting legislation, an initiative measure cannot be validly adopted unless such steps are taken. (Hurst v. City of Burlingame (1929), 207 Cal. 134, 140, 277 P. 308 [zoning, lack of notice and hearing]; Galvin v. Board of Supervisors (1925), 195 Cal. 686, 696–698, 235 P. 450 [toll bridge franchise, lack of hearing, notice to state engineer, etc.])" 36 Cal.2d at pages 133, 134, 222 P.2d at page 230.

In Chase v. Kalber, supra, 28 Cal.App. 561, 153 P. 397, the right of referendum to a resolution establishing grades of streets was denied. This was a legislative act of the council. The court held it was never the intention of the people in reserving the right of initiative or referendum to have it apply to such a legislative proceeding. (See Starbuck v. City of Fullerton, supra, 34 Cal.App. 683, 168 P. 583, to the same effect concerning street opening proceedings.)

4. Effect of Invalidity.

[9] As we have shown, practically all of the many provisions of the ordinance are invalid. All that is left is the Declaration of Rights in Part I, § 1, which is merely a reaffirmance of the general rights of the people as established by the United States and California Constitutions, the Declaration of Independence and the Palo Alto Freeholders' Charter. Under the severability clause, section 7, if all the rest of the ordinance were invalid (and it is), section 1 would be valid. It, however, would be meaningless. Petitioners contend that because of the severability clause the ordinance, regardless of the invalidity of any portion of it, must be submitted to the people and its invalidity determined after its adoption. Our determination that practically the whole of the ordinance is invalid brings the ordinance (assuming any of it to be valid) under the ruling in Bennett v. Drullard, 27 Cal.App. 180, 149 P. 368. There the city clerk and council had refused to submit to the people an initiative ordinance containing three alternative propositions. The proponents conceded that two of the propositions were void but contended that the initiative petition should be considered as presenting three ordinances, one of which would be valid and therefore the council should have eliminated the void portions and submitted the valid portion. The court held that the council had no such power and that because of the invalidity of portions of the ordinance, the council properly refused to submit the ordinance to the people. Petitioners here seek to distinguish the Bennett case from ours by pointing out that in that case the petitioners urged that the city council delete the void portions of the ordinance and present the valid portion to the people, while in our case petitioners seek to have the whole ordinance presented to the people, and, if adopted by them, have the valid portions take effect. While factually there is this distinction between the two cases, it is a distinction without a difference. In the Bennett case, in addition to holding that the council could not separate the wheat from the chaff, the court flatly held that the proposed ordi-

nance could not be submitted without deletion for the reason that portions of it were void and 27 Cal.App. at page 187, 149 P. at page 370, "That their inclusion in the petition renders the entire petition void." Cases like Klassen v. Burton, 110 Cal.App. 2d 539, 243 P.2d 28, holding that ordinances containing void emergency clauses are saved by severability clauses do not apply to initiative ordinances where the void subject matter is an integral part of the ordinance to be submitted to the voters rather than merely the effective date.

While this is one ordinance dealing with one general subject there are really three principal matters set forth in it, which are fundamentally different. One is the attempted application of the initiative and referendum to parking district proceedings, the second is the attempted abandonment of the right of eminent domain in such proceedings. If only one of these matters were invalid, such invalidity would preclude the submission of the measure. The third is the repeal of the University Avenue District proceedings. While we have been fully mindful of the fact that the petition of over 2000 voters should not, except for strong legal reasons, be set aside, and that the right of the initiative is an important right of the people and should not be curtailed unless absolutely necessary, the opportunity to exercise such right must be given them so that they can exercise it in a reasonably intelligent manner. Assume, for example, that the provision repealing the present district proceedings were valid and the other provisions invalid. An elector who might be in favor of the University Avenue proceeding but desires to abrogate the right of eminent domain or to apply the initiative and referendum generally, or vice versa, would be required to vote against the proceedings which he favored in order to vote for either or both of the other matters. As both of these matters are invalid, he would be voting against the very proceeding he did not want to vote down only to find that what he voted *for* was invalid.

The alternative writ is discharged and the petition for a peremptory writ denied.

PETERS, P. J., concurs.

FRED B. WOOD, Justice (concurring).

I concur in the majority opinion in every respect except the dictum that if only one of the principal matters set forth in the ordinance were invalid such invalidity would preclude the submission of the measure. I would withhold formulating and expressing an opinion on that subject until a case comes before us which presents that question for decision.

Hearing denied; SCHAUER, J., dissenting.

119 Cal.App.2d 849

SHAFFORD v. OTTO SALES CO., Inc., et al.

Civ. 15510.

District Court of Appeal, First District,
Division 1, California.

Aug. 25, 1953.

Hearing Denied Oct. 22, 1953.

Broker's action against import and export company and its president for commissions alleged to be due him under terms of oral agreement on all sales of coconut made to a certain company. The Superior Court, City and County of San Francisco, rendered judgment for broker and imported export business and its president appealed. The District Court of Appeal, Peters, P. J., held that fact that import and export business breached contract with agent and fraudulently concealed such breach from him, that president controlled the business and with his family owned it entirely and that president personally sent letter to broker offering coconuts for sale and had sent broker contract without evidence that business had been incorporated at that time were not sufficient to show a use by the president of the corporate entity for his personal purposes.

Judgment against president reversed and judgment against import and export business affirmed.

1. Depositions 🔑7

Deposition taken before president of incorporated import business had been individually served or had appeared did not constitute evidence against him in broker's action against import business and its president for commissions allegedly due under terms of oral contract to pay broker on all sales of coconut to a certain company.

2. Sales ⚷7

An agency contract, such as one appointing a factor or creating a bailment, can be shown by other provisions of contract or by surrounding circumstances to be a mere mask to hide a true sale.

3. Sales ⚷52(5)

In broker's action against incorporated import business and its president to recover commissions alleged to be due under terms of oral agreement to pay broker commissions on all sales of coconut made to a certain company, fact that 26 invoices all describing such company as purchaser were introduced into evidence was alone sufficient to support implied finding that such transactions were sales despite contract constituting company as selling agent for import business.

4. Corporations ⚷1

Fact that president of import business sent letter to broker personally offering sale of coconut without showing that import business had been incorporated at that time, that president's family completely owned business and fraudulently concealed its breach of business contract whereby broker was to receive commission on all sales of coconut to a certain company was not sufficient to show use by president of business for personal purposes and would not support a personal judgment against him.

◆

Fabian D. Brown, San Francisco, for appellants.

Dana, Bledsoe & Smith and R. S. Cathcart, San Francisco, of counsel, for respondents.

PETERS, Presiding Justice.

Plaintiff, R. H. Shafford, brought this action against Otto Sales Company, Inc. (hereafter referred to as Otto Sales), and against the senior Walter E. Otto, president and general manager of Otto Sales, to recover commissions claimed to be due to him under the terms of an oral agreement. Based upon a jury verdict, he recovered judgment against both defendants in the sum of $15,760.20, with interest, and costs. Both defendants appeal.

Both appellants urge that the judgment for commissions cannot stand because, under the terms of his contract, Shafford was to receive commissions only on all *sales* of coconut made by Otto Sales to the B & O Nut Company (hereafter called B & O) and, so it is claimed, there is no evidence that any such sales were made. While appellants admit that many coconut transactions between Otto Sales and B & O occurred, it is claimed that none of them involved sales between the two, but that in all of them B & O acted as a factor or agent for Otto Sales and was not a purchaser. The individual appellant urges, in addition, that the judgment against him personally cannot stand because the transaction was a corporate one, and, so it is claimed, there is no evidence that justified the court in disregarding the corporate entity so as to hold him personally.

Before the facts are set forth, the main characters in this case should be identified.

Respondent Shafford, one of the two witnesses for respondent, is a licensed broker and the sole owner of an unincorporated brokerage business located in Los Angeles and Chicago and known as "Worthington Sales Associates." It is his business to bring sellers of commodities into contact with purchasers, for which service he receives a commission.

Walter E. Otto, the sole witness for appellants, has been self-employed as an import and export merchant since 1919, and, so he testified, has "never worked for anybody else." He, and the corporation later formed, operate from San Francisco. Prior to 1947 he did business as "W. E. Otto." At some undisclosed time in that year he incorporated the Otto Sales Company, Inc. He testified that the corporation was formed because he was busy, and because his family wanted to invest money in the business; that his wife and two children each invested a substantial sum of their money in the corporation; that he is the owner of but one-third of the shares of the company; that he and his family own 150 of the 153 shares of Otto Sales, the other three shares being held by an employee.

Otto Sales was engaged in both the import and export business. The import business consisted of buying commodities abroad and selling them to purchasers here, either through salesmen employed by Otto Sales or through independent brokers. The product involved in the present action is desiccated coconut. Until Otto Sales made the Philippine connections hereafter described it was getting some coconut from producers in India and Ceylon, but was not itself engaged in the production of coconut.

[1] B. J. Grantier, the only other witness for respondent, was in charge of the import department, first for Otto and then for Otto Sales. He testified through a deposition inasmuch as he was to be out of the country at the time of trial. This deposition was taken at a time when Otto Sales and Walter Otto, Jr. (later dismissed), had been served in the action, but before Otto, Sr., had been individually served or had appeared. Both counsel agreed that this was so. The trial court ruled that the deposition was admissible only against the corporation and Otto, Jr. So far as the deposition not constituting evidence against Otto, Sr., is concerned, that ruling was correct. Overton v. Harband, 6 Cal.App.2d 455, 44 P.2d 484. Grantier testified that Otto was domineering, refused to delegate authority, was the only one exercising any real power in the corporation, and made all important decisions.

We turn now to a discussion of the events leading up to the present controversy. On this appeal it is admitted by appellants that Shafford and Otto Sales entered into a contract on January 9, 1948, whereby Shafford was to receive a commission on all sales of coconut by Otto Sales to B & O. The negotiations between the parties, leading up to that contract, are important. During the war many of the coconut plantations in the Far East had been destroyed. In 1947, when the candy business in this country resumed upon the termination of rationing, there was a great demand for coconut, and but a very limited supply. In the early part of 1947 Shafford had learned that Otto or Otto Sales had coconut for sale, and communicated with them looking towards sales to his clients. In fact, Shafford had made offerings to his clients based upon listings furnished him by Otto or Otto Sales. Two of the documents upon which Shafford relies to establish Otto's misuse of the corporate entity belong to this early period. One was the initial communication between Shafford and appellants. It is a form letter dated January 30, 1947, and sent to the trade and to Shafford by "W. E. Otto," setting forth the terms of an offering of Ceylon desiccated coconut. It should be noted that this letter was sent about a year before the contract for commissions was entered into. Just when, in 1947, Otto Sales was incorporated, does not appear. Thus, this letter may have been sent prior to the incorporation of Otto Sales.

The second document is a form contract captioned "W. E. Otto" sent to Shafford in August, 1947, with a letter under the name "Otto Sales Company," telling Shafford that such contracts should be signed by Shafford or his customers. The contract form contains blanks, including one for acceptance by "W. E. Otto." Shafford used this form of contract in several transactions. All other later letters, telegrams and other communications were sent out by Otto Sales.

Under date of November 4, 1947, Grantier, for the corporation, wrote to Shafford to the effect that the corporation wanted to deal exclusively through Shafford in making coconut sales rather than employ a sales force, and that a definite agreement should be executed as soon as a regular source of supply of coconut could be secured. Prior to this date Shafford had already contacted B & O as a prospective client, hoping to secure coconut for that corporation through Otto Sales.

In the fall of 1947 Otto went to the Philippines looking for a coconut supply. On December 17, 1947, he signed a contract with one Angel Reyes, the owner of a desiccated coconut plant on Luzon, whereby Otto Sales obtained complete control over the operation and products of the plant for one year. The agreement provided for a fifty-fifty split of profits between the Otto Sales and Reyes. This was the first time Otto Sales had entered into the production end of the business.

Shafford was notified of this source of supply and immediately came to San Francisco and talked first to Grantier, and, upon his return, to Otto. Shafford was informed that the Luzon plant had a potential of 16,000 pounds of shredded coconut per day, but that $75,000 was needed to finance the first month's production. Shafford stated that he would try to secure the needed financing. At this conference Shafford was promised a 5% commission on all sales for one year, and was handed a letter from Otto Sales describing the need for $75,000 financing and setting forth the terms under which Shafford could offer the coconut to be produced and processed in the then unfinished plant.

On January 6, 1948, Otto Sales sent Shafford a telegram offering 300,000 pounds of coconut for February, March and April, at a designated price, but requiring purchases to be financed by letters of credit plus a deposit of ten cents a pound upon placing the order. The telegram stated that the quoted prices included a 5% commission for Shafford. Shafford immediately communicated with Oppenheimer, president and manager of B & O. That company expressed a desire to purchase 600,000 pounds of coconut during the year, and Shafford told Oppenheimer that his source was ready to furnish that amount and much more. Oppenheimer, by telegram to Shafford, stated his acquiescence in the price offered, but not in the terms of payment, being disturbed about the required deposit of ten cents a pound. Shafford thereupon notified Otto Sales that he had a potential customer, and that company requested Shafford to come to San Francisco on January 9, 1948, to discuss this prospective sale.

The conference was held on the date specified. Shafford had not yet disclosed to Otto Sales the name of his prospective purchaser, nor had he disclosed to B & O his prospective source of supply. He told Otto that he had a buyer who was then in San Francisco who wanted about a million pounds, and that he, Shafford, wanted a letter confirming the 5% commission promised in the telegram. Otto dictated to Grantier such a letter, which contained a blank line for the name of the yet undisclosed purchaser, in which it was agreed that Shafford was to receive a 5% commission on all sales to such purchaser up to one million pounds. This letter was not signed.

Shafford testified that he then asked Oppenheimer to come to the office of Otto Sales to meet the source of supply, and disclosed the name of the purchaser to Otto. The names of B & O and Oppenheimer were then typed in the blank space of Shafford's letter. Before Oppenheimer arrived, according to Shafford, Otto told him that he knew of Oppenheimer's financial standing and believed that he would want to buy the entire output of the Luzon plant, which would be far in excess of a million pounds a year. For that reason he suggested that he would not deliver to Shafford the 5% commission letter until after they had talked to Oppenheimer. If Oppenheimer agreed to purchase more than a million pounds Otto stated that another letter would be drafted giving Shafford a 5% commission on the total sale. This testimony was corroborated by Grantier. Otto denied that the 5% commission letter had been drafted and denied discussing the 5% commission with Shafford at this time. This testimony was obviously disbelieved by the jury.

At about this point Oppenheimer, accompanied by an associate, arrived and Shafford introduced the two to Otto, his son and to Grantier. A two-hour conference ensued during which the terms of the prospective sale, costs, fixing of prices, financing, and gross profits were discussed. Otto spoke of the need for $75,000 financing but did not directly ask Oppenheimer to have his company advance that sum. Specific figures for sales could not be set because the Luzon plant was not yet in production, but approximate figures were discussed. There was no definite agreement as to purchase price. Shafford testified that he told the parties that price was up to the buyer and seller, that he was to receive a commission only in the event a sale to B & O was consummated, and that all agreed that a 5% commission was to be paid him on the deal. The conference ended with Oppenheimer stating that he thought it was a deal, but would get in touch with Otto after consulting his bankers and lawyers.

Grantier, in his deposition, testified that Otto had stated that Shafford was to receive a 5% commission whether part or all of the out put was sold to B & O and was entitled to such commission whether the deal was a long term or short term one. Grantier recalled that Oppenheimer agreed that B & O would take the entire output at twenty-nine cents a pound, with a sliding scale adjustment, but that Oppenheimer did not like the ten cents a pound cash deposit requirement and was not sure that his company would advance $75,000. Grantier also stated that it was agreed that Shafford's 5% commission was to be in addition to a 7% commission to be paid to Otto. Most of this testimony was denied by Otto.

Shafford and Grantier testified that at the end of the conference Otto told Shafford to await word from him as to when B & O was to sign the contract. Shafford returned to Los Angeles to await this notification.

Grantier testified that after Shafford had left, Otto told him to draw up another contract offering Shafford a 5% commission on but 300,000 pounds, instead of the one million contained in the original letter which had not been delivered to Shafford; that he thereupon tore up the million-pound commission letter and typed the new one as directed; that later Otto asked Grantier if either letter had been signed and, upon learning that neither had, the newly-drawn second letter was torn up.

Shafford testified that he never saw Otto again after the January 9th conference. He sent three letters to Otto Sales between January 14th and 21st, 1948, inquiring as to what was happening on the B & O deal, and stating that he had other prospective buyers who would like to get some of the coconut if B & O did not buy it all. On January 21, 1948, Otto, on behalf of Otto Sales, wrote to Shafford telling him that despite earlier optimism it now looked doubtful whether B & O would complete the deal. The letter stated: "We do not want you to press or discuss this matter with B & O Nut Company until we have concluded negotiations as when we have concluded negotiations we will advise you what the results have been." It is a reasonable inference from this letter that Otto was thus trying to prevent Shafford from communicating with B & O about the deal.

On January 28, 1948, Otto, for Otto Sales, again wrote to Shafford, curtly telling him that the deal with B & O "fell through"; that the plant was to be financed from another source, and that no coconut was being offered until March when the plant would be ready. In response to another letter, Otto, on behalf of Otto Sales, informed Shafford that the B & O deal fell through because that company was not willing to assume the risks involved, and that financing had been secured elsewhere.

A year and a half later, under date of October 26, 1949, Shafford wrote a letter addressed to Otto and to Otto Sales in which he stated that he had secured information that Otto Sales had sold coconut to B & O and demanding his commissions. Otto, under date of November 1, 1949, on behalf of Otto Sales, wrote to Shafford denying the accusation and again stating that B & O had been unwilling to finance the deal, and that such financing had been secured from W. E. Dean.

Grantier testified that he saw Otto and Oppenheimer together on January 10, 1948, the date after the San Francisco conference, and that on January 12th Otto told him "specifically that B & O Nut Company had signed a contract to buy the output of the plant, and that he had found an individual, a separate individual, to finance the plant." Otto directed Grantier to offer no more coconut for sale, and not to communicate with Shafford. Thereafter, Grantier was absent from the office for a short period, and when he returned he saw one of Shafford's letters. He told Otto that Shafford was entitled to an explanation. Otto then directed Grantier to tell Shafford the B & O deal had fallen through. Thereafter, Otto was "evasive" about the deal. Later he ordered Grantier to get quotations on specially made coconut bags and some

25,000 were secured upon an order that specifically requested that the name of the company be left off. He also testified that no coconut was sold to any other purchaser between December of 1947 and February 15, 1948, when he was dismissed by Otto.

In February of 1948, Angel Reyes, the owner of the Luzon plant, agreed with Otto personally to extend the prior contract for operation of the plant for a two-year term.

What happened after January 9, 1948, and the actual transactions between Otto Sales and B & O were described by Otto, in his direct examination or when called under section 2055 of the Code of Civil Procedure. He testified, and offered a contract to prove it, that Dean and Company, about January 28, 1948, had advanced the $75,000 needed to finance the Luzon plant. According to the terms of the Dean contract that company loaned the $75,000 to Otto Sales upon the condition of the formation of a joint venture, with Dean furnishing the money for operation, and with Otto Sales furnishing the Reyes contract. It was provided that the joint venture would organize a corporation with each of the contracting parties holding one-half of the shares, but with a 7½% commission payable to Otto Sales before computation of profits. Such a corporation, with the agreed stock ownership, called "Luzon Desiccated Coconut Corporation" was formed on April 30, 1948. Otto testified that under the Dean agreement Otto Sales retained complete control over the operations of Luzon Desiccated.

Otto categorically denied that B & O ever offered to buy, or that it ever bought, all or any part of the output of the Luzon plant. He claimed that all deals between Otto Sales and B & O were based on a factor's agreement. In support of this contention he introduced a contract between B & O and Otto Sales dated March 3, 1948, by which B & O was to become the "sole selling agent" for all coconut from the Luzon plant for one year at a commission of 6½% exclusive of expenses. While this contract provided for the rendition of accounts from B & O to Otto Sales, and generally provided that Otto Sales would set the price at which the coconut was to be sold, it also provided that B & O was to provide letters of credit two weeks in advance of production, and that B & O had the option to sell at its own price if shipped goods remained unsold for 30 days at the dock or warehouse. A March 4, 1948, supplementary clause required B & O to supply Otto Sales with the names of buyers of the coconut. Otto testified that this contract comprised the entire deal with B & O. Obviously, the contract did not amount to a sale of any coconut to B & O but constituted B & O selling agent or factor for Otto Sales. But the real question is, what did the parties do under this contract and how did they do it?

Otto admitted that with the exception of June and July, large shipments of coconut from Luzon Desiccated had been made by Otto Sales to B & O in the months from April to October, 1948. No issue of the amount of such shipments is involved on this appeal. These shipments were made pursuant to certain printed documents in which there were blanks for the insertion of certain information. They list the grades, prices and quantities of coconut involved in the particular shipment, provide how much has been paid and how much is due and is to be paid under the particular invoice. They all contain the following heading, the portions that are typewritten being indicated by the parenthesis:

> "Luzon Desiccated Coconut Corporation
> Pagsanjan, Laguna, P. I.
>
> Invoice For Goods Delivered
>
> Purchased by (B & O Nut Company)
> Address (San Francisco, California)
> Port of Discharge (Same)
> Consigned to (Same) "

Twenty-six of these invoices, all describing B & O as the purchaser were introduced into evidence. At the trial there was some quibbling over whether these documents were or were not "invoices." The documents declare themselves to be invoices not only as indicated above but in several other unquoted portions of the documents, and Otto conceded that all of these invoices were paid to Luzon Desiccated and that Luzon Desiccated received its money from B & O upon the invoices when the coconut was loaded on ships in the Philippines.

Otto testified that B & O received the coconut pursuant to these documents and then sold it pursuant to the April agreement, receiving a commission as provided in that agreement. The agreement with B & O was terminated by Otto on October 12, 1948. No one connected with B & O was called as a witness.

On this evidence the jury on instructions unchallenged on this appeal brought in a verdict of $15,760.20 against both defendants.

Both appellants point out that admittedly, under Shafford's contract, he was to receive a commission only if a sale of coconut was made to B & O, and contend that the evidence shows without conflict that no such sale was ever made. Less than two pages of a five and a half page opening brief are devoted to this issue in which no case authority at all is cited, and the closing brief is but little more complete. It is somewhat difficult to follow appellants' incomplete and undeveloped argument, but it seems to be that the evidence, without conflict, shows that under the agency contract with B & O, Otto Sales purchased the coconut from Luzon Desiccated using and employing the credit of B & O as a factor, agreeing to pay it as a factor a commission on sales to third persons effectuated by it, and reimbursing it as factor for unsold merchandize at the termination of the contract. Section 2026 of the Civil Code is cited as the sole authority in support of this conclusion. It reads: "A factor is an agent who, in the pursuit of an independent calling, is employed by another to sell property for him, and is vested by the latter with the possession or control of the property, or authorized to receive payment therefor from the purchaser."

The appellants attempt to explain away the invoices, describing B & O as the purchaser by the contention that they constitute mere fragments of evidence contradicted by the evidence as to the transaction as a whole, and therefore (so it is claimed) must be disregarded.

[2] There is no doubt that the written contract between B & O and Otto Sales generally purported to be an agency contract and did not provide for the sale to B & O of any coconut. But, of course, an agency contract, such as one appointing a factor or creating a bailment, can be shown to be a sham by third parties by other provisions of the contract or by the surrounding circumstances. That is, it can be shown that the agency contract is a mere mask to hide a true sale between the parties. Where such evidence is produced the question of whether or not a sale took place becomes a jury question. Miller Rubber Co. v. Citizens' Trust & Savings Bank, 9 Cir., 233 F. 488; Reliance Shoe Co. v. Manly, 4 Cir., 25 F.2d 381; In re Heckathorn, D.C., 144 F. 499; In re Penny & Anderson, D.C., 176 F. 141; Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 42 S.Ct. 360, 66 L.Ed. 653; United States v. City and County of San Francisco, D.C., 23 F.Supp. 40; 9 Cir., 106 F.2d 569; 310 U.S. 16, 60 S.Ct. 749, 84 L.Ed. 1050; see, also, cases collected 22 Am.Jur. p. 309, § 5; 2 C.J.S., Agency, § 2(i), p. 1031; 12 Cal.Jur. p. 411, § 2. This is a rule of common sense. As the above cited cases indicate, mere verbal formulas, mere words and the ingenuity of contractual expression dreamed up by ingenious business men or their lawyers cannot be used to prevent a showing of the real nature of the transaction. It is substance and not form that controls.

[3] The evidence already set forth at some length is susceptible of the reasonable interpretation that the March 3, 1948, contract between B & O and Otto Sales was made in bad faith and was part of a general course of conduct whereby Otto Sales attempted to disguise actual sales to B & O as a factoring arrangement in order to defeat Shafford's right to commissions. The fact that the invoices described B & O as the purchaser is alone sufficient to support the implied finding of the jury that the transactions were sales. This is strongly supported by the evidence that B & O paid Luzon Desiccated, which at all times was completely controlled by Otto Sales, in cash before the goods were shipped

Alamitos Land Co. v. Texas Co., 11 Cal. App.2d 614, 54 P.2d 489. There is also Grantier's evidence that Otto had told him that B & O had contracted to buy the entire plant output. The contention that the literal terms of the contract alone must govern, in the face of this evidence, approaches the frivolous.

[4] But the second point raised by appellant Otto personally presents a more difficult proposition. It is urged that there was insufficient evidence upon which to hold him personally on a corporation contract in the absence of evidence that he used the corporate entity, as a shield for fraudulent activities. On this isue all of Grantier's testimony must be disregarded. As already pointed out, his testimony was not admitted as against Otto. As so limited what does the record show on this issue? It shows that Otto was the president and general manager of the corporation; that, although he and his family owned practically all of the stock, Otto owned personally only one-third of such stock and that his family invested their own money in the stock purchased by them. There is no evidence that the corporation was used as a shield by Otto to cover up his activities as an individual. There is no evidence that Shafford believed he was dealing with Otto personally, or placed any reliance in such belief. There is no evidence that the corportion is undercapitalized or not financially responsible. There is no evidence that any inequitable result will follow by refusing to disregard the corporate entity.

Respondent calls attention to the mimeographed offering of coconut by Otto personally in January of 1947, but there is no evidence that Otto Sales had even been organized at that time. Such offering did not mislead Shafford, a year later, during which year many corporate communications had been made to him. Respondent also calls attention to the transmission of the contract forms personally by Otto in August, 1947. This was a minor matter and cannot be held to be controlling. Respondent also asserts that Otto's untruthful and evasive testimony in other connections, and his attempts at concealment, would jusify the jury in believing that he would also fraudulently hide behind a corporation as his alter ego. But just how the right to disbelieve Otto as a witness can support a positive finding of misuse of the corporate entity does not appear. Breach of contract by the corporation, even though fraudulently concealed, does not support an inference that the corporate entity was being misused for personal purposes.

The only case cited by appellant in his opening brief in his two-page discussion of this problem is Wenban Estate, Inc. v. Hewlett, 193 Cal. 675, 227 P. 723. That case laid down the following test, 193 Cal. at page 697, 227 P. at page 731: "Thus proof that an individual owns all of the stock of a corporation and that the corporation is in truth and in fact but the corporate double of the owner of the stock will, in conjunction with a further showing that as a result of the double relationship fraud or injustice will inure to a third person, suffice to dissipate the separate identity of the corporation."

The case also held, 193 Cal. at page 698, 227 P. at page 732, that it "is not necessary that actual fraud be shown. It is sufficient if a refusal to recognize the fact of the identity of the corporate existence with that of the individual would bring about inequitable results."

There are many cases that could have been cited holding that sole ownership and actual control are not enough to warrant a court in piercing the corporate veil. See, for example, Hollywood Cleaning & Pressing Co. v. Hollywood Laundry Service, 217 Cal. 124, 17 P.2d 709; Erkenbrecher v. Grant, 187 Cal. 7, 200 P. 641; Dos Pueblos Ranch & Imp. Co. v. Ellis, 8 Cal.2d 617, 67 P.2d 340; Carlesimo v. Schwebel, 87 Cal. App.2d 482, 197 P.2d 167; Norins Realty Co. v. Consol. A. & T. G. Co., 80 Cal.App. 2d 879, 182 P.2d 593; Judelson v. American Metal Bearing Co., 89 Cal.App.2d 256, 200 P.2d 836; Consolidated etc. Industries v. Marks, 109 Cal.App.2d 310, 240 P.2d 718; Gardner v. Rutherford, 57 Cal.App.2d 874, 136 P.2d 48; Estate of Greenwald, 19 Cal. App.2d 291, 65 P.2d 70; California Emp. Comm. v. Butte County etc. Ass'n, 25 Cal. 2d 624, 154 P.2d 892; Estate of Winder, 99 Cal.App.2d 83, 221 P.2d 193; Estate of Barreiro, 125 Cal.App. 752, 14 P.2d 786; see discussion in 31 Cal.L.Rev. 426. These cases recognize that the formation of even a one-man corporation to obtain limited liability is a proper objective unless used for improper purposes. They hold that complete stock ownership and actual one-man control will not alone be sufficient to impose liability on the individual. In the absence of confusion of corporate with individual affairs, or failing to disclose to third parties the existence of the two entities, or abuse or bad faith in the exercise of corporate control, the corporate entity will not be disregarded.

There are other cases that contain some language somewhat inconsistent with some of the language in the above-cited cases, and in which the corporate entity has been disregarded where there was one-man ownership and control, but also at least some, if slight, evidence of unfairness, inequitable results, or confusion of parties. See D. N. & E. Walter & Co. v. Zuckerman, 214 Cal. 418, 6 P.2d 251, 79 A.L.R. 329; Wittmann v. Whittingham, 85 Cal.App. 140, 259 P. 63; Sime v. Malouf, 95 Cal.App.2d 82, 212 P.2d 946, 213 P.2d 788; Kohn v. Kohn, 95 Cal.App.2d 708, 214 P.2d 71; Stark v. Coker, 20 Cal.2d 839, 129 P.2d 390; Watson v. Commonwealth Ins. Co., 8 Cal.2d 61, 63 P.2d 295; Thomson v. L. C. Roney & Co., 112 Cal.App.2d 420, 246 P.2d 1017.

In the instant case, applying the most liberal rule adopted by the courts in this field, it must be held that the evidence is insufficient to support a judgment against Otto personally. The most that the evidence shows is one-man ownership (through his family), and perhaps one-man control. The two personal documents sent to Shafford were too remote to sustain a finding of confusion of identities. There is no evidence of such confusion. Shafford did not testify that he believed or was led to believe that he was dealing with Otto personally. There is no evidence at all that any inequitable or unfair result will result from refusing to impose personal liability upon Otto. This being so, the judgment against him cannot stand.

The judgment against Walter E. Otto is reversed; the judgment against Otto Sales Company, Inc., is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

Hearing denied; CARTER, J., dissenting.

RICHARDS v. STANLEY et al.*

Civ. 15322.

District Court of Appeal, First District,
Division 2, California.

Aug. 24, 1953.

Hearing Granted Oct. 22, 1953.

Action to recover for personal injuries sustained when automobile driven by thief and owned by defendants struck motorcycle on which plaintiff was riding. The Superior Court, City and County of San Francisco, entered judgment granting non-suit and plaintiff appealed. The District Court of Appeal, Goodell, J., held that where owner of automobile negligently failed to remove keys from it, and thief stole automobile and negligently collided with plaintiff, the thief's negligence was not a superseding act which broke the chain of causation set in motion by the leaving of the key in the unlocked automobile.

Judgment reversed and cause remanded for a new trial with direction to grant plaintiff reasonable time within which to amend his complaint.

1. Pleading 🔑205(1)

Although ordinance forbidding automobile owners to leave automobile unlocked and unattended with keys in ignition, provided that violation of ordinance would not have any bearing in any civil action, complaint alleging that defendants negligently and in violation of ordinance left automobile unlocked and unattended with keys in ignition, which induced thief to take it and negligently collide with plaintiff, was sufficient as against a general demurrer.

*** Subsequent opinion 271 P.2d 23.**

2. Pleading ⚷428(5, 6)

Motion of defendant to exclude evidence, based on insufficiency of complaint, was in the nature of a general demurrer to the complaint, and the court had to accept its allegations as true.

3. Automobiles ⚷245(65)

If defendants negligently, left their automobile unlocked and unattended with keys in ignition, and thief stole the automobile and negligently collided with plaintiff, the thief's negligence was not as matter of law a superseding act which broke the chain of causation set in motion by the leaving of the key in the unlocked automobile.

4. Pleading ⚷236(6)

Where plaintiff based action for injuries inflicted by defendants' stolen automobile on defendants' negligence and violation of ordinance forbidding automobile owners to leave automobiles unlocked and unattended with keys in ignition, and trial court held complaint sufficient as against general demurrer, but subsequently sustained motion to exclude evidence because of insufficiency of complaint, refusal to allow plaintiff time to amend complaint by adding cause of action founded on general negligence, was abuse of discretion. Code Civ.Proc. § 472c.

5. Automobiles ⚷244(2)

Ordinance requiring automobile owners to remove keys from ignition before leaving automobile unlocked and unattended, was designed to reduce theft of automobiles, and provision that section shall not be admissible or have bearing in any civil action could not be used to establish prima facie negligence of owner if automobile was stolen and plaintiff was injured by it.

Frank J. Baumgarten and Harry N. Grover, San Francisco, for appellant.

Clark & Heafey, Belcher & Koller, Edwin A. Heafey, Oakland (Gerald P. Martin, Oakland, of counsel), for respondents.

GOODELL, Justice.

This appeal was taken from a judgment entered on the granting of a nonsuit in a personal injury action.

The complaint alleges that the defendants Manfred Stanley and Mary Stanley, husband and wife, were the owners of a 1941 De Soto Sedan which at the time in question was under the control of Mrs. Stanley and that on August 14, 1948, at about 5:30 p. m., she parked it on Stevenson Street near Second in San Francisco and left it "unattended and unlocked with the ignition key in said car lock in direct violation of section 69" of the Municipal (Traffic) Code, which is set out in the complaint as shown in the footnote.[1]

It alleges that by reason of her carelessness in leaving the car unattended on a public street, unlocked, with the key in the lock, defendant Rawlings was thereby induced "to and did, enter said automobile and drove it from its parked place over various streets in the City * * * and into the intersection of Army Street and Potrero Avenue in a careless and negligent manner to the point of impact with the plaintiff's vehicle in said intersection."

It then alleges that about 5:45 p. m. plaintiff was driving a motorcycle on Army Street near Potrero Avenue when Rawlings in the De Soto carelessly and negligently ran into him with great force and violence, throwing him to the pavement. Then: "That by reason of the premises *and the aforesaid carelessness and negligence of the defendants and each of them*, there was inflicted upon plaintiff serious personal injuries which rendered said plaintiff sick, sore, lame and disabled, and causing permanent injuries." (Emphasis added). Then follow allegations of plaintiff's injuries, hospitalization and treatment, also respecting the damage to his motorcycle. The prayer is for $50,000 general damages plus special damages and $470 property damages.

---

[1] "*Sec. 69. Requiring removal of ignition keys from noncommercial motor vehicles standing unattended in certain places, authorizing officers to remove.* No person shall leave a motor vehicle, except a commercial motor vehicle, unattended on any street, alley, used car lot, or unattended parking lot, without first stopping the engine, and removing and taking the ignition key from the vehicle; provided, however, that any violation of this section shall not mitigate the offense of stealing any such motor vehicle; nor shall this section or any violation thereof be admissible as evidence affecting recovery in any civil action for theft of such motor vehicle, or the insurance thereon, or have any other bearing in any civil action. Whenever any police officer shall find any such motor vehicle standing in violation of this section, such police officer is authorized to remove therefrom the keys left therein and deliver the same to the officer in charge of the nearest police station."

The complaint is based on concurrent negligence since it brackets Mrs. Stanley's negligence in leaving the key in the car with Rawlings' negligence in colliding with plaintiff.

The general demurrer of the Stanleys was overruled and their answer contains denials and pleads plaintiff's contributory negligence.

At the trial a jury was empaneled and opening statements were made. When section 69 was offered in evidence the defense objected that "it shows on its face that it does not pertain in any way to a civil action; it is not to be used in any way in any civil action." After argument the court admitted it but the next day the ruling was reversed and the court rejected it, remarking, however, that "if the complaint states a cause of action otherwise, all right—but couldn't it be amended so it could state a cause of action?"

After further discussion the following occurred:

"Mr. Grover: If your Honor please, at this time, on behalf of the plaintiff, we move the court for leave to amend the present complaint by adding thereto a cause of action founded upon a charge of general negligence on the part of Mary and Manfred Stanley, the two defendants here." The defense objected on the ground that the cause of action as pleaded "is based on this ordinance * * *; your Honor has held that that ordinance is not admissible. Then, counsel now seeks to set forth a separate cause of action setting forth general negligence. The first cause of action then would be on the basis of the statute, and the second on the basis of general negligence. It sets forth a new cause of action after a period of one year as described, [sic] and certainly it is barred by the statute of limitations, and we object to it on that ground.

"The Court: Very well. The objection is sustained.

"Mr. Grover: I understand that the motion is denied, your Honor?

"The Court: Yes, denied.

"Mr. Heafey: At this time, on behalf of the defendants Manfred Stanley and Mary Stanley, we object to the introduction of any further evidence under the cause of action that is set forth in this complaint which is based on the ordinance * * *.

"The Court: The motion is granted.

"Mr. Heafey: At this time I assume that counsel has no further evidence to offer, no offer of evidence to make, and we move the court for a judgment of nonsuit in favor of Manfred Stanley and Mary Stanley.

"The Court: The motion for nonsuit will be granted. But the case is still pending against the other defendant."

It will be seen that the trial was brought to a halt by a ruling which shut out all testimony on the plaintiff's side. The court had suggested the possibility of amending the complaint, but as soon as plaintiff's counsel asked leave to amend, the court denied it without having the benefit of the amendment which plaintiff might have proposed. It would appear that the court had concluded that plaintiff relied solely on the traffic ordinance and could neither allege nor prove a case without it.

Appellant contends that even though all references to the ordinance be eliminated, the complaint still states a cause of action for negligence against Mrs. Stanley.

[1] If from paragraph IV the words "in direct violation of Section 69" etc. be stricken there remains the averment that Mrs. Stanley parked the car in the downtown business district of a large city and left it "unattended and unlocked with the ignition key in said car lock." If from

paragraph V the words "in direct violation of the aforesaid City Ordinance" be stricken there remain the averments that Mrs. Stanley's negligence in leaving the car as she did, induced Rawlings to take it and drive it in a careless and negligent manner. We are satisfied that regardless of the references to the ordinance the complaint was sufficient as against a general demurrer, and that the first order (made nine months before the trial) overruling the general demurrer was correct. See Jackson v. Hardy, 70 Cal.App.2d 6, 12–13, 160 P.2d 161.

[2] The motion of the defense to exclude evidence based on the insufficiency of the complaint was in the nature of a general demurrer to the complaint, Calhoun v. Calhoun, 81 Cal.App.2d 297, 183 P.2d 922, hence on such motion the court had to accept its allegations as true. Smith v. Beauchamp, 71 Cal.App.2d 250, 162 P.2d 662.

The real and underlying question in this case is whether Rawlings' negligence was an intervening or superseding act which broke the chain of causation set in motion by the leaving of the key in the unlocked car.

The subject of intervening acts has been under examination by the Supreme Court in several recent cases. In Eads v. Marks, 39 Cal.2d 807, 812, 249 P.2d 257, 260, that court said: "Where the intervening act is reasonably foreseeable, the chain of causation is not broken, and the original actor remains liable", citing Mosley v. Arden Farms Co., 26 Cal.2d 213, 157 P.2d 372, 158 A.L.R. 872 and Osborn v. City of Whittier, 103 Cal.App.2d 609, 230 P.2d 132.

That court has given its approval to §§ 447, 449 and 453 of the Restatement of Torts with respect to proximate causation. See McEvoy v. American Pool Corporation, 32 Cal.2d 295, 298–299, 195 P.2d 783. Section 447 reads: "The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if (a) the actor at the time of his negligent conduct should have realized that a third person might so act." Sections 449 and 453 are found in the footnote.[2]

In the McEvoy case, supra, Jack McEvoy was employed by the Pool Corporation as a service man. He used his own car in making his rounds, being paid for its use by his employer. In his work he used dangerous chemicals which he always carried in his car. One evening while off duty a hit-and-run driver collided with his car and the impact broke the glass containers, spilling the chemicals on Jack's mother who happened to be riding with him. In her action against the corporation a nonsuit was granted. In reversing the judgment the court said, 32 Cal.2d 299, 195 P.2d 786: "In the light of the foregoing [Restatement] we cannot say, as a matter of law, that defendants are relieved from liability for negligence by the intervening conduct of their employee or the hit-and-run driver. As we have seen, the jury could have found that defendants owed a duty to persons in plaintiff's situation, and they cannot escape responsibility for their failure to perform that duty merely because of intervening acts the likelihood of which they reasonably should have foreseen. In regard to Jack's conduct in leaving the chemicals in the car, there was evidence that defendants failed to give him adequate notice of the extremely dangerous character of the liquids and that he was unaware that they were dangerous. The jury could have found that defendants had knowledge that their employees did not remove the glass jars from their cars at night before driving for pleasure and that defendants should have foreseen the likelihood of such conduct on the part of Jack on the night of the accident. *As for the intervening negligence of the unknown driver, the jury could have found, in view of the frequency of automobile accidents, that defendants should have foreseen that a third person might cause the type of accident which occurred.*" (Emphasis added.)

---

[2] Section 449—"If the realizable likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious or criminal does not prevent the actor from being liable for harm caused thereby."

Section 453, comment (a): "If the facts are undisputed, it is usually the duty of the court to apply to them any rule which determines the existence or extent of the negligent actor's liability. If, however, the negligent character of the third person's intervening act or the reasonable foreseeability of its being done is a factor in determining whether the intervening act relieves the actor from liability for his antecedent negligence, and under the undisputed facts there is room for reasonable difference of opinion as to whether such act was negligent or foreseeable, the question should be left to the jury."

The reasoning of the McEvoy case on the question of intervening negligence was followed in the case of Benton v. Sloss, 38 Cal.2d 399, 240 P.2d 575. In that case Sloss, a used car dealer, during negotiations for the sale of an old car to one Jay Fetters, a 19-year-old boy, permitted him to drive it over a week-end. Jay had no driver's license, and Sloss knew it. While driving around with some other youngsters, it collided with another car and the plaintiffs, who were riding with Jay, were injured. In affirming a judgment in their favor against Sloss the court said, 38 Cal. 2d at page 405, 240 P.2d at page 579: "Jay's negligent driving was unquestionably a cause of plaintiffs' injuries. Sloss' negligence was also a cause of those injuries, *if it was a substantial factor in bringing them about.* McEvoy v. American Pool Corp., 32 Cal.2d 295, 298, 195 P.2d 783; Rest., Torts, § 431. This *question of fact* the trial court resolved in plaintiffs' favor. * * * *The negligent conduct of Jay did not relieve Sloss from liability, for the likelihood of negligent operation of the vehicle was one of the hazards that Sloss could reasonably foresee.* Mosley v. Arden Farms Co., 26 Cal.2d 213, 219, 220, 157 P.2d 372, 158 A. L.R. 872; McEvoy v. American Pool Corp., supra, 32 Cal.2d 295, 298, 195 P.2d 783; Lacy v. Pacific Gas & Elec. Co., 220 Cal. 97, 29 P.2d 781; Opple v. Ray, 208 Ind. 450, 456, 195 N.E. 81; see Rest., Torts, § 447." (Emphasis added.)

See also Luis v. Cavin, 88 Cal.App.2d 107, 113, 198 P.2d 563 and Werkman v. Howard Zink Corp., 97 Cal.App.2d 418, 425–427, 218 P.2d 43.

[3] In the Mosely case, 26 Cal.2d 219, 157 P.2d 372, 375, the court says that "the issue of proximate cause is essentially one of fact." The McEvoy case and Benton v. Sloss are directly in point, and we see no reason for prolonging the discussion of the question of proximate cause. Under these authorities it could not be held as a matter of law that Rawlings' negligence was a superseding act.

Our holding, then, is simply that the question whether the leaving of the ignition key in the lock of the Stanleys' unlocked car parked in a busy street was negligence, and, if so, whether it was a proximate cause of plaintiff's injury, are questions of fact.

[4] At the time when leave to amend was denied the complaint had been already (nine months before) held sufficient as against a general demurrer. In those circumstances plaintiff's counsel could hardly be expected "to appear at the time of trial armed with the proposed amendments to their pleadings." See MacIsaac v. Pozzo, 26 Cal.2d 809, 816, 161 P.2d 449. The denial of plaintiff's motion to amend was tantamount to the sustaining of a demurrer without leave to amend. Time should have been granted to enable plaintiff to amend (if so advised) and it was an abuse of discretion to deny such permission, Code Civ. Proc. § 472c; see Washer v. Bank of America, 21 Cal.2d 822, 833, 136 P.2d 297, 155 A.L.R. 1338; Hancock Oil Co. of California v. Hopkins, 24 Cal.2d 497, 510–511, 150 P.2d 463; Speegle v. Board of Fire Underwriters, 29 Cal.2d 34, 42, 172 P.2d 867; Cruise v. City and County of San Francisco, 101 Cal.App.2d 558, 561, 225 P. 2d 988; C. Dudley De Velbiss Co. v. Kraintz, 101 Cal.App.2d 612, 617, 225 P.2d 969.

[5] We are satisfied that § 69 is purely and simply a police measure designed to remove the temptation to steal automobiles, and thus reduce the number of thefts thereof. Regardless of the provision therein that the section shall not be admissible or

have any "bearing in any civil action" we are satisfied that the section cannot be used to establish prima facie negligence and that the court properly rejected it in the case now under review.

The judgment appealed from is reversed and the cause remanded for a new trial with the direction to the court to grant plaintiff a reasonable time within which to amend his complaint freed from all reference to § 69 of the Municipal Code.

NOURSE, P. J., and DOOLING, J., concur.

119 Cal.App.2d Supp. 871

SAN DIEGO COUNTY v. MILOTZ et al.

No. 179948.

Appellate Department, Superior Court,
San Diego County, California.
June 22, 1953.

As Corrected Sept. 1, 1953.

Action by county against court reporter, county auditor, and his bondsmen, for reporter's fees allegedly illegally allowed by auditor. The Municipal Court, San Diego Judicial District entered judgment of dismissal after sustaining of demurrers to second amended complaint without leave to amend, and county appealed. The Superior Court, Appellate Department, Glen, J., held that complaint alleging wrongful payment in violation of statute providing for reduction of reporter's compensation for filing transcript by one-half, if transcript was not filed within time allowed, was insufficient for failure to allege with particularity the precise failure to comply with the statute, but that plaintiff should have been given an opportunity to file an amended complaint in that the provisions for reduction of compensation of the reporter were mandatory, giving rise to right in county to recover overpayments from reporter, the auditor, and his bondsmen.

Judgment reversed, with directions.

1. Counties 🔑101(6)

Complaint in which county specifically alleged that liability of county auditor, and his bondsmen, for payment of reporter's fees to third defendant, arose out of payment of public funds in violation of provision of Penal Code requiring a reporter to file transcripts of preliminary examinations in felony cases within prescribed time, in default of which the reporter's compensation shall be reduced by one-half, was required to allege with particularity the precise failure to comply with the statute, including facts showing commencement of the statutory time in which transcripts should have been filed. Pen.Code, § 869; Government Code, § 26525.

2. Courts 🔑57(2)

Criminal Law 🔑236

Under statute providing manner of taking, transcribing, and filing of testimony before a magistrate in a felony case, except in homicide cases wherein defendant is held to answer, the reporter is not required to reduce to writing and file the testimony taken at the preliminary hearing, except upon a demand of the prosecuting attorney, or the defendant, or his counsel, and until a defendant is held to answer, no transcript need be prepared, and if one is prepared without defendant being held to answer, the reporter is not entitled to be paid any compensation by the auditor. Pen. Code, § 869; Government Code, § 26525.

3. Criminal Law 🔑236

A magistrate is a statutory official, and he may order a transcript written and filed only as authorized by statute.

4. Counties 🔑101(6)

Courts 🔑57(2)

Complaint of county to recover from county auditor, his bondsmen, and reporter for fees allegedly paid in violation of statute requiring reduction of compensation of reporter to one-half if transcript of preliminary examinations is not filed within the prescribed time, which did not allege that preliminary hearings in question related to homicide, or that demands for transcripts were made by the prosecuting attorney, or defendant, or his counsel, and which did not allege date of close of preliminary hearings or failure to file transcripts within 10 days from such date, was insufficient to state a cause of action under the statute. Pen.Code, § 869.

5. Criminal Law ⚷236

Statute providing procedure for taking, transcribing, and filing by reporter of testimony taken before a magistrate in a felony case, is not ambiguous or uncertain, and admits of no construction in derogation of its plain terms. Pen.Code, § 869.

6. Statutes ⚷184, 217.1

Where the ambiguity of a statute gives rise to a need for its construction, the legislative history of the statute and the objective of the legislature should be given consideration, and the statute should be so construed as to give effect to the legislative purpose.

7. Courts ⚷57(2)

Statute requiring in part that the reporter file transcript, where required in felony cases, within 10 days after close of preliminary examination, and providing for reduction by one-half of compensation of reporter for services if transcript is not filed within time allowed, manifests legislative desire to require prompt filing of transcript of preliminary hearings in felony cases, and the requirement of timely filing under pain of reduction of compensation is mandatory, and not merely directory. Pen. Code, § 869.

8. Statutes ⚷227, 230

When a statute is amended to abolish an evil or to correct a practice in existence, effect must be given to each section, phrase and word of the amendment, and where a statute or an amendment thereto prescribes the consequence to follow or a penalty for failure to act in time, the limitation is ordinarily mandatory and not directory.

9. Statutes ⚷228

Where an act required by statute is impossible of performance, implied exceptions are recognized to the mandatory requirements, based upon the impossibility.

10. Courts ⚷57(2)

The matter of impossibility, in some circumstances, of filing of transcript of preliminary examination in felony case by reporter within 10 days of close of hearing, thereby subjecting reporter to reduction of compensation by one-half, is properly addressed to the Legislature, and not to the courts, which are bound to apply the filing statute as it is plainly and unambiguously written. Pen.Code, § 869.

11. Counties ⚷91, 96
Courts ⚷57(2)

Under statute limiting court reporter to half compensation where he has failed to file transcript in felony case within time allowed, if under the circumstances a transcript is required, there is not a mere withholding of one-half compensation by the auditor, but a reduction of reporter's compensation, and upon disbursement to reporter of full compensation, the amount of the overpayment may be recovered from the reporter, the auditor who made the wrongful payment, and his bondsmen. Pen. Code, § 869; Government Code, § 26525.

12. Counties ⚷69(1)

Statutory or constitutional authority for payment of compensation by county for official services rendered is necessary, in absence of which it cannot legally be paid, no matter how beneficial the services performed may be. Pen.Code, § 869; Government Code, § 26525.

13. Officers ⚷94

Compensation statutes are to be strictly construed in favor of the government.

14. Counties ⚷91, 96

Under provision of Government Code declaring that if any county officer draws any warrant without authorization by law and warrant is paid, district attorney shall institute suit to recover money paid, and 20% damages for use thereof, when county auditor had paid court reporter his full compensation despite fact that certain compensation to which he was entitled had been reduced by one-half because of failure to file transcripts in felony cases within time allowed, judgment could be entered against auditor, and his bondsmen, for amount of public funds wrongfully disbursed, without ordering payment of the 20% penalty. Pen.Code, § 869; Government Code, § 26525.

15. Counties ⚷91

A county auditor who draws a warrant for payment of compensation to court reporter, without authority of law in that certain compensation to which reporter is entitled has been reduced by one-half by his failure to file transcripts in felony cases, is liable without specific statutory provision, for the disbursements made, even though he did not receive any of the funds disbursed, in view of auditor's general statutory duty to order, examine, allow, and order paid, only valid claims against the county. Pen.Code, § 869; Government Code, §§ 29803, 29804.

16. Counties ⚷91

The good faith of a county auditor in making a payment of compensation to court reporter in excess of that to which reporter is entitled, by virtue of reduction of his compensation to one-half by failure to file transcripts in felony cases within time required, does not eliminate liability of auditor for a payment made without authority in law. Pen.Code, § 869; Government Code, §§ 29803, 29804.

◆

James Don Keller, Dist. Atty., San Diego, by Duane J. Carnes, Dep. Dist. Atty., San Diego, for appellant.

Butler, Kaminar & Sorbo, San Diego, by Myron Kaminar, San Diego, for respondent W. F. Milotz, Jr.

James B. Abbey, San Diego, for respondent J. C. Perrigo.

GLEN, Judge.

Plaintiff seeks to recover from defendant Milotz and from J. C. Perrigo, county auditor, and his bondsmen, reporter's fees alleged to have been illegally allowed by the county auditor and received by Milotz contrary to section 869, Penal Code.

The amended complaint alleges an indebtedness of $1852.30 to the County of San Diego "* * * for and on account of moneys paid out upon County warrants issued by defendant J. C. Perrigo to defendant W. F. Milotz, Jr., without authorization of law and in violation of the provisions of Section 869 of the Penal Code requiring * * * reduction of compensation by one-half for failure to transcribe, certify and file transcripts upon preliminary examinations in felony cases, together with affidavits as provided in said section within the time provided therein. That an additional sum of twenty (20) per cent, or $370.46, is due plaintiff under the provisions of Government Code Section 26525 as damages for the use of said money."

The several defendants each filed general demurrers to the second amended complaint which were sustained without leave to amend. The county appeals from the judgment entered thereon.

In their briefs, the parties have devoted their energies entirely to the question whether the provision of § 869, Penal Code reducing the compensation of the reporter one-half if the transcripts of preliminary examinations are not filed within the time allowed by that section is mandatory or merely directory.

[1] Upon analysis of the pleadings and the statute under consideration, we perceive further questions that require some comment in view of our reversal of the judgment. Since the complaint specifically alleges defendant's liability arises out of payment of public funds in violation of § 869, Penal Code, and is not couched in terms of a common count without reference to the statute, the pleading must allege with particularity the precise failure to comply with the statute in order to determine the commencement of the statutory time in which transcripts must be filed.

Penal Code, § 869 sets up a complete scheme for the taking, transcribing, and filing of testimony before a magistrate in felony cases. The statute is quite lengthy and divided into seven subdivisions and must be construed as a whole. The provisions pertinent to this inquiry are as follows:

> "The testimony of each witness in cases of *homicide* must be reduced to writing, as a deposition, by the magistrate, or under his direction, and in *other cases* upon the demand of the prosecuting attorney, or the defendant, or his counsel. The magistrate before whom the examination is had may, in

> his discretion, order the testimony and proceedings to be *taken* down in shorthand in all examinations herein mentioned, and for that purpose he may appoint a shorthand reporter. * * *
>
> "Fifth—The reporter shall, within ten days after the *close* of such examination, *if* the defendant be held to answer the charge, *transcribe* his said shorthand notes, * * * and file both said original and copy with the county clerk of the county, or city and county, in which the defendant was examined. The reporter shall, *before* receiving *any* compensation as such reporter, file with the auditor of the county his affidavit setting forth that said transcriptions have been filed with said county clerk *within* the time herein provided for. The compensation of the reporter for any services rendered by him as such reporter in any court of this State shall be *reduced one-half* if the provisions of this section as to the *time* of filing said transcript *have not* been complied with by him. * * *
>
> "Seventh—If said transcript *is* filed within the time hereinbefore provided for, the reporter shall be entitled to receive the compensation fixed and allowed by law to reporters in the superior courts of this State." (Emphasis added.)

[2] Except in homicide cases wherein the defendant is held to answer, the statute does not require the testimony taken at a preliminary hearing be reduced to writing and filed except upon the demand of the prosecuting attorney, or the defendant, or his counsel. Kalloch v. Superior Court, 56 Cal. 229; People v. Smith, 59 Cal. 365; People v. Brooks, 72 Cal.App.2d 657, 165 P.2d 51. In People v. Smith, supra, the defendant was charged with robbery and was held to answer without a transcript of the testimony being filed, the magistrate merely endorsing his order holding the defendant upon the complaint which he styled "a deposition." Upon denial of the defendant's motion to dismiss in the Superior Court he appealed. At page 366 of 59 Cal. the Supreme Court says:

> "According to the provisions of the Penal Code, a person, when arrested on a charge of having committed a public offense, must be examined before a magistrate. (See Penal Code, sections 858–863.) * * *
>
> "It is provided by Section 869, as to this examination, that 'the testimony of each witness, *in cases of homicide,* must be reduced to writing as a deposition, by the magistrate or under his direction, and, *in other cases,* upon the demand of the prosecuting attorney, or the defendant or his counsel.' The same section prescribes the manner in which the deposition shall be taken, when the testimony is in that form. This is the only requirement as to the reduction of the testimony to writing."

In People v. Brooks, supra, defendants were convicted of burglary. They contended they had no preliminary hearing and were not represented by counsel and that there was no transcript of the proceedings filed in the superior court. At page 660 of 72 Cal.App.2d, at page 53 of 165 P.2d of the decision the court remarks:

> "Nor is it necessary, except in homicide cases, that the proceedings be taken down in shorthand and transcribed by a court reporter. Sec. 869, Penal Code; People v. Williams, 129 Cal.App. 504, 19 P.2d 37. * * *
>
> "Seemingly they [the defendants] were content to rely on the absence of a reporter's transcript of the proceedings before the committing magistrate from the files of the superior court. As this was a case in which burglary, not homicide, was charged, the presence of a reporter was not required by law so the absence of a reporter's transcript was not evidence supporting their contention that they had been committed without a preliminary examination."

In Kalloch v. Superior Court, supra, the magistrate proceeded with the examination, and after hearing the oral statements of witnesses committed the petitioner for trial. The petitioner having been charged with murder, the information was dismissed because no transcript was prepared.

Until a defendant is held to answer, no transcript need be prepared, and if one is prepared without defendant being held to answer, the reporter is not entitled to any compensation.

In Mattingly v. Nichols, 133 Cal. 332, at page 334, 65 P. 748, at page 749, it is said:

> "We think, however, that the Code does not contemplate, much less require, the shorthand notes of the reporter to be transcribed, where the accused has been discharged. Subdivision 5 of section 869 of the Penal Code provides: 'The reporter shall, within ten days after the close of such examination (if the defendant be held to answer to the charge), transcribe into longhand writing his said shorthand notes, and certify and file the same with the county clerk of the county, or city and county, in which the defendant was examined, and shall in all cases file his original notes with said clerk.' If it was the intention of the legislature to require the reporter's notes to be transcribed and filed with the original notes in cases where the accused is discharged, as well as in cases where he is held to answer, it would have been easy to say so. No distinction whatever would have been made. It is not material to inquire whether the transcribed notes could or would have been of any use. The question, as finally stated in the reply brief, is whether appellant is entitled to pay, having performed the service upon the demand of the accused and under the order of the examining magistrate. But neither the state nor the county can be charged with a liability *unless it is authorized by law.* No discretion is vested in the justice of the peace in the matter. His authority must be found in the statute, if he has it, and we do not find any." (Emphasis added.)

[3] A magistrate is a statutory official. His powers and duties are thus limited by statute. He may order a transcript written and filed only as authorized by statute. Thus in Fursdon v. County of Los Angeles, 100 Cal.App.2d Supp. 845, 223 P.2d 520, it is held:

> "A judge of a municipal court, acting as a magistrate in holding a preliminary examination of a felony charge, had no authority, where defendant was not held to answer but the charge against him was dismissed, to order the phonographic reporters to make a daily transcript consisting of an original and six copies and to make such services a charge against the county."

At page 850 of 100 Cal.App.2d Supp., at page 524 of 223 P.2d the court observes:

> "'This office of magistrates is purely a statutory one, "and the powers and duties of the functionary are solely those given by statute." (Citing cases.) Even a justice of the Supreme Court, or a judge of the superior court, if he sees fit to assume the duties of a committing magistrate, "is not accompanied in the discharge of those functions by any of the general or implied powers * * * which surround him when sitting as a judge of a court of record." * * *'
>
> "From these cases we conclude that, whatever may be the inherent powers of the court from which a magistrate comes to conduct a preliminary examination, those powers do not inhere in him while he is acting as such magistrate. Indeed, this conclusion is at least implied in the opinion in Mattingly v. Nichols, supra, 1901, 133 Cal. 332, 334–335, 65 P. 748, 749, * * *."

[4] We are of the opinion that upon a careful reading of § 869, Penal Code and consideration of the cases above cited, the complaint in this case is demurrable for failure to allege whether the preliminary hearings in question were or were not homicide cases and the defendant held to answer; and in other felony cases whether or not a demand for a transcript was made by the prosecuting attorney, or the defendant, or his counsel; also, the date of the close of the preliminary hearing; the failure to file the transcript within ten days from that

date; and the failure of the reporter to file the affidavit required by section 869 before receiving payment. It would seem to us that such allegations are essential to determine from the pleading when and if the ten-day period in which the reporter must file the transcript under proper circumstances had expired before a cause of action may be stated for recovery of public funds disbursed contrary to the statute.

Plaintiff, therefore, should have been given an opportunity to file an amended complaint unless the provisions relating to reduction of compensation of the reporter in § 869, Penal Code are directory only as contended by the defendants.

The question thus becomes, assuming proper pleadings, whether public funds disbursed to the defendant, Milotz, as a reporter, by the defendant, Perrigo, the county auditor, in disregard of the provisions of § 869, Penal Code, are recoverable from the reporter as unlawfully disbursed and, further, whether or not the county auditor and his bondsmen are liable for such disbursements under section 26525 of the Government Code, which provides:

> "If the board of supervisors without authority of law orders any amount paid as salary, fees, or for any other purposes and the money is actually paid, *or if any county officer draws any warrant in his own favor or in favor of any other person without authorization by the board or law and the warrant is paid,* the district attorney shall institute suit in the name of the county to recover the money paid, and 20 percent damages for the use thereof. If the money has not been paid on the order or warrants, the district attorney upon receiving notice thereof shall commence suit in the name of the county to restrain the payment. An order of the board is not necessary in order to maintain the suits." (Emphasis added.)

[5, 6] Section 869 of the Penal Code is not ambiguous or uncertain in its language. Hence there is no room for construction in derogation of its plain terms. In re Miller, 31 Cal.2d 191, 187 P.2d 722; Ross v. City of Long Beach, 24 Cal.2d 258, 148 P.2d 649. Even if it were ambiguous and hence in need of construction, the object of such construction is to ascertain the intent and purpose of the legislature. In arriving at a conclusion in this regard, the legislative history of the statute and the objective of the legislature should be given consideration, and the statute so construed as to give effect to the legislative purpose. Baugh v. Rogers, 24 Cal.2d 200, 148 P.2d 633, 152 A.L.R. 1043; Gartner v. Roth, 26 Cal.2d 184, 157 P.2d 361.

The fifth subdivision of § 869, Penal Code requiring the filing of the reporter's transcript within ten days after the close of the preliminary examination appears to have been added to the section in 1881, as follows:

> "* * * The reporter shall, within ten days after the close of such examination, if the defendant be held to answer to the charge, transcribe into longhand writing his said shorthand notes, and certify and file the same with the County Clerk of the county, or city and county, in which the defendant was examined, and shall, in all cases, file his original notes with said Clerk."

In People v. Grundell, 1888, 75 Cal. 301, 17 P. 214 and People v. Buckley, 1904, 143 Cal. 375, 77 P. 169, it was decided that the provision of section 869, Penal Code, requiring the filing of the transcript within ten days was directory only, and that such a transcript could be read in evidence against a defendant if filed within a reasonable time after he was held to answer.

The section was again amended in 1919 to add the following:

> "* * * The reporter shall receive no compensation for any services rendered by him as such reporter in any court of this state until the provisions of this section have been, by him, complied with, and shall, before receiving any compensation as such reporter, file with the auditor of the county his affidavit setting forth that said transcriptions, herein provided for, have been filed as herein required." St.1919, p. 465.

In 1927 there was a further amendment to the section which is substantially the present section since the 1933 amendment changed provisions of no interest in this case. In 1927 the following was added:

> "* * * The compensation of the reporter for any services rendered by him as such reporter in any court of this state shall be reduced one-half if the provisions of this section as to the time of filing said transcript have not been complied with by him." St.1927, p. 1150.

[7] It is quite apparent from the legislative history of said Penal Code section that the legislature sought to require prompt filing of transcriptions of preliminary hearings in felony cases by first requiring in 1881 that they be filed within ten days, and by denying the reporter any compensation until the transcripts were filed by the amendment of 1919 and then by reducing the compensation to one-half by the 1927 amendment. Especially is this true when we consider our constitutional and statutory provisions long existing in this State having as their main objectives the guarantee of a speedy trial to those accused of crime.

We must assume the legislature had in mind the decisions announced in People v. Grundell and People v. Buckley, supra, when it amended § 869, Penal Code in 1919 and 1927 and had some sound reason for the amendments.

[8] When a statute is amended to abolish an evil or to correct a practice in existence, effect must be given to each section, phrase and word of the amendment. Likewise, where a statute or an amendment thereto prescribes the consequence to follow or a penalty for failure to act in time, the limitation is ordinarily mandatory and not directory.

In Thomas v. Driscoll, 42 Cal.App.2d 23, 108 P.2d 43, an amendment to section 657, Code of Civil Procedure, having to do with orders granting new trials, was under consideration. The amendment was held to be mandatory and as having been made to cure an existing evil. The court, 42 Cal.App.2d at page 26, 108 P.2d at page 45, has this to say:

> "Moreover, the provision that 'it will be conclusively presumed that the order was not based upon' the insufficiency of the evidence, unless the order be so written and filed, indicates that the legislature intended that for the order to be effective, it must be filed within ten days. Also, the use of the imperative auxiliary 'shall' signified a command. 57 Cor.Jur. 548. Although imperative words are sometimes held to have only a directory meaning, this rule of interpretation is not applicable when a consequence or penalty is provided for a failure to do the act commanded. This is a California rule and is supported by the weight of authority in other jurisdictions. In Shaw v. Randall, 15 Cal. 384, where the court, in disposing of a contention that the statute was directory only, said: 'In construing the statute we must look to the language used and endeavor, if possible, to ascertain the intention of the Legislature. * * * Where a consequence is attached to a failure to comply * * * the consequence can be avoided only by compliance with the statute.' This was followed in Perine v. Forbush, 97 Cal. 305, 32 P. 226, and in McCrea v. Haraszthy, 51 Cal. 146. The same doctrine is applied by the courts of Missouri in Hudgins v. Mooresville Consol. School Dist., 312 Mo. 1, 278 S.W. 769, and in Ousley v. Powell, Mo.App., 12 S.W.2d 102."

In Whitley v. Superior Court of Los Angeles County, 18 Cal.2d 75, 113 P.2d 449, Thomas v. Driscoll, supra, is approved and the above language quoted by the Supreme Court. The court said, 18 Cal.2d—at page 79, 113 P.2d at page 452:

> "Another circumstance to be noted in our consideration of the intended character of this statutory language is the fact that a penalty is attached to a failure to act in time. The well-established principle of construction that where consequences are attached to a failure to act in accordance with legis-

> lative direction, such direction is mandatory, was recognized in the recent case of Thomas v. Driscoll, * * *."

The Supreme Court again approved the holding of the Driscoll case in Carbone v. Superior Court of Napa County, 18 Cal.2d 768, where at page 771, 117 P.2d 872, at page 874, 136 A.L.R. 1260 the court says:

> "The legislature in adopting the amendment presumably had these decisions in mind and intended to change the law. Whitley v. Superior Court, 18 Cal.2d 75, 113 P.2d 449 * * *. See Thomas v. Driscoll, 42 Cal.App.2d 23, 108 P.2d 43. * * *"

See, also. Hammond v. McDonald, 49 Cal. App.2d [illegible]1, at page 681, 122 P.2d 332; Garrison v. Rourke, 32 Cal.2d 430, at page 435, 196 P.2d 884.

Respondents cite many decisions holding imperative words such as "shall" and "must" to have only a directory meaning. However broad these interpretations may appear, such authorities are not applicable here. As was said in Rosenfield v. Vosper, 70 Cal.App.2d 217, at page 223, 160 P.2d 842, at page 845, wherein the court quoted from Thomas v. Driscoll, supra, and emphasizes the following language:

> "'* * * Although imperative words are sometimes held to have only a directory meaning, this rule of interpretation is not applicable when a consequence or penalty is provided for a failure to do the act commanded. This is a California rule and is supported by the weight of authority in other jurisdictions.' The statute here is so clear that it leaves no room for interpretation. The law with reference to the determination of the question of disqualification, as it existed prior to 1927, was inadequate and unsatisfactory in many respects. The practice has been entirely changed."

The same reasoning might be well applied to the legislative changes in § 869 of the Penal Code.

Defendant Milotz strenuously contends that the provisions of the statute requiring the filing of a preliminary transcript within ten days of the close of the hearing are directory only for the reason that many cases may arise wherein it would be impossible for the reporter to comply with the ten-day provision concerning the preparation and filing of transcripts.

As we read section 869, Penal Code, no discretion is given the magistrate or auditor or anyone else to apply the withholding provisions of the section. The auditor's duty is plain and so is the reporter's. The magistrate may appoint a reporter to take down the testimony (apparently to relieve himself of the duty of making a longhand deposition), but is given no discretion to extend the time in which it must be prepared and filed.

[9] Many acts required by law to be done within a specified time may and do become difficult, or seemingly even impossible of performance, but that possibility alone does not confer discretion to extend the plain time limit set up by the legislature. Where an act is impossible of performance, implied exceptions are recognized to mandatory requirements, but such exceptions are based upon impossibility.

In Rose v. Knapp, 38 Cal.2d 114, at page 117, 237 P.2d 981, at page 983, the court considers the subject of impossibility of performing a statutory duty within the time prescribed, and has this to say:

> "The provision of section 583, requiring dismissal if an action is not brought to trial within five years after the filing of the complaint unless the parties have stipulated for an extension of the period, is mandatory, but it is subject to implied exceptions. As stated in Christin v. Superior Court, 9 Cal.2d 526, 532–533, 71 P.2d 205, 208, 112 A.L.R. 1153, 'The purpose of the statute is plain: to prevent *avoidable* delay for too long a period. It is not designed arbitrarily to close the proceeding at all events in five years * * *' and one exception has been recognized 'where, for all practical purposes, going to trial would be impossible, whether this was because of total lack of jurisdiction in the strict sense, or because proceeding to trial would be both impracticable and futile.' (Cases cited.) What is impossible, im-

> practicable or futile must, of course, be determined in the light of the facts of the particular case."

[10] In any event, defendant Milotz's argument in this respect is addressed to the legislature, not to the courts, and we again may assume that the legislature in arriving at the ten-day period of time given to the reporter in which to prepare and file a preliminary transcript, balanced the inconvenience and hardship upon the reporter against the constitutional and statutory objective guaranteeing one accused of crime a speedy trial. The possibility of more than ten days in jail for one charged with a felony and unable to post bail while awaiting a transcript of his preliminary hearing must have weighed heavily with the legislature. Those charged with felonies, whether in custody or not, cannot be expected to await the pleasure of the court reporter.

[11] Even though the provisions of § 869, Penal Code, limiting the reporter to half compensation in proper cases, are mandatory, may the county recover moneys actually disbursed contrary to that section from the reporter as well as from the county auditor and his bondsmen? We believe the plaintiff may recover from both the reporter and the auditor and his bondsmen.

Defendants contend that since the Penal Code section permits only a withholding of the funds that that power was lost and dissipated when the payments were actually made. With this contention we cannot agree. They assert the section provides a penalty and also the method of its application, namely, withholding the compensation which is the exclusive remedy. Reliance is placed upon County of Alameda v. Freitas, 8 Cal.App.2d 653, 48 P.2d 165, 166. In that case, there was an effort made to collect money paid a contractor that should have been withheld as a penalty for failure to pay workmen on a public works project at prevailing rates. The court held the remedy of withholding was exclusive, and upon failure to withhold the county could not recover back the moneys paid. The court reasoned that the method prescribed by the enabling statute was exclusive, Public Works Wage Rate Act, Stats. 1931, chap. 437, p. 910, and since it was not followed the action failed. In the present case, the action proceeds in exact compliance with the method prescribed by section 26525 of the Government Code. Therefore, the Freitas case, so far as the form of action is concerned, supports the validity of the amended complaint. As stated in the Freitas case, supra, "* * * Where a statute gives a penalty and prescribes the form of remedy for its recovery, such form is exclusive. * * *" No reference is made in that decision to section 26525 of the Government Code or its predecessor (section 4005b, Political Code) but only to the Public Works Wage Rate Act.

In the instant case, § 869, Penal Code, as pointed out above, confers no discretion on the reporter or the auditor or the magistrate. The remedy is in effect not a withholding but a reduction of compensation of one-half for failure to comply with the statute, and the county is proceeding in exact compliance with the method prescribed by section 26525 of the Government Code.

The Supreme Court, in Miller v. McKinnon, 20 Cal.2d 83, 124 P.2d 34, 140 A.L.R. 570, deals with section 26525, Government Code. The case holds that not only persons receiving money paid out without authority in law may be sued by the county or by the district attorney or by a taxpayer, but also that those officials who affirmatively participate in illegal payments are proper parties defendant.

We do not find the Freitas and the McKinnon decisions, supra, to be in conflict. Considered together, they support the position of the county upon a proper construction of section 869, Penal Code, and section 26525, Government Code. It is to be noted, also, that the McKinnon case goes beyond the remedy prescribed by section 26525 of the Government Code, and indicates that independent of the statute a cause of action exists to recover at least from the recipient public funds illegally disbursed. The court uses the following language, Miller v. McKinnon, supra, 20 Cal.2d at page 95, 124 P.2d at page 41:

> "It has been intimated either directly or indirectly that section 4005b [pred-

ecessor of Section 26525, Government Code] in effect creates a cause of action for money illegally expended against the person to whom paid. (Citing cases.) It cannot be doubted that unless some substantive right is established by section 4005b then there is no basis for the recovery of the 20 per cent penalty in addition to the money illegally received, provision for which is made in that section. We believe that it must be conceded that that section at least recognizes the existence of such a cause of action. As heretofore pointed out, however, a cause of action exists to recover from the person receiving the money illegally paid, independent of any statute, and it is also clear that the action may be prosecuted by a taxpayer in his name on behalf of the public agency."

In Aebli v. Board of Education, 62 Cal. App.2d 706, 145 P.2d 601, it is held:

> "Money paid under a mistake of fact may be recovered back, however negligent the party paying may have been in making the mistake, unless the payment has caused such a change in the position of the other party that it would be unjust to require him to refund.
>
> "If money is paid out by mistake by the state or an agency of government (whether by mistake of fact or mistake of law) it can be recovered back in many instances where, if paid out by an individual or by a private corporation, it could not be."
>
> "In the absence of unusual circumstances an illegal payment of public funds cannot be ratified, nor can recovery be estopped.
>
> "Estoppels will not be invoked against the government or its agencies except in rare and unusual circumstances."

At page 725 et seq. of 62 Cal.App.2d, at page 610 of 145 P.2d of the decision, the court quotes at great length the language of a recent case in Massachusetts, Norfolk County v. Cook, 211 Mass. 390, 97 N.E. 778, and cites many leading cases from other jurisdictions, holding generally that public funds paid out erroneously or illegally may be recovered, and that ordinarily the government is not estopped except under most unusual circumstances. See, also, Foster v. Pension Board of the City of Alameda, 23 Cal.App.2d 550, 73 P.2d 631; Miller v. City of Martinez, 28 Cal.App.2d 364, 82 P.2d 519.

It is urged upon us by the defendants that § 869, Penal Code, reducing the reporter's compensation to one-half in the event the transcription is not filed within ten days is a penalty, and if not a penalty the section fixed two standards of compensation, namely, full compensation when the transcript is properly filed and half compensation when it is not properly filed, and since penalties are not favored in the law, the plaintiff should not be permitted recovery.

We do not so construe the statute. It does not provide for a penalty but for reduction of compensation for work not performed within the time required by law. Nor does the statute fix two measures of compensation for reporters. The measure of compensation is fixed by paragraph "Seventh" of the statute quoted, supra, and if the services are not properly performed it is reduced to one-half by paragraph "Fifth" of the section.

[12, 13] Statutory or constitutional authority for compensation for official services rendered is necessary. Otherwise it cannot legally be paid, however beneficial the services performed may be. Compensation statutes are to be strictly construed in favor of the government. See 31 Cal. Jur. 942, Public Officers, § 119; 43 Am.Jur. 134, 135, Public Officers, § 341.

> "Any right which a public officer may have to a salary or compensation must generally be found in some provision of the law (Citing—Realty Associates Securities Corp. v. O'Connor, 295 U.S. 295 [55 S.Ct. 663, 79 L.Ed. 1446]; Nicholas v. United States, 257 U.S. 71 [42 S.Ct. 7, 66 L.Ed. 133]; South Dakota v. Collins, 249 U.S. 220 [39 S.Ct. 261, 63 L.Ed. 572]; United States v. Van Duzee, 185 U.S. 278 [22 S.Ct. 648, 46 L.Ed. 909]) for whatever

may be the character of the compensation, whether an annual salary, a per diem allowance, or fees for particular services, it must depend upon the will of the people speaking through their Constitution, statutes, or ordinances." 43 Am.Jur. 134, 135, Public Officers, section 341.

In Realty Associates Securities Corp. v. O'Connor, supra [295 U.S. 295, 55 S.Ct. 665], Mr. Justice Cardozo, speaking of referees in bankruptcy, said:

> "Like public officers generally, they must show clear warrant of law before compensation will be owing to them for the performance of their public duties."

The same judge said in People ex rel. Rand v. Craig, 231 N.Y. 216, 221, 131 N.E. 894, 895:

> "We have felt it our duty, however, when obscurity has engendered doubt, to fall back upon the fundamental principle that only clear warrant of law will justify the assumption of a power to control the public purse. Stetler v. McFarlane, 230 N.Y. 400, 408, 130 N.E. 591."

In United States v. Van Duzee, 185 U.S. 278, 22 S.Ct. 648, 649, 46 L.Ed. 909, the court said:

> "As said by Mr. Justice Jackson, in United States v. Shields, 153 U.S. 88, 91, 14 S.Ct. 735, 736, 38 L.Ed. 645: 'Fees allowed to public officers are matters of strict law, depending upon the very provisions of the statute. They are not open to equitable construction by the courts, nor to any discretionary action on the part of the officials.'"

Numerous California decisions follow the same rule of strict construction in construing statutes authorizing payment of public funds for services rendered. See City of Corona v. Merriam, 20 Cal.App. 231, 128 P. 769; Woods v. Potter, 8 Cal.App. 41, 95 P. 1125; Sarter v. Siskiyou County, 42 Cal.App. 530, 183 P. 852; Greene v. Town of Lakeport, 74 Cal.App. 1, 239 P. 702.

[14] We turn now to further contentions of the defendant auditor and his bondsmen not heretofore considered. They point out that even though the reporter may be liable as a recipient of the funds, the auditor is not, since the complaint contains no allegation of fraud or connivance on his part; and, further, that the auditor could not be liable for 20 percent damages as provided in section 26525 of the Government Code because there are no allegations, nor could it be proven, they had the use of any of the funds disbursed. While it may be that the auditor would not be liable for 20 percent damages as provided in the Government Code section, we believe the remedy therein provided is severable and the trial court may well award a judgment for public funds disbursed against the auditor without necessarily ordering a penalty for the use thereof when no use is alleged or proven.

Section 26525, insofar as pertinent to the additional contentions of the auditor, provides:

> "* * * or if any county officer *draws any warrant* in his own favor or in favor of any other person *without authorization by the board or law and the warrant is paid*, the district attorney shall institute suit in the name of the county to recover the money paid, and 20 percent damages for the use thereof." (Emphasis added.)

As authority for the auditor's contention that although the recipient of public funds may be liable, the public officer authorizing the payment is not liable without a showing of fraud, he cites Ventura County v. Clay, 119 Cal. 213, 51 P. 189; County of Santa Barbara v. Janssens, 177 Cal. 114, 169 P. 1025, L.R.A. 1918C, 558; County of Santa Cruz v. McPherson, 133 Cal. 282, 65 P. 574; County of Alameda v. Evers, 136 Cal. 132, 68 P. 475; Thiel Detective Company v. County of Tuolumne, 37 Cal.App. 423, 173 P. 1120.

In Miller v. McKinnon, supra, there is language used indicating that not only the recipient of the illegal funds, but also the supervisors who participated in ordering the illegal payments, were proper parties to the litigation. However, in that case, the supervisors who had authorized the payment of the funds were charged with fraud and connivance with the recipient of the illegal payments. The auditor was not a party to that litigation.

In Ventura County v. Clay, supra, the district attorney instituted suit on behalf of the county to recover from the treasurer and his bondsmen moneys alleged to have been paid on illegal claims, together with a penalty of 20 percent upon the amount paid. It was held that section 8 of the County Government Act authorizing the district attorney to institute such suits without order of the board of supervisors contemplated an action brought against the recipient of the funds only, and had no application to an action brought on the bond of the county treasurer, and that the district attorney had no authority to bring such an action unless ordered to do so by the board of supervisors.

In County of Santa Barbara v. Janssens, supra, an action was brought against the sheriff to recover moneys paid to a deputy illegally appointed. The court held that although the sheriff approved and requested the allowance of such claim by the board of supervisors, the money which was paid without authority of law was not paid to him, and neither the sheriff nor his surety was liable in an action brought to recover the amount under section 4005b of the Political Code (now section 26525, Government Code).

The most recent decision considering this subject is Galli v. Brown, 110 Cal.App.2d 764, 243 P.2d 920, in which it was held that at common law a public officer is not liable for mistakes or errors made in good faith within the scope of his authority and without corruption; and that, further, section 26525 of the Government Code authorizes the district attorney to bring an action against the recipient only, but not against the person allowing the same, to recover for the county moneys unlawfully paid. At page 778 of 110 Cal.App.2d at page 929 of 243 P.2d, the court, speaking through Mr. Justice Peters, has this to say:

> "The district attorney is authorized to bring suit against persons unlawfully receiving money to recover the the money paid, plus a penalty. Gov. Code, § 26525. This action lies against the person receiving the money, not the person allowing it. County of Santa Barbara v. Janssens, 177 Cal. 114, 169 P. 1025, L.R.A.1918C, 558; Merriam v. Board of Supervisors, 72 Cal. 517, 14 P. 137. There may be other sections dealing with the same subject matter, but we have found no general law, and have been referred to none, imposing liability on a county officer who in good faith erroneously allows a claim where money is available to pay it.
>
> "* * * The complaint here involved does not charge bad faith on the part of Brown, and without such an allegation the complaint is fatally defective—a point that can be raised at any time."

Under Penal Code, § 869, it is solely and only the duty of the auditor to pass upon, allow and approve, and order paid, the compensation of the reporter for any services rendered by him pursuant to that section.

Under section 26525, Government Code, if the warrants are drawn without authorization of law, it would appear that the auditor would be liable for the money paid out on the warrant drawn without authority. What is said in Galli v. Brown, supra, must be taken in consideration with the facts there involved. The invalidity of the claim held to be illegal was based not on the legality of the work done, but on the legality of the employment of a public employee by a city attorney; the employment was not under the jurisdiction or control of the auditor either in fact or in law. Furthermore, the controller (corresponding to the auditor here) was adjudged not liable by the trial court and no appeal was taken from that judgment. The city attorney, on the other hand, was held liable by the trial court for the payment of compensation to an employee illegally hired contrary to the charter provisions of the City of San Francisco and he alone appealed. It follows, therefore, that what was therein said about the liability of the controller (auditor) was dicta and the cases there cited are clearly distinguishable from the present case. The statement made in Galli v. Brown, supra, cites as supporting authorities County of Santa Barbara v. Janssens, supra, and Merriam v. Board of Supervisors, supra. The Janssens case involved the liability of a sheriff, not the auditor. The Merriam case holds that a taxpayer could not maintain an injunction against the board of supervisors to restrain them from examining or ordering paid certain claims on the ground that they were not valid demands against the county. The facts of those cases would seem to give but slight support to the general statement in Galli v. Brown, supra, to the effect that action lies against the person receiving the money, not the person allowing it. In the instant case, it was the plain duty of the auditor, not the board of supervisors, or any other officer, to allow, approve and order paid the claims of the reporter under section 869, Penal Code, and to require the reporter to file an affidavit setting forth that the transcriptions had been filed with the county clerk within the time provided by Penal Code, § 869. It is the failure to perform this statutory duty that makes him liable for the illegal expenditure.

[15] An auditor who draws the warrant without authority of law is liable without specific statutory liability for the disbursements made, even though he did not receive any of the funds disbursed, because it is his general statutory duty to order, examine, allow, and order paid, only valid claims against the county.

The auditor's general statutory duty is set forth in sections 29803 and 29804 of the Government Code (formerly section 4091, Political Code). Section 29804 reads as follows:

> "Debts and demands fixed by law. The auditor shall issue warrants on the treasurer for all debts and demands against the county when the *amounts are fixed by law or are authorized by law* to be allowed by a person or tribunal other than the board." (Emphasis added.)

In County of Calaveras v. Poe, 167 Cal. 519, 140 P. 23, an action by the county against an officer who was at the same time county clerk, county auditor, and county recorder, for moneys wrongfully paid out, was upheld. He employed a copyist without authority of law and was held liable for the salary unlawfully paid out. At page 521 of 167 Cal., at page 24 of 140 P. the court says:

> "Appellant contends that there is no statutory provision for the recovery of money paid upon the warrants approved in good faith by an *auditor*. He denies that any such authority arose under section 4005b of the Political Code because that section authorizes the district attorney to institute suit against the person or persons in whose favor the warrant or warrants not authorized by law shall have been drawn, when such persons shall have received the money. It may be forcibly argued that section 4005b of the Political Code does apply to defendant Poe because in contemplation of law the money paid to his copyist was an increase of his compensation and therefore might be regarded as a payment to him. The section cited is not, however, the only statute which the plaintiff might invoke to sustain this action. The office of auditor is created by statute. The duty of the defendant *as auditor* was to refuse to sanction any illegal claim against the county. His official obligations were fixed by statute sec. 4091 et seq. of the Pol. Code, and he might only issue warrants for debts or demands against the county which were *authorized* by law to be allowed to some person." (Emphasis added.)

We conclude that the auditor would be liable under the provisions of section 26525, Government Code, as well as liable for violation of his general statutory duty in allowing the claim of the reporter, Milotz, in this case if it were properly alleged and proven, as heretofore pointed out, that the transcripts, together with the affidavits of the reporter as provided for were not filed as required by section 869, Penal Code.

[16] We have not overlooked the fact that this case presents features of hardship, and while no intentional wrong was done by any of the parties participating in paying or receiving the illegal payments, it appears that the provisions of § 869, Penal Code were not complied with by the reporter or the auditor, and good faith does not alter the principles and precedents which are binding upon the defendants.

The judgment is reversed and the trial court is directed to permit plaintiff to amend its complaint if it be so advised.

TURRENTINE, P. J., and BURCH, J., concur.

---

119 Cal.App.2d Supp. 900

ANNIN v. BELRIDGE OIL EMPLOYEES FEDERAL CREDIT UNION et al.

C. A. 8.

Appellate Department, Superior Court,
Kern County, California.

July 15, 1953.

Action to recover amount paid by plaintiff on note payable to defendant under mistaken belief that plaintiff had signed note as co-maker. The Municipal Court of Bakersfield Judicial District entered an order granting a new trial after judgment for plaintiff, and plaintiff appealed. The Superior Court, Appellate Department, Main, J., held that plaintiff was entitled to rescind oral promise to pay note, if not paid by borrower, which was made several months after loan evidenced by note had been made under mistaken belief that plaintiff had signed note as co-maker, and that plaintiff was not estopped from asserting that his supposed signature on note was forged.

Order reversed.

1. Trial 🔑392(1)

Findings were waived by failure to request them at trial before judge of municipal court sitting without a jury. Code Civ.Proc. § 632.

2. Appeal and Error 🔑634

In determining whether an appeal can properly be entertained, appellate court must first take note of the deficiencies in the record on appeal.

3. Appeal and Error 🔑607(1)

Where record on appeal contains the judgment roll, appeal may be submitted and decided on judgment roll alone. Rules on Appeal, rule 5(f).

4. Courts 🔑190(6)

Where clerk's transcript sent up to Appellate Department of Superior Court on appeal from order of municipal court granting defendant a new trial included complaint, demurrer, answer, amended answer and counterclaim, judgment and order granting new trial, Appellate Department had jurisdiction to determine appeal, though record contained neither reporter's transcript, stipulated statement of facts, findings, or stipulated or settled statement on appeal. Rules on Appeal, rule 5(f).

5. Appeal and Error 🔑854(6)

Where order granting new trial specified only one of three grounds of motion for new trial without specifically excluding the other grounds, order must be sustained if any ground relied on in motion was established, even though reviewing court might have ruled differently in the first instance.

6. Appeal and Error 🔑933(4)

Where order granting new trial does not specify insufficiency of the evidence as the ground, it is conclusively presumed that order was not based on such ground and such ground cannot be considered on appeal. Code Civ.Proc. § 657.

7. Courts 🔑190(6)

Where municipal judge who granted motion for new trial had not heard the evidence given at trial and had before him no record of any rulings by trial judge on evidence or motions nor any indication that exceptions were taken and appellate court had before it no trial record of any description, order granting a new trial could not be sustained on ground of errors in law occurring at trial and excepted to by movants. Code Civ.Proc. § 657.

8. Appeal and Error 🔑901

On appeal from order granting a new trial, appellant has the burden of showing error, even though to do so appellant must prove that no error in law existed that justified the granting of a new trial, and in absence of a showing of error the order must be affirmed. Code Civ.Proc. § 657.

9. Appeal and Error 🔑933(1)

On appeal from order granting a new trial, the presumption is against the verdict or decision and in favor of such ruling, unless the record reveals no possible justification for the ruling. Code Civ.Proc. § 657.

10. New Trial 🔑70

Where there is no substantial conflict in the testimony on material issues and the evidence as a whole would be insufficient as a matter of law to support a verdict in favor of moving party, order granting a new trial cannot be sustained. Code Civ.Proc. § 657.

11. Appeal and Error 🔑933(1)

Where the question presented on appeal from order granting a new trial is purely one of law and appellate court is satisfied that no error has been committed, the presumption in favor of such order is not applicable. Code Civ.Proc. § 657.

12. Appeal and Error 🔑977(3)

Where only one result is legally possible on all the facts and trial court by granting a new trial refuses to reach such result, order granting a new trial will be reversed. Code Civ.Proc. § 657.

13. Appeal and Error 🔑931(3)

Where findings are waived, it will be assumed on appeal that trial court found every fact essential to support the judgment, and findings will be implied in favor of successful litigant upon all issues raised by the pleadings.

14. Appeal and Error 🔑907(3)

Judgment for plaintiff established his cause of action and refuted denials and affirmative defenses of answer, and where record on appeal from order granting a new trial contained neither reporter's transcript, stipulated statement of facts, findings, nor settled statement on appeal, the material facts alleged in complaint must be taken as true and any facts alleged in answer at variance with those alleged in complaint must be taken as untrue. Code Civ.Proc. § 657.

15. Appeal and Error 🔑931(4)

On appeal from order granting a new trial after judgment for plaintiff in action to recover a payment made by him to defendant in mistaken belief that plaintiff had signed as comaker a note payable to defendant, defendant was bound by finding implicit in judgment that supposed signature of plaintiff was a forgery. Code Civ. Proc. § 657.

16. Guaranty 🔑19

Promisor was entitled to rescind written promise to pay note, if not paid by borrower, made several months after loan evidenced by note had been made, on ground that promise was made under mistaken belief that promisor had signed note as comaker, and hence liability could not be predicated on such promise as a guaranty. Civ.Code, §§ 1576, 1577.

17. Bills and Notes 🔑61

Where written promise to pay note, if not paid by borrower, made several months after loan evidenced by note had been made, and subsequent payment of note were made under mistaken belief that promisor had signed note as comaker, payee could not avoid liability to repay amount received from promisor in payment of note on ground that promisor was estopped from claiming that his signature on note was forged or on ground that promisor had ratified such signature as his own, in absence of showing that payee had changed its position to its detriment in reliance on promise. Civ.Code, §§ 1576, 1577.

18. New Trial 🔑66, 70

The causes for granting a motion for new trial on grounds that decision is against law and that evidence is insufficient to justify decision are objections of an entirely different order stated in the disjunctive, and are distinct causes for granting new trial. Code Civ.Proc. § 657.

19. New Trial ⚷70

"Insufficiency of evidence" to justify decision as ground for new trial means that there is an absence of evidence or that the evidence received is lacking in probative force to establish the proposition of fact to which it is addressed. Code Civ.Proc. § 657.

See publication Words and Phrases, for other judicial constructions and definitions of "Insufficiency of Evidence".

20. New Trial ⚷66

An order granting a new trial on ground that verdict is against law cannot be sustained by merely showing that verdict or decision is unsupported by evidence. Code Civ.Proc. § 657.

21. New Trial ⚷66, 79

In statute providing grounds for new trial, phrase "against law" refers to a situation furnishing reason for re-examination of an issue of fact, and if trial court fails to find on material issues created by pleadings, and as to which evidence was introduced, decision is against law, and a re-examination of facts would be necessary to determine issues of fact. Code Civ.Proc. § 657.

See publication Words and Phrases, for other judicial constructions and definitions of "Against Law".

22. New Trial ⚷79

If findings necessarily dispose of case, decision is not against law within meaning of statute providing grounds for new trial merely because conclusions of law or judgment are not supported by the findings. Code Civ.Proc. § 657.

23. Appeal and Error ⚷933(4)

Where findings were waived but findings implicit in judgment disposed of the case, and order granting new trial did not specify that it was granted on ground of insufficiency of evidence and no error appeared in determination of any question of fact, order granting new trial could not be sustained on ground that decision was "against law." Code Civ.Proc. §§ 632, 657.

Gordon A. Drescher, Wasco, for appellant.

Norbert Baumgarten, Bakersfield, for respondents.

MAIN, Judge.

This is an appeal by plaintiff Annin from an order of the Municipal Court granting to defendants a new trial after judgment in the Municipal Court for the plaintiff. The defendant-respondent did not take a cross-appeal from the judgment as permitted by Rule 3(a)(2) of the Rules on Appeal from Municipal Courts in Civil Cases.

The plaintiff's cause of action as disclosed by his complaint was to recover a payment in the sum of $571.41 made by him to the defendant Belridge Oil Employees Federal Credit Union by mistake, in the belief that he had signed a note payable to the Credit Union, whereas in truth and fact the purported signature was a forgery, as plaintiff discovered only after making the payment.

[1] Judge Stewart Magee of the Municipal Court sitting without a jury heard the evidence on August 5, 1952, and gave judgment for the plaintiff on December 4, 1952. Thereafter defendants moved for a new trial, which motion was heard and granted on February 13, 1953. However on December 31, 1952, Judge Magee, the trial judge, went out of office. The new trial was granted by his successor, Judge Doyle Miller, who had not heard the evidence at the trial. Furthermore he had before him at the time of his ruling no transcript of the evidence, no stipulated statement of facts, and no findings. Findings had been waived by failure to request them at the trial. Code Civ.Proc. § 632. He did have before him the pleadings, the judgment in favor of plaintiff and the exhibits introduced in evidence.

[2–4] In determining whether the appeal can properly be entertained, the appellate court must first take note of the deficiencies in the record on appeal. The record contains neither reporter's transcript, stipulated statement of facts, findings, nor stipulated or settled statement on appeal. However where the record does contain the judgment roll, the law permits the submission and decision of an appeal on that alone. Schein v. Holbrook, 111

Cal.App.2d Supp. 972, 245 P.2d 708. Such procedure is also contemplated by subdivision (f) of Rule 5 of the Rules on Appeal. Since the clerk's transcript sent up to this court includes the complaint, demurrer, answer, amended answer and counterclaim, judgment, and order granting new trial, this court has concluded that it may proceed to determine the appeal.

Defendant's motion for a new trial specified as grounds:

1. Insufficiency of the evidence to justify the verdict.
2. That the judgment is against the law.
3. Errors in law occurring at the trial and excepted to by the defendants.

[5] The order granting the new trial specified only one of these grounds, "that decision of said trial is against law." The other two grounds were not specifically excluded in the order; and therefore the order must be sustained if any ground relied on in the motion was established, Scott v. Renz, 1945, 67 Cal.App.2d 428, 154 P. 2d 738, even though the reviewing court might have ruled differently in the first instance. Barr v. Mountjoy, 1942, 50 Cal. App.2d 40, 43, 122 P.2d 676.

[6] However where the order does not specify insufficiency of the evidence as the ground, it is conclusively presumed that the order was *not* based on that ground. Sec. 657, Code of Civil Procedure. The order here did not so specify and the ground cannot be considered.

[7] The third ground relied on in the motion was "Errors in Law occurring at the trial and excepted to by the defendants." The Municipal Judge who granted the motion had not heard the evidence given at the trial. He had before him no record of any rulings by the trial judge on evidence or motions nor any indication that any exceptions were taken. So far as appears, all documents offered in evidence were admitted and none were excluded. The record before the appellate court is likewise devoid of any support for an order granting a new trial for errors in law, since this court has before it no trial record of any description. The ruling judge could not grant the motion on this ground, and of course did not purport to do so.

[8] As a possible ground for sustaining the order appealed from, there remains the ground specified in the order, that "the judgment is against law." In reviewing the correctness of such an order it is necessary to remember that "the burden rests on appellant to show error. In the absence of a showing of error the order must be affirmed * * *. The rule is and should be that the burden is on the appellant to show error, even where to do so the appellant must prove a negative—i. e., that no error in law existed that justified the granting of a new trial." Scott v. Renz, 67 Cal.App.2d 428, 431, 154 P.2d 738, 740.

[9, 10] In the appellate court the presumption is against the verdict (decision) and in favor of the ruling, unless the record reveals no possible justification for the ruling. Scott v. Renz and Barr v. Mountjoy, supra. These and many other cases asserting this proposition are cases where new trial was granted for insufficiency of the evidence. But the rule is likewise in such cases that before the granting of a new trial can be affirmed, there must exist a substantial conflict in the evidence justifying the exercise of some discretion by the trial judge. Pacific Tel. & Tel. Co. v. Wellman, 98 Cal.App.2d 151, 157, 219 P.2d 506. As was said in Moss v. Stubbs, 111 Cal.App. 359, 363, 295 P. 572, 573, 296 P. 86, "Where there is no substantial conflict in the testimony on material issues, and the evidence as a whole would be insufficient as a matter of law to support a verdict in favor of the moving party, an order granting a new trial cannot be sustained."

[11] An exception to the rule declaring a presumption in favor of an order granting a new trial where the question presented is purely one of law, was declared by the Supreme Court in Santa Marina v. Connolly, 79 Cal. 517, 521, 21 P. 1093. There no controversy existed as to the material facts, the sole question being whether the transactions between the parties as a matter of law amounted to a fraud on the respondents or not. The trial judge concluded, 79 Cal. page 523, 21 P. page 1095, that the findings of fact were not

sustained by the evidence in some particulars which seemed to the Supreme Court wholly immaterial. The order granting a new trial was therefore reversed. The court said:

"Taking this view of the transaction, we are clear that the court below was right in its first conclusion, and that it was error to grant a new trial.

"We do not overlook the rule that, on an appeal from an order granting a new trial, every intendment is in favor of the order of the court, but, where the question presented is purely one of law, and this court is satisfied that an error has been committed, the rule is not applicable."

[12] In the Santa Marina case the new trial was granted for insufficiency of the evidence and, so far as the opinion discloses, on no other specified ground, such as that the decision was "against law." Nevertheless the case is clear authority for the proposition that if only one result is legally possible on all the facts, and the trial court by granting a new trial refuses to reach that result, his order will be reversed.

The determination of this appeal therefore requires an examination of the record to determine the facts presented to Judge Miller at the time of his ruling, in order to ascertain whether on such facts the granting of a judgment for plaintiff by Judge Magee was "against law."

These facts are determinable only from the pleadings, exhibits and judgment for the plaintiff, since the record before Judge Miller contained nothing else. Findings were waived, no trial record of any sort existed, and the judge had not heard the evidence.

[13] Where findings are waived, it will be assumed that the trial court found every fact essential to the support of the judgment, and findings will be implied in favor of the successful litigant upon all of the issues raised by the pleadings. Snyder v. Snyder, 1951, 102 Cal.App.2d 489, 227 P.2d 847; Childers v. Childers, 1946, 74 Cal.App.2d 56, 168 P.2d 218.

[14] The judgment not only establishes plaintiff's cause of action, but refutes the denials and affirmative defenses of the answer. The material facts alleged in the complaint are to be taken as true, and any at variance with them alleged in the answer as untrue.

In the present instance, however, Judge Miller also had before him as a part of the trial evidence several documentary exhibits, the substance of which is set forth in the proper sequence for whatever comfort they may afford respondent, along with the allegations of the complaint, in the following reconstructed statement of facts:

Statement of Facts

On or about August 14, 1950, one C. J. Green, in order to obtain a loan from defendant Credit Union, obtained plaintiff's signature on a printed "Application for Loan" form (Exhibit 1). Two days later Green obtained the loan. He executed and delivered to defendant at its office in Kern County, California, a promissory note (Exhibit H) on which appeared the signature of Green and the handwritten words "Clarence R. Annin" in a space on the face of the note captioned "Signature of Maker and Comaker."

The purported signature of plaintiff Clarence R. Annin was a forgery; he did not execute the note as co-maker for Green nor at all.

On December 22, 1950, a memorandum was sent from defendant Union to plaintiff enclosing copy of a notice sent to Green at Babbitt, Nevada, showing a balance due on the loan of $743.41. The memorandum states that the last payment was received October 25, 1950 and "as co-signer on the loan it is to your interest that some action be taken immediately. Perhaps you can contact Mr. Green and find out what arrangements he proposes to make in regard to payments."

On December 28, 1950, plaintiff, thinking he had co-signed the promissory note with Green, stated in a letter to defendant Union that if Green did not pay, he, Annin, would do so. This letter (Exhibit B) is set out in full, as respondent places its principal reliance thereon:

"Clarence R. Annin
"Route 1, Box 215
"Wasco, California
"12–28–50

"Belridge Oil Emp—Fed., Cr. Un.
"Att—E. D. Press Tres.
"Sirs—

"Please note my correct address. Your letter was sent to a Wasco city address. I live in the country.

"Thanks for the information about Carl J. Green.

"I am working with the local Chief of police and Judge in order to keep from getting ~~hurt~~ stuck too hard.

"I hope this deal may be paid up without anyone being hurt, but in any event I co-signed with Green and you people may count on your full payment, from me, if not from Green. Any additional information about his activities would be appreciated.

"Sincerely
"Clarence R. Annin."

On January 15, 1951, a letter (Exhibit 2) from the Union to Annin acknowledged receipt of Exhibit B, stated the loan balance, and that no response had been received from Green to the notice of December 22, 1950. (Exhibit A.)

On January 22, 1951, defendant Union notified plaintiff Annin that it had received a payment of $225 from Green. "This substantial amount takes care of payments to date and several in advance." (Exhibit C.)

On June 21, 1951, a form notice was sent by the Union to Green at Hawthorne, Nevada, stating "your account is now past due, may we have your prompt attention to this account," copy to Annin. (Exhibit 3.)

On July 25, 1951, defendant wrote plaintiff as co-signer on the note with Carl J. Green (Exhibit 4):

"Mr. Green upon leaving employment of Belridge Oil Company in Oct., 1950, had a balance due of $743.41. On January 25, 1951, he made a payment of $209.40 on his note which was then paid up to April, 1951, leaving a balance of $534.01. Repeated efforts to secure payment on note, now 3 months' delinquent have failed and as co-signer we would appreciate your making payments for months of May, June & July in the amount of $35.00 for each month."

On November 16, 1951, the Union wrote plaintiff "as we have not received any answer from Mr. Green * * *, I have been again requested to ask that payments be made by you as co-signer in accordance with note." (Exhibit D).

On November 27, 1951, plaintiff paid the balance due upon said note (Exhibits E and F), and about December 2, 1951, received a letter from defendant (Exhibit G) enclosing the promissory note. Upon its receipt plaintiff discovered that the signature purporting to be his was a forgery, and that he had not signed said note as he had been led to believe by the defendants. Thereupon he notified defendant that he had not co-signed the note and that the signature purported to be his was a forgery and demanded repayment by defendants of $571.41. Defendant refused to pay, and the judgment was for plaintiff in the amount of $571.41 plus interest and costs.

The first defense in the amended answer denies certain allegations of the complaint, which denials were disposed of by the judgment for plaintiff.

The second and separate defense recites the history of the transaction on the assumption that plaintiff's signature on the note was genuine; alleges that defendant Union, in consideration of plaintiff's letter of December 28, 1950, "did not accelerate the payment of the principal of said note and did not attempt further enforcement of its right under said note"; that certain payments on the note were thereafter made (referring to those made by Green), but that the note again became delinquent on May 25, 1951; that defendant then elected to declare the entire balance of $534.01 due and payable, and that plaintiff on November 27, 1951, paid the entire sum with interest.

Based on this recital defendant pleads that plaintiff is estopped from claiming that his signature on the note is forged, and from claiming repayment from defendant; that if the signature was a forgery, plaintiff "duly ratified" the signature as his.

The third defense repeats the narrative allegations of the second, and relies upon the letter of December 28, 1950, as an independent agreement to pay all sums due on the note, and alleges that the payment by plaintiff was made pursuant to this agreement (rather than upon the note).

The fourth defense, after re-stating the narrative of the second defense, alleges the execution and delivery of plaintiff's check (given in payment of the note) in the sum of $571.41 to defendant; "said sum of money which plaintiff seeks to recover in said action is the sum that was received by said defendant by said negotiable instrument" (the check).

[15] The difficulty with these defenses is that they lack evidentiary support in the record. Under the finding implicit in the judgment, the facts are not as defendant alleges them to be, and no support for his contentions is to be had in the exhibits. Judge Miller had before him nothing to indicate any such reliance by defendant on plaintiff's letter as is alleged. As shown by the correspondence, defendant's reliance was upon the promissory note and the supposed signature of plaintiff appearing thereon. Defendant's repeated demand was for payment of *the note*. The reliance on the note was unfortunate, but plaintiff had done nothing to induce it; and there is nothing in the record to indicate any investigation by defendant as to whether the signature was genuine. Respondent is bound by the trial court's finding that the supposed signature was a forgery. Respondent made the loan and accepted the note four months before the letter of December 28, 1950, was written; and the record shows no change of position by defendant thereafter. The alleged "ratification" was found by the trial court, in accordance with the allegation in the complaint, to have been made by plaintiff without knowledge that he was not already bound to pay the note.

There is no indication except the allegation in the amended answer that either party ever treated the letter or the check given a year later as unrelated to the note. The trial court by its judgment found the only legal significance of these documents to depend on the validity of plaintiff's signature on the note.

In an attempt to demonstrate that the decision was "against law," respondent argues that "The issue in this case is not the liability of appellant on the note but the liability on plaintiff's Exhibit B (letter of December 28, 1950) which is a contract in itself and constituted a ratification of any defect in the note. Consideration was given by respondent in forbearance to sue Green and further respondent changed its position by ceasing all attempts to collect from Green and accepted (from Green) part payment of the principal. This note had an acceleration clause and therefore respondent did not have to reinstate the loan in good standing. The letter of December 28, 1950 legally removed all possible question of said note being a forgery."

[16] The fallacy of this position is at once apparent. As previously pointed out, the complaint alleges and the trial court by its judgment found that at the time the letter of December 28, 1950, was written by Annin, he was under the mistaken impression that he had in fact signed the note as alleged by defendant. He was still laboring under this mistake of fact at the time he sent his check to pay the balance due on the note. Under Sections 1576 and 1577 of the Civil Code he would be entitled to rescind his undertaking of December 28, 1950, if it was made under a "belief in the present existence of a thing material to the contract, which does not exist". Plaintiff wrote his letter and paid the demand under the mistaken belief that he had co-signed the note, which in reality he had not. It is impossible to base any liability on such a document as Exhibit B executed under such a mistake of fact. The letter of December 28 is not a new guaranty; by reason of the mistake it is not legally a guaranty at all, since under Section 1577 the plaintiff was entitled to rescind it.

[17] No change of position by defendant Union is apparent. At the time of plaintiff's mistaken commitment, defendant had already made its loan to Green and in so doing had accepted the co-signature on the note presented by Green as being in truth and fact the signature of plaintiff Annin. There is no suggestion in the rec-

ord that defendant made any investigation as to the genuineness of Annin's signature before advancing the money to Green. The record is devoid of any indication that the Union changed its position to its detriment in any way after receiving the payment from Green, or by reason of plaintiff's letter on December 28, 1950.

Decisions in such cases as Crumrine v. Dizdar, 59 Cal.App.2d 783, 140 P.2d 101, cited by respondent, where the surety was induced by fraud to sign and did actually sign with the principal maker, have no application to our case, where the alleged co-maker never signed at all. The instrument in the Crumrine case was valid as between the surety and the payee of the instrument, although fraudulent as between the surety and the principal maker. In the case now on appeal the instrument was void ab initio as to the purported co-signer.

Other propositions of law are advanced by respondent, but they do not support his attempt to base liability on a void instrument, a nullity.

In addition to the analysis in our foregoing opinion, the decision in Renfer v. Skaggs, 1950, 96 Cal.App.2d 380, 215 P.2d 487, 488, seems to us determinative of this appeal. There plaintiff sued to rescind a contract for purchase of a business on the ground of defendant seller's fraudulent misrepresentations, and sought to recover the portion of the purchase price paid. The court found in accord with the allegations of the complaint and against the allegations of the cross-complaint, and gave judgment for plaintiffs. The order granting defendant a new trial did not specify any ground, but on plaintiff's appeal, respondent asserts that the order was based upon the ground that the decision was "against law."

[18–22] "The phrase 'against law' used in section 657 of the Code of Civil Procedure as one of the causes for granting a new trial is not entirely clear. Mosekian v. Ginsberg, 122 Cal.App. 774, 776, 10 P.2d 525. In a general sense a decision is 'against law' if there is any valid legal cause whatsoever for a new trial. The statute, however, in authorizing the granting of a new trial on the ground that the decision is 'against law' does not include in that phrase all, or any, of the other several distinct and separate causes of the motion which are specified in section 657. Brumagim v. Bradshaw, 39 Cal. 24, 35. The statute makes the cause that the decision is 'against law' a distinct cause of a motion for a new trial. It is nonetheless a distinct cause because of the circumstance that it is found in the same subdivision of the section as another cause of a motion, the 'insufficiency of the evidence' to justify the decision. The two are stated in the disjunctive. They are alternatives. They are objections of an entirely different order. When we say that the evidence is insufficient to justify the decision, we mean that there is an absence of evidence or that the evidence received is lacking in probative force to establish the proposition of fact to which it is addressed. In re Estate of Bainbridge, 169 Cal. 166, 170, 146 P. 427. 'An order granting a new trial on the ground that the verdict (decision) is against law cannot be sustained by merely showing that it is unsupported by the evidence.' Hawkinson v. Oesdean, 61 Cal. App.2d 712, 716, 143 P.2d 967, 969.

"The phrase '"against law" refers to a situation furnishing a reason "for a re-examination of an issue of fact."' In re Estate of Keating, 162 Cal. 406, 410, 122 P. 1079, 1081. If the court fails to find on material issues made by the pleadings —issues as to which a finding would have the effect to countervail or destroy the effect of the other findings—and as to which evidence was introduced, the decision is 'against law.' In such a case, a re-examination of the facts is necessary in order that the issues of fact may be determined. (Citing cases.) This rule, of course, does not apply where the fact is implied by law, where the fact is immaterial, where the fact is admitted by the pleadings, [or] where the situation is such that it can be said that if the court had found on a material issue it would have been in such a way as to support the judgment * * *.

"If the findings which are made necessarily dispose of the case, the decision is not * * * 'against law' because the conclusions of law or the judgment are not supported by the findings. (Citing cases.) * * * respondent's argument is that because on the motion for a new trial the court may have drawn different conclusions from the evidence than it drew in its findings, the decision—the findings of fact, Code Civ.Proc., sec. 632—is 'against law.' The argument goes solely to the sufficiency of the evidence to justify the decision. Respondent says that the court should have found originally that the alleged misrepresentations were not material and did not induce plaintiffs to make the purchase. This is saying that the findings are contrary to the evidence; that the evidence is lacking in probative force to establish the allegations of the complaint. This is the meaning of 'insufficiency of the evidence' to justify the decision as used in section 657 of the Code of Civil Procedure. In re Estate of Bainbridge, 169 Cal. 166, 169–170, 146 P. 427. Since the order granting a new trial did not specify that it was granted on the ground of the insufficiency of the evidence to sustain the decision, it is conclusively presumed that it was not based on that ground. Code Civ.Proc., sec. 657."

[23] In the case now on appeal the findings implied by the judgment dispose of the case. We have not been able to find any error in the determination of any question of fact, nor any ground on which the order can be upheld. The decision of the trial court not having been "against law," the order granting a new trial must be reversed.

Order reversed.

LAMBERT, P. J., and BRADSHAW, J., concur.

41 Cal.2d 399

CHOATE v. STATE BAR OF CALIFORNIA.

L. A. 22566.

Supreme Court of California, in Bank.
Aug. 19, 1953.

Proceeding to review a recommendation of Board of Governors of State Bar that an attorney be disciplined. The Supreme Court held that evidence did not, on any reasonable view thereof, warrant finding that attorney had been guilty of any act involving moral turpitude or dishonesty or overreaching in connection with his administration and distribution of certain estates, and that record compelled conclusion that petitioner had violated none of his duties as an attorney.

Proceeding dismissed.

1. Attorney and Client ⚷53(2)

In proceedings relating to disciplining of an attorney, evidence before the Board of Governors of the State Bar did not, on any reasonable view thereof, warrant conclusion that attorney had been guilty of any act involving moral turpitude or dishonesty or overreaching, or that he had in any way violated his duties as an attorney. Business and Profession's Code, §§ 6067, 6078, 6103.

2. Attorney and Client ⚷57

The Supreme Court, when reviewing disciplinary proceedings against an attorney, is not bound by the findings of fact of the local committee and the Board of Governors of the State Bar, but court may pass upon the sufficiency and weight of the evidence.

3. Attorney and Client ⚷57

A petitioner for review of recommendation of Board of Governors of State Bar for disciplining of petitioner as an attorney has burden of showing that the recommendation of the Board is erroneous or unlawful.

◆

John W. Preston, Los Angeles, for petitioner.

Stanley A. Barker, Los Angeles, and Jerold E. Weil, San Francisco, for respondent.

PER CURIAM.

This is a proceeding to review a recommendation of the Board of Governors of The State Bar[1] that petitioner, W. Joseph Choate, be suspended from the practice of law in this state for a period of one year. The board approved and adopted findings of fact of a local administrative committee which had also recommended a year's suspension.

[1] The charges against petitioner are based upon certain of his actions in connection with the administration and distribution of the estates of Henry W. Morse and his wife, Amy Harding Morse, both deceased. The evidence is without substantial dispute, save as to the inferences to be drawn therefrom, and we have concluded that on any reasonable view of such evidence petitioner does not appear to have been guilty of any act involving moral turpitude or dishonesty or overreaching and that the most that can be inferred against him is that perhaps he relied too readily and too heavily upon the word and advice of others, whom however, he had no reason to distrust. Because we have concluded that no disciplinary action whatsoever is justified the facts are set out in considerable detail.

In 1931 or 1932 petitioner became acquainted with Henry W. Morse, who was then manager and part owner of a hotel near Ojai, Ventura County, California, and with Mrs. Morse, and thereafter had various social and professional contacts with them. In October, 1934, Mr. Morse executed a will prepared for him by petitioner, in which Mrs. Morse was named as executrix and as principal beneficiary and residuary legatee. Mr. Morse died in July, 1937, and was survived by his wife, who then resided in Massachusetts. Upon her nomination Letters of Administration With the Will Annexed were issued to petitioner by the superior court in Ventura County, in Mr. Morse's estate, and on January 18, 1941, a final decree of distribution was made ordering distribution of the property to Mrs. Morse. Included in such property were seven trust deed notes of the face

---

1. Adopted by the affirmative vote of ten of the thirteen board members present and voting.

value of one thousand dollars each, issued by the Ojai Improvement Co. to Mr. Morse, dated April 1, 1933. The notes, appraised at their face value in Mr. Morse's estate, were part of a total issue of $45,000 secured by a trust deed upon the Ojai hotel property mentioned above and upon some ninety acres of unimproved land near Ojai. These notes figure prominently in the contentions of the bar.

In March, 1938, Mrs. Morse executed a will, prepared by Mr. Edmond H. Talbot, a Boston attorney, in which petitioner was named as executor and as beneficiary of one-half of the residue. Mrs. Alma Farrar, a cousin of Mrs. Morse, was named as beneficiary of the other one-half of the residue. On February 5, 1941 (i. e., some two and one-half weeks after Mr. Morse's estate was ordered distributed), Mrs. Morse died in Massachusetts. Following a contest, her will was admitted to probate in May, 1942, letters testamentary were issued to petitioner in the probate court for Norfolk County in Massachusetts, and Mr. Talbot was appointed "resident executor in Massachusetts" of Mrs. Morse's estate. As executor of the will of Mrs. Morse, petitioner received possession of the property distributable to her from the the estate of her husband and delivered it to Mr. Talbot. Such property consisted of the seven $1,000 trust deed notes, some $1,285 in cash, and certain stock which later proved valueless.

Mrs. Morse's estate had an appraised value of some $8,258, plus the seven notes. The Massachusetts appraiser appointed by the probate court of that state appraised the notes in Mrs. Morse's estate as of "no value" or "value uncertain"; the appraisal also bears a notation that "A letter from the president of the company [which issued the notes] * * *, under date of July 21, 1942, states 'there is no market for these notes'." After payment of debts except for something in excess of $4,000 due petitioner, and costs of administration exclusive of some $600 executor's fees due petitioner, and legacies, the property remaining to be distributed[2] to the two residuary legatees consisted of the notes, $400 in cash, and certain personal effects of negligible value. By agreement between Mrs. Farrar and petitioner as residuary legatees, the $400 cash was, in April, 1944, distributed to Mrs. Farrar as her share of the residue and petitioner received the notes and the personal effects. In reaching the agreement consideration was given to the fact that petitioner had not been paid the fees of $600 due him as executor of Mrs. Morse's estate and that he had a claim against the estate in the sum of $3,500, plus interest thereon for some five years, based on a debt owing him from Mrs. Morse and evidenced by a writing hereinafter mentioned; these sums due to petitioner aggregated some $5,000.

Thereafter, in February, 1946, petitioner learned of the possibility that the estate of Henry W. Morse was entitled to share in another estate which was then being administered in New Hampshire. Petitioner alertly pursued the matter, and following the expenditure of various efforts on his part he collected, in 1947, the sum of $1,328.58, which represented Mr. Morse's distributive share of the New Hampshire estate. Thereupon, on July 31, 1947, petitioner (who as related hereinabove had previously been discharged as administrator of the estate of Mr. Morse), after consulting with the judge of the superior court in Ventura County, California, and explaining the facts to him, filed an account and petition in that court. Such document was entitled "Account of Administrator of After-discovered Property, Report, Petition for Extraordinary Fees for Services Rendered and Petition for Distribution"; it contained the following allegations: "That the undersigned Administrator with the Will Annexed, Joseph Choate, Esq., has heretofore rendered his First and Final Account, Report and Petition for Distribution which has heretofore been Ordered by the Court, and finally settled." After also setting forth the facts that he had received the $1,328.58 and had performed extraordinary services in obtaining such sum, petitioner's account and petition continued, "That your Petitioner, as Administrator with the Will Annexed, has acted as his own counsel in said matter * * * Wherefore, said Administrator with the Will annexed, Joseph Choate, Esq., and petitioner herein asks that said Account of After-discovered property be approved, allowed and settled and that the Administrator's extraordinary fees and expenses be fixed in the sum of $500.00, and that a Decree be made for the distribution of said estate to the person or persons entitled thereto, to-wit, the whole thereof to Amy H. Morse under the provisions of the Will of the deceased and for all other proper relief." The court thereafter made and entered an order settling the account, allowing petitioner the $500 fee, plus $3.50 expended as costs, and ordering the balance of the money (i. e., $825.08) distributed to Mrs. Morse. Since under Mrs. Morse's will the after-discovered asset was distributable one-half to petitioner and one-half to Mrs. Farrar, petitioner in December, 1947, sent a check for $412.54 (being one-half of the balance) to Mrs. Farrar together with a letter stating in effect that such sum was her share of an after-discovered asset of Mr. Morse's estate which "Mr. Talbot has requested me to remit * * * to you as one of the two residuary beneficiaries of Mrs. Morse's estate, under the provisions of her will." Petitioner also enclosed a receipt for the money, which Mrs. Farrar signed and returned to him and which petitioner than sent to Mr. Talbot.

---

[2] A balance remained to be distributed because petitioner agreed to waive the payment of sums due him in consideration of distribution to him of the mentioned notes.

The findings of fact made herein by the local committee and adopted by the board of governors recite that in reaching the settlement with Mrs. Farrar as to a division of the residue of the estate of Mrs. Morse petitioner knowingly and "actively misrepresented the circumstances surrounding the value of the [seven $1,000] notes by characterizing" a sale which had been made of the hotel property securing the notes, and cash payments made on the sales price, as a rental rather than as a sale, and by representing the value of the notes at the time of the settlement "to be twenty cents on the dollar, or less, whereas, * * * [petitioner] then well knew that the value placed on them by the president of the corporation [issuing them] was fifty cents on the dollar." It was further found that petitioner, as executor of Mrs. Morse's estate, "had a fiduciary relationship to his co-beneficiary" Mrs. Farrar, which he violated by not informing her of various other facts concerning the value of the notes and of the property by which they were secured. With respect to the $1,328.58 received by petitioner as an after-discovered asset of Mr. Morse's estate, it was found that petitioner made false representations to the probate court in Ventura County that he had performed extraordinary services *as administrator* in obtaining such money, although he had actually been discharged as administrator, and further that petitioner "failed to report honestly and fully to" Mrs. Farrar the amount received "or that he had taken the sum of $500.00 as a purported fee for his services." It was further found that the "purported order" allowing the fee "was void and beyond the jurisdiction of the court by reason of respondent's [petitioner's] having been discharged as administrator," and the committee concluded that petitioner "has withheld from Mrs. Farrar" for his own use and benefit the sum of $250 (being one-half of the fee allowed him by the Ventura court) without her knowledge or consent. The committee further concluded that petitioner's conduct as related in the findings summarized hereinabove constituted a violation of his duties as an attorney "within the meaning of" sections 6067, 6068 and 6103 of the State Bar Act, Bus. & Prof. Code, and also a violation of Rule 9 of the Rules of Professional Conduct, 33 Cal.2d 30.[3]

Section 6067 provides for the attorney's oath to support both federal and state Constitutions and faithfully to discharge the duties of an attorney. Section 6068 lists various of such duties of which only the following appear on any theory of the bar to be in any wise material or relevant here: to support both federal and state Constitutions and law, and to "employ, for the purpose of maintaining the causes confided to him such means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law." Section 6103 provides, so far as hypothetically here material, that an attorney's "violation of the oath taken by him, or of his duties as such attorney, constitute causes for disbarment or suspension." Petitioner was not found guilty of violating section 6106, which provides for discipline following an act of moral turpitude, dishonesty or corruption.

---

[3] Rule 9: "A member of the State Bar shall not commingle the money or other property of a client with his own; and he shall promptly report to the client the receipt by him of all money and other property belonging to such client."

[2, 3] Petitioner strongly contends that the evidence overwhelmingly shows that he has not committed any unprofessional or unethical act or otherwise violated the State Bar Act or the Rules of Professional Conduct, and that therefore no basis exists for discipline. This court is not bound by the findings of fact of the local committee and the board, and in reviewing a recommendation for discipline we pass upon the sufficiency and weight of the evidence. Petitioner has the burden, however, of showing that the recommendation of the board is erroneous or unlawful. Clark v. State Bar, 1952, 39 Cal.2d 161, 165, 246 P.2d 1, and cases there cited. This burden, we are convinced, petitioner has fully sustained.

In considering the evidence herein, it may be noted preliminarily that at the time of the hearing before the board of governors petitioner asked leave to introduce additional evidence consisting of some thirty affidavits, letters and documents bearing upon the charges against him. The board refused to admit the additional evidence but did lodge and mark it for identification and has transmitted it to this court. Petitioner asks that this court consider such evidence in this review, and also consider two affidavits which he has submitted subsequent to the granting of his petition for review. An inspection of all of such evidence makes manifest that it has a material bearing upon the issues presented and should in the interests of justice be made a part of the record in this proceeding and considered by this court.

The first question presented is whether or not petitioner wilfully and fraudulently deceived Mrs. Farrar into making the settlement in the estate of Mrs. Morse, whereby Mrs. Farrar received $400 in cash and petitioner received the seven one thousand dollar trust deed notes. The evidence as to the circumstances leading up to and surrounding the settlement is extensive and detailed, but for the purposes of this review may be summarized as follows:

Following Mr. Morse's death in 1937, Mrs. Morse employed petitioner to advise her and at her request he made numerous trips to Massachusetts to confer with and represent her. In 1937 she paid him $200, and between February, 1938, and April, 1939, she paid him further sums totaling $7,500. In April, 1939, she discontinued his services and signed an authorization for him to withhold from Mr. Morse's estate an additional sum of $3,500 for services rendered to her personally. When Mrs. Morse died in February, 1941, the $3,500 remained unpaid to petitioner. Petitioner therefore filed the $3,500 claim with Mr. Talbot, the Boston attorney and resident executor[4] who was administering Mrs. Morse's estate in Massachusetts. According to the testimony of an office associate of Mr. Talbot, the latter, pursuant to Massachusetts practice, then listed the claim "in the regular Affidavit of Debts and Expenses, which was filed with the Commissioner of Taxation in Boston. Mr. Choate's claim among others was accepted by the Commissioner, and this established the validity of the claim with the Commonwealth of Massachusetts. * * * In this state there is no judicial determination of a claim filed against an estate until the account showing the payment of said claim is allowed unless it is protested before payment." Mr. Talbot thereupon wrote petitioner early in December, 1943, that "all claims against the estate have been gotten out of the way except your claim of $3500.00 embodied in the letter from Mrs. Morse to you, which claim we established and was included in the Affidavit of Debts and Expenses which was filed with the Massachusetts Inheritance Tax Commissioner.

---

[4] Appointed pursuant to the requirements of Massachusetts law. Vol. 6, Annotated Laws of Mass. Ch. 195.

"I think you are sufficiently conversant with the intricacies of the Estate and what we have been through to enable you, yourself, to write Mrs. Farrar and make the offer which you have suggested, viz., giving her the balance of the cash in the Estate and you taking the notes for your claim. There was due in November, $140.00 semiannual interest on these notes. I have not received a check. Do you know whether Mr. Sheridan is making the payment or not? I had an idea if the interest were paid you might offer Mrs. Farrar $350.00 and you take the notes at the same amount of $350.00, and when you file your first and final account as executor, the two residuary legatees, Mrs. Farrar and yourself, would, in the account, each be paid these two items of $350.00 each.

"Therefore, when you have settled with Mrs. Farrar, please let me know the terms, and I will prepare your first and final probate account as executor and send it on to you for signature and verification."

Thereafter, on December 14, 1943, petitioner wrote to Mrs. Farrar,[5] who lived in Maine. In the letter he reviewed the debts and expenses of the estate, and the specific legacies which had been paid, and then continued, "we come to the embarrassing fact that the residue and balance of the estate, as just received from Mr. Talbot, consists of $268.00 and seven trust deed notes of questionable value which formerly belonged to Mr. Morse's estate. At this point may I state that this balance does not take into consideration the fact that I have an allowed claim of $3,500 yet unpaid for my legal services rendered to Mrs. Morse over a period of several years. * * * I received a letter from Mrs. Morse by which she * * * authorized and directed me to withhold from her husband's estate, then in the process of being probated, the sum of $3,500.00 in payment of this obligation. I am enclosing a copy of that letter which Mrs. Morse sent me * * * and which is the basis for the claim of $3,500.00 which I filed with the estate and which has been approved and allowed by the Court. As I have stated above, however, this claim has never been paid, owing to the condition of the estate, and is the only outstanding obligation.

"With relation to the above-mentioned seven trust deed notes, may I give you a bit of their background, as they now form the only asset in the estate outside of the cash sum of $268.00 * * *."

In his letter, petitioner then reviewed briefly the history of the Ojai hotel property securing the notes, and then continued, "The seven Trust Deed Notes * * * were defaulted in both principal and interest and became practically valueless. The Hotel closed in 1936 and remained vacant * * * and these Trust Deed Notes had no market whatsoever. In 1941 the Notes were reputed to be worth 20¢ on the dollar and even at that figure there was no sale for them. There are $45,500.00 worth of these Notes outstanding, and from time to time the Noteholders have all signed extension agreements merely to accommodate the [hotel] Company. Two years ago these Notes were again extended and now their date of maturity is 1954, more than ten years hence. * * * Therefore, under these circumstances, it seems doubtful whether my claim can ever be paid in full. * * *

"There seems to be only one suggestion for me to make, and that is that Mrs. Farrar take the cash remaining in the estate, being $268.00 and I will take the seven trust deed notes and hope that eventually they will partially recover in value. 1954, the date of their maturity, is a long ways off. A private boys' school has recently rented the Hotel for its accommodations, but as you know a private school is always an uncertain venture. * * * If the Trust Deed Notes had any appreciable value at the present time I would request Mr. Talbot to petition the Court for authorization to sell them at this time in order to satisfy my claim, but due to their present negligible value, which is probably in the neighborhood of 20¢ on the dollar, this would be an unwise step to take. * * *

---

[5] Because Mrs. Farrar was then 87 years of age and feeble from illness her son, Leo W. Farrar, with whom she lived, acted for his mother in making the settlement with petitioner. Petitioner's letter was addressed to the son's wife, who carried on the correspondence with petitioner on behalf of her husband and her mother-in-law.

"If you wish to verify any of the facts as I have outlined them to you, you may communicate directly with Mr. Edmund H. Talbot * * * or if you wish to obtain any information concerning these Trust Deed Notes, you may communicate with Mr. Robert M. Sheridan, Bank of America Building, Ventura, California, who is president of the Company which issued these Notes * * *."

Petitioner received no immediate reply from Mrs. Farrar, and the following month, on January 12, 1944, again wrote her, "to ask what you wish me to do in the matter"; he also mentioned that he had received no fees or compensation in the estate, again suggested that for further information she communicate directly with Mr. Talbot and Mr. Sheridan, and requested an answer.

Still receiving no reply from Mrs. Farrar petitioner wrote to Mr. Talbot, relating his offer of settlement and that he had heard nothing from her, and asking Talbot "if you can suggest some way whereby we can proceed to sell the seven trust deed notes and thereby permit me to properly buy them in to satisfy my claim, or to if possible sell them for more than $3500.00 if anyone cares to pay it and then have the overage remain as part of the residue to be distributed, after paying me my claim. I recall that you made some such suggestion many months ago, so if it can be done I think we had better proceed. Naturally I am anxious as you are to close the estate and apparently we will have no cooperation from Mrs. Farrar, therefore can we expedite matters by resorting to proper Massachusetts procedure. Mrs. Farrar, is in her late nineties and I feel that time is an important factor now. May I have you[r] good judgment and suggestion on this * * *." At Talbot's request, petitioner also sent him copies of the letters written to Mrs. Farrar.

Thereafter, on February 10, 1944, Mr. Talbot, who had previously been informed by Mr. Sheridan that there was no market for the notes, wrote to Mrs. Farrar concerning closing the estate, and inquiring whether she wished to accept petitioner's suggestion of settlement.[6] Mrs. Farrar,

---

[6] Mr. Talbot's letter is as follows: "Mr. Choate has forwarded to us the correspondence between you and him, with reference to the adjustment with you of his claim against the Morse Estate. We, as you know, attended to all legal matters here in Massachusetts, but as to the final adjustment between you and him, we thought, under the circumstances, it would be better for him to do so directly with you.

"It is unfortunate that there should have been almost three years of litigation in this estate, which was not a large one in value. Mr. Choate has, in his letters, acquainted you with all the details, and we need not go further into the matter.

"The situation today is this: all claims against the estate have been satisfied except that of Mr. Choate's claim of $3500. A similar claim in favor of one Lee for $3500. against the estate on a written order signed by Mrs. Morse was litigated in court, and the Judge found it to be valid, and likewise the court's decision validates Mr. Choate's claim. We settled with Mr. Lee for a much smaller amount than the court found to be due him.

"The only remaining assets in the estate to satisfy Mr. Choate's claim are approximately $400. in cash, and the Ojai Valley California, notes. These notes were inventoried at 'no value' by the appraiser appointed by the Probate Court.

"Under the will, you and Mr. Choate are named as residuary legatees. The Ojai Valley notes, being of no value, he could apply both the $400. cash and these notes, toward the satisfaction of his claim, and there would be nothing left for either of you as residuary legatees.

"Being thus placed in a dual position, to adjust the matter, he is willing to turn over to you the $400. cash and take his chances with the notes, to satisfy in part his claim against the estate.

"There is no market for these notes. They will not become due for about ten acting through her son, Leo Farrar, accepted the settlement offer, and Mr. Talbot prepared the first and final account of petitioner as executor of Mrs. Morse's will. Both petitioner and Mrs. Farrar signed the account and requested that it be allowed, and it was allowed by the Massachusetts probate court in April, 1944. It shows payment to Mrs. Farrar, as residuary legatee, of the $400 balance of cash in the estate, and distribution to petitioner, also as residuary legatee, of "balance personal property, inventoried 'No Value [i. e., the seven notes]'."

It is upon petitioner's letter of December 14, 1943, to Mrs. Farrar that the charges of fraudulent misrepresentations to her in connection with the settlement are chiefly based. Firstly, petitioner's statement in that letter that his claim of $5,500 "has been approved and allowed by the [Massachusetts] Court" is attacked as not being supported by the evidence. The evidence shows, however, that although the claim apparently had not been approved and allowed pursuant to the procedure followed in California, it had been "validated" both by the "Commissioner of Taxation in Boston" and by the "court's decision," and petitioner in making his statement was relying upon his understanding of Massachusetts practice and of the steps taken thereunder as related and indicated to him by Mr. Talbot, the Massachusetts attorney of some fifty years' experience who had the actual handling of Mrs. Morse's estate. We note that Mr. Talbot's letter to Mrs. Farrar (quoted in footnote 6, hereinabove) also informed her that "the court's decision validates Mr. Choate's claim." Under such circumstances it appears that petitioner's statement cannot fairly be said to constitute culpable misrepresentation nor does it by any stretch of reasonable inference appear that Mr. Choate could have had any thought of personal gain by the representations he made.

Petitioner admittedly made two apparently inadvertent and inconsequential factual misstatements in the same letter, which it is also charged show, together with his failure to mention various other matters in connection with the notes and the property securing them, that he was attempting to fraudulently induce Mrs. Farrar to make the settlement with him. He stated that the maturity date of the notes, after the last extension thereof, was 1954, whereas it was 1952. He also stated that the hotel had been rented to the private boys' school, whereas it had actually been sold to the school. Petitioner testified that the reason for these two misstatements is that he wrote the letter late at night at his home following a long distance telephone call from Mr. Talbot, whereas the files containing accurate information were at his office. He also produced evidence showing that several extensions of the maturity date of the notes had been sought and that on a prior occasion one extension had been granted by agreement between the various noteholders; and also that preliminary negotiations with the boys' school (of which petitioner had been informed by Mr. Sheridan, president of the hotel company) actually contemplated and involved a lease rather than sale of the property. Although he stated to Mrs. Farrar that the "present negligible value" of the notes "is probably in the neighborhood of 20¢ on the dollar" despite the fact that Mr. Sheridan had some eighteen months earlier expressed his own opinion that the notes should be appraised in Mrs. Morse's estate at "about fifty cents on the dollar," instead of the inventoried "value uncertain" or "no value" fixed by the appraiser appointed by the probate court, we are disposed, in view of the fact that ideas as to the value or lack of value of the notes varied somewhat widely, and

---

years. If they had any appreciable value, it would be his duty to put them up at auction in either Boston or Los Angeles, but undoubtedly no one would make a bid for them, unless you cared to do so.

"We are anxious to close the estate in the court, and get rid of it.

"You, of course, must make your own decision in the matter, as we cannot advise you.

"If you accept the $400. cash, please let us know, and we will draw up the final account, and after it is signed by you and Mr. Choate, we will have it allowed by the Judge."

that petitioner expressly suggested that Mrs. Farrar communicate with Sheridan (who apparently attributed a higher possible value to them than did any other person but who admitted that there was no market for them) for further information, to accept his earnest argument that he did not intentionally or fraudulently seek to mislead Mrs. Farrar into a settlement less advantageous to her than it might otherwise have been. Even if we assume that the notes were potentially worth fifty cents on the dollar it seems almost certain that Mr. Choate could have forced their sale for a sum substantially less than enough to pay his approved claim. Such claim of petitioner against Mrs. Morse's estate, with interest thereon, together with the $600 in fees which he had not yet received, amounted in all to some $5,000, which, in addition to waiving his right to one-half of the cash remaining in the estate, he settled by accepting notes for which there was no market and which at that time were certainly considered to be worth substantially less than their face value.[7] Apparently no one even suggested that they might, at the time concerned, be worth more than "about fifty cents on the dollar." Moreover, the evidence indicates that Mrs. Farrar was eager to have the estate distributed and that both petitioner and Mr. Talbot made various unsuccessful efforts to sell the notes but were repeatedly informed there was no market for them.

Respondent State Bar also points out that three payments of interest (totaling $420) received on the notes were listed in petitioner's final account as executor of Mrs. Morse's will as "Sundry amounts of cash received," although the exact sources of various other much smaller amounts of income were given in the account. It appears, however, that two of such payments were made directly to Mr. Talbot and that the third payment, originally sent to petitioner, was by him forwarded to Talbot. Here again, also, the account was prepared by Mr. Talbot, upon whom petitioner relied in matters concerning administration of the Massachusetts estate, and we do not think petitioner can be fairly charged with intent to deceive Mrs. Farrar by the manner cash receipts were listed by Mr. Talbot.

Concerning the after-discovered asset of $1,328.58 which came into petitioner's hands as a part of the estate of Henry W. Morse, it is charged against petitioner that although technically Mrs. Farrar was not entitled to notice of the proceedings to distribute such asset because she was not an heir or distributee of the estate of Mr. Morse, nevertheless it was petitioner's duty to disclose to her the full amount of such asset and that he had applied for and obtained an allowance of $500 out of the sum for extraordinary services. It is not charged that petitioner did not earn the $500 fee, or that it was not a reasonable allowance. The record indicates that Mr. Choate performed various services, including cooperation with and a personal visit to the New Hampshire attorney for the estate from which the asset was distributed to the Henry W. Morse estate. Under such circumstances it does not appear that petitioner has violated any duty of disclosure owing from him to Mrs. Farrar.

It further appears that, contrary to the finding of the local administrative committee and the board of governors, petitioner did not make false representations to or mislead the probate court in Ventura County in connection with the after-discovered asset. The augmented record establishes that when in January, 1946, petitioner first learned of the possibility that the Henry W. Morse estate had a claim to such asset he contemplated petitioning the court to reopen the estate and procured blank petitions for that purpose. Thereafter he discussed the matter with the judge of the probate court who had handled the proceedings in the estate, who suggested that if the money was received it could be distributed under the omnibus clause of the distribution decree already entered. Petitioner, as already related, subsequently received the money and reported it in full to the probate court in the hereinabove mentioned "Account of Administrator of After-Discovered Property, Report, Petition for Extraordinary Fees for Services Rendered and Petition for Distribution." We agree with the judge of that court, whose letter expressing his views on the matter is in evidence, that although it may be assumed that (since petitioner had previously been discharged as administrator of Mr. Morse's estate, following the prior distribution thereof) it was technically incorrect to grant the extraordinary fee to petitioner without first expressly reopening the estate and reappointing him administrator, nevertheless "there is nothing in the situation * * * which involves wrongdoing or moral turpitude on" petitioner's part.

---

[7] It appears that in 1948, some four years after petitioner's settlement with Mrs. Farrar, a relative of the headmaster of the boys' school which had purchased the Ojai hotel property which secured the notes, paid off the notes in full, in order to help the school financially. Shortly thereafter the school vacated the property and it has subsequently remained vacant. Some three years later, in 1951, this disciplinary proceeding was instituted against petitioner. He obviously cannot, however, be held to have acted, in negotiating with Mrs. Farrar in 1943 and 1944, with foresight as to what would happen in 1948.

In view of the conclusions reached on the charges on which petitioner was found guilty, no useful purpose would be served by discussing in detail petitioner's contention that the disciplinary proceeding against him was initiated and pressed as the result of spite felt against him by a relative of Henry W. Morse, or by reviewing the evidence which appears to support his contention. It should further be mentioned, however, that the record contains evidence indicating that Mrs. Farrar's son and daughter-in-law are entirely satisfied both with the settlement and with the remittance on the after-discovered asset. Mrs. Farrar was not a witness as she had passed on before the hearing in this matter.

Lastly, we are not disposed in such a proceeding as this to sustain the imposition of discipline against petitioner based on the "findings" of The State Bar that the "purported order" of the probate court of Ventura County allowing a fee of $500 to petitioner "was void and beyond the jurisdiction of the court" and the ensuing conclusion that therefore one-half of the $500 fee actually belonged to Mrs. Farrar and that petitioner by accepting such fee and depositing it in his own account was guilty of an improper act, including the commingling of his own money with money belonging to Mrs. Farrar.

For the reasons above stated the additional evidence submitted by petitioner is admitted as, and made a part of, the record in this proceeding. It is further ordered that this proceeding against petitioner be, and it is, dismissed.

---

120 Cal.App.2d 86

NORTON v. CONSOLIDATED FISHERIES, Inc. et al.

Civ. 15404.

District Court of Appeal, First District, Division 2, California.

Sept. 4, 1953.

Action by alleged assignee of commercial fishermen for price or value of their salmon catch for 1949 season delivered to defendant's fishery. The Superior Court, County of Contra Costa, Wakefield Taylor, J., entered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Goodell, J., held that evidence sustained finding that fishermen had orally assigned their interest in 1949 salmon catch to plaintiff.

Affirmed.

1. Assignments 🔑134

In action by alleged assignee of commercial fishermen for price or value of their 1949 salmon catch delivered to defendant's fishery, defendant had burden of proving affirmative defense that prior assignment of value of 1949 salmon catch had been made to a special fund set up by fishermen and held by their union, that prior assignment had never been revoked, and that second assignment was for purpose of depriving defendant from collecting as setoff, sums advanced to members of union, who had contributed to special fund.

2. Assignments 🔑137

In action by assignee of commercial fishermen for price or value of fishermen's 1949 salmon catch, evidence sustained finding that no prior assignment had been made of the fishermen's right to value for the 1949 salmon catch.

3. Evidence 🔑584(3)

The direct testimony of one witness who is entitled to full credit is sufficient, without corroboration, to support a verdict. Code Civ.Proc. § 1844.

4. Evidence 🔑588

Trial judge is not required to accept testimony of uncorroborated witness as true. Code Civ.Proc. § 1844.

5. Assignments 🔑137

In action by assignee of commercial fishermen for price or value of their 1949 salmon catch delivered to defendant's fishery, assignee's testimony alone was sufficient to sustain finding that fishermen orally assigned their interest in 1949 salmon catch to assignee. Code Civ.Proc. § 1844.

6. Assignments 🔑134

The party alleging an assignment has burden of proving the assignment.

◆

Joseph L. Alioto and Walter F. Calcagno, San Francisco, for appellants.

Robert L. Condon and Charles L. Hemmings, Martinez, for respondent.

GOODELL, Justice.

Respondent sued as assignee of about 60 commercial fishermen, for the price or value of their salmon catch for the 1949 season. The complaint names all the assignors and specifies the value of the fish delivered by each, aggregating $12,650.40. Judgment was rendered for $11,703.15 with interest and costs, and after the denial of a new trial this appeal was taken.

The answer admits that the reasonable price of the fish delivered to Consolidated at Pittsburg, California, was $12,549.60.

Only two of the assignors testified, namely, Joe and Vince Aiello who denied making any assignment; the court found in their favor and reduced the assignee's claim accordingly. As to all the others the court found in accordance with plaintiff's allegation that before suit each of the fishermen had orally assigned his claim to her and that she was the owner and holder thereof.

Two affirmative defenses were pleaded but the court found "That each and all of the allegations [thereof] except such as are herein expressly found to be true, are untrue."

The first defense was that prior to September 20, 1949 all the fishermen named in the complaint had assigned all their right, title and interest in their 1949 salmon catch (including fish delivered to Consolidated) "to a special fund managed and controlled by International Fishermen & Allied Workers of America, Local No. 35." It is then alleged that those who assigned to the special fund included fishermen *not named in the complaint*, who owed Consolidated $10,907.87 for gear and netting advanced to them for the 1949 salmon season; further, that all the assignors to the special fund operated as joint venturers under the special fund managed, controlled and directed by Local 35. It concluded with the claim that Consolidated had a valid offset against the special fund for $10,904.87 and that "any subsequent purported oral assignment to plaintiff * * * is null and void and of no effect in law as to this defendant."

The second defense was "that the purported oral assignment to plaintiff was illegal and fraudulent for the purpose of depriving this defendant of exercising its valid claim and offset against the * * * special fund" in that plaintiff was and continued to be secretary-treasurer of Local 35 and "that in form the present action was instituted by plaintiff in her individual capacity, but in substance the present action is being instituted by plaintiff in her representative capacity as secretary-treasurer of * * * 35 and for its benefit." For these reasons the defense claimed that plaintiff and her assignors were estopped from asserting any claims against defendant.

[1] The burden of proving both defenses was of course on Consolidated.

With respect to the allegation respecting fishermen *not named in the complaint* who owed $10,907.87, for which an offset was asserted against the assignors who *were* named in the complaint, the defense offered no evidence whatever.

With respect to the charge that plaintiff was suing ostensibly in her individual capacity but in reality on behalf of the union, the defense offered no evidence whatever of its own. When questioned on this point plaintiff testified emphatically that she represented "the people", not the union; that she was no longer its secretary-treasurer, and that, in fact, the union had gone out of business in January, 1951, none of which testimony was contradicted.

With respect to the "special fund", the defense offered no evidence whatever of its own. There is nothing in the record to show the purposes or objects of the fund, or the terms of its creation, or what ultimate disposition was to have been made of it. The first defense pleads that plaintiff's assignors had "assigned" all their right, title and interest in their 1949 salmon catch to this *fund*; there was no proof of any such "*assignment*" to any *fund* or any union. Whatever the record shows on the subject is found in the testimony of the plaintiff herself, who, in 1949, was secretary-treasurer of Local 35, a union of commercial fishermen at Pittsburg.

From her testimony, which on this subject is uncontradicted, it appears that a written contract was signed prior to August 10, 1949 between the union and the companies, fixing the price for the ensuing 1949 salmon catch at 21 cents a pound. About September 5 the companies announced—despite their contract—that they would pay no more than 19 cents. Each side was unyielding "and the fishermen wouldn't go fishing." There was confusion among the men, and they engaged in a lot of talk, including the suggestion that they might set up their own co-operative fish market. Obviously something had to be done since time and tide do not wait on negotiations. The fishermen selected a committee of 8 or 9 of their number which apparently negotiated some sort of a make-shift arrangement with Consolidated (and presumably 2 or 3 other companies) so that the 60 or so men would go fishing while the fish were still running. They fished from September 20 to 26 and the catch was delivered to Consolidated, as it admits, the committee apparently co-operating with Consolidated concerning the Fish & Game tags and the handling of the catch.

It is true that during the period of uncertainty and confusion the men discussed among themselves the setting up of a special fund. Plaintiff testified that the men agreed among themselves that the proceeds of the catch would be "set aside and put in a special fund separate and apart from any other fund the union had * * *" She testified that the men later voted to discontinue the fund. "It was sort of hanging in mid-air" as she put it.

We repeat that this "special fund" was injected into the case by the defense for the purpose of asserting a $10,907.87 offset (on which there was a total failure of proof) and Consolidated now seeks to show that it amounted to a prior "assignment" to the *union* which left no choses in action in the fishermen's hands susceptible of (a subsequent) assignment to plaintiff. Since the burden was on the defense of proving this prior "assignment", it had the task of going forward either by pressing the cross-examination of plaintiff or by laying before the court some tangible and definite evidence showing what the fund was all about. The scant and sketchy testimony in this record certainly would not have supported a finding that a prior "assignment" had been made. The most that could be made of it is some sort of a tentative arrangement among the fishermen themselves, *who were creditors*, to impound the proceeds of their catch for some undisclosed purpose, which arrangement apparently was never carried into execution, but was abandoned. But such internal arrangement, even if perfected, would seem to be of no concern to the persons to whom the catch had been delivered and who, by their own admission, have never paid for it.

[2] In any event it could not be held on this record that there was any "assignment" to the "special fund" as the term "assignment" is used and understood in the law, hence this case presents no problem of successive or conflicting assignments, or priori-

ties. What has been said we think answers appellant's contention that whatever was "assigned" by the fishermen to the "special fund" was never "assigned" back to them.

So much for the two affirmative defenses.

With respect to appellant's contention "that material findings made by the court are contrary to the law and the evidence and the judgment lacks evidentiary support", it must be conceded that the only testimony respecting the oral assignments was that given by the assignee herself which, admittedly, was not as specific as it might have been. But, in the very nature of things oral assignments are never as definite as written ones.

[3, 4] Appellant has supplied no authority holding that an assignee is not a competent witness to prove an assignment, and we doubt if such authority can be found. Moreover, "The direct evidence of one witness who is entitled to full credit is sufficient * * *." § 1844 Code Civ.Proc. No corroboration is required in a case such as this. Radich v. Gak, 61 Cal.App. 375–376, 214 P. 1000. The trial judge was not required to accept the plaintiff's testimony as true, Lohman v. Lohman, 29 Cal.2d 144, 149, 173 P.2d 657; Berg v. Journeymen's P. & G. F. Union, 5 Cal.App.2d 582, 42 P. 2d 1091, but the fact remains that he did so.

The case on which appellant chiefly relies is Gustafson v. Stockton & T. C. R. R. Co., 132 Cal. 619, 64 P. 995, but there the trial court found on the evidence before it that there had been no oral assignment and the judgment for defendant based on such finding was affirmed. Here, on the other hand, the court with all the facts before it found for the plaintiff, and appellants have produced no authority convincing us that such finding is unsupported.

There are circumstances corroborative to some extent of plaintiff's testimony. Almost a year elapsed from the delivery of the fish to the filing of the action, which afforded ample time for the 60-odd fishermen to decide how they wanted to proceed against Consolidated to recover for the fish admittedly delivered, and admittedly worth between $11,000 and $12,000. It also afforded ample time for these numerous assignments to be made orally at various times and places as plaintiff testified. It also afforded ample time for the dissolution of the "special fund", before this action was commenced. The court could readily have concluded from the evidence that the plaintiff was probably the best informed person, and therefore the logical person, to whom the fishermen could intrust the collection of their money, having served as the secretary-treasurer of their union and being thoroughly familiar with all the antecedent controversies and negotiations. Plaintiff testified that Local 35 became non-operative in January, 1951, which was after the action was commenced, but the court could easily have inferred from this record that the union's activities had slowed down if not come to a complete halt long before the action was actually filed.

[5, 6] There can be no doubt that when an alleged assignment is denied the burden of proving it is on the plaintiff. In its closing brief appellant cites the case of Martin v. Going, 57 Cal.App. 631, 207 P. 935, but that case has no application whatever since there wages were the subject matter, and the statute, § 955 Civ.Code, expressly required an assignment of wages to be in writing. Compare § 1052 Civ.Code.

The answer of Consolidated expressly admits that the reasonable value of the fish which it received was $12,549.60. It raises no issue as to the identity of the persons who did the fishing and delivered the catch. It expressly admits "that no part of the purchase price has been paid." Appellant made no attempt to prove its two special defenses, and it has not convinced us by authority or argument that the evidence was insufficient to support the court's finding that the oral assignments were made.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

PLOTTS v. ALBERT et al.

Civ. 8261.

District Court of Appeal, Third District, California.

Sept. 4, 1953.

Rehearing Denied Sept. 30, 1953.

Action against operators of trailer court for injuries sustained by tenant when she stumbled and fell while walking in area commonly used by tenants. The Superior Court, San Joaquin County, entered judgment on a verdict for defendants, and plaintiff appealed. The District Court of Appeal, Van Dyke, P. J., held that erroneously instructing jury on assumption of risk in terms of voluntary exposure to danger which tenant in exercise of ordinary care would have known existed constituted reversible error in view of inability to determine whether verdict was based on a correct premise or a premise derived from erroneous instruction.

Judgment reversed.

1. Landlord and Tenant ⚷169(11)

In action against operators of trailer court for injuries sustained by tenant when, while walking in area commonly used by tenants, she allegedly stumbled on a small stake protruding from the ground, whether defendants were negligent in maintenance of premises and whether tenant was contributorily negligent in failing to see stake were questions of fact for jury under the evidence.

2. Negligence ⚷105

"Assumption of risk" means voluntary acceptance of risk with knowledge and appreciation thereof or under such circumstances that plaintiff must have had knowledge of the hazard, but where it merely appears that plaintiff could or should have discovered danger by exercise of ordinary care, defense is not assumption of risk but contributory negligence.

See publication Words and Phrases, for other judicial constructions and definitions of "Assumption of Risk".

3. Appeal and Error ⚷1068(2)

Erroneously instructing jury on assumption of risk in terms of voluntary exposure to danger which plaintiff in exercise of ordinary care would have known existed constituted reversible error, where the evidence was such that reviewing court could not determine from the record whether verdict for defendants was based on finding that they were not negligent or on finding, under erroneous instruction, that plantiff had assumed the risk of dangerous condition which caused injury.

Willens & Boscoe, Stockton, for appellant.

William C. Burns and Robert K. Barber, San Francisco, for respondents.

VAN DYKE, Presiding Justice.

Plaintiff-appellant, Anna Plotts, sought by this action to recover damages for injuries which she received while she was a tenant of a trailer rented to her by defendants-respondent. She alleged that her injuries resulted from a fall caused by stumbling over a stake protruding from the ground in an area reserved for the common use of the tenants of a trailer court owned and operated by respondents. The jury returned a verdict in favor of respondents, and plaintiff appeals.

Briefly, the evidence shows the following. Appellant was a woman 91 years of age. She was walking on or near a pathway in an area commonly used by trailer tenants. She stumbled over some object which she neither saw nor identified. From the testimony of other witnesses it could be properly inferred that the object was a small stake about three inches wide and less than an inch thick, embedded in the ground with the top protruding an inch or more above the surface. The stake was somewhat obscured from view by grass. No question is or could be raised that appellant was not lawfully using the area where she fell or that it was not an area for the common use of tenants.

[1] Appellant urges reversal for the giving of an instruction on assumption of risk, and further claims that the evidence is insufficient as a matter of law to sustain the jury's verdict. We are satisfied that as to the latter assignment of error it cannot be sustained, and that in view of the evidence the issues as to respondents'

negligence in the maintenance of their premises, and of appellant's contributory negligence in failing to see the stake over which it could have been inferred she fell, were equally questions of fact for the jury's determination. As to the first assignment of error, however, a different situation is presented.

Respondents requested that the court instruct the jury upon assumption of risk, and the court in doing so used an instruction which appears in "California Jury Instructions, Civil," commonly called "B.A.J.I." It is instruction No. 207 therein, and is intended as a general statement of the rule. Adapted to this case, it reads as follows:

> "There is a legal principle commonly referred to by the term 'assumption of risk' which now will be explained to you:
>
> "One is said to assume a risk when she freely, voluntarily and knowingly manifests her assent to dangerous conduct or to the creation or maintenance of a dangerous condition, and voluntarily exposes herself to that danger, or when she knows, *or in the exercise of ordinary care would know,* that a danger exists in either the conduct or condition of another, or in the condition, use or operation of property, and voluntarily places herself, or remains, within the area of danger.
>
> "One who thus assumed a risk is not entitled to recover for damage caused her without intention and which resulted from the dangerous condition or conduct to which she thus exposed herself." (Italics added.)

[2] Shortly after this case was tried the Supreme Court, in Hayes v. Richfield Oil Corporation, 38 Cal.2d 375, 240 P.2d 580, held this instruction to be erroneous in so far as it included within the doctrine the concept that risk could be assumed without knowledge thereof, as stated in the foregoing italicized portion of the instruction. Said the Supreme Court, in 38 Cal.2d at pages 384–385, 240 P.2d at page 585:

> "The trial court properly refused to give instructions requested by Richfield which misstated the law relating to the doctrine of assumption of risk. These instructions were to the effect that one assumes a risk 'when he knows, or in the exercise of ordinary care would know, that a danger exists' and voluntarily places himself within the area of danger, and that, to bar recovery, plaintiff must have actual knowledge of the danger 'or the conditions must be such that he would have such knowledge if he exercised ordinary care.' The doctrine of assumption of risk is based on the theory that there has been a voluntary acceptance of a risk, and such acceptance, whether express or implied, requires knowledge and appreciation of the risk. See Rest., Torts, § 893; Prosser on Torts (1941), pp. 377–386; 10 So.Cal.L.Rev., 67, 74. Where the facts are such that the plaintiff must have had knowledge of the hazard, the situation is equivalent to actual knowledge, and there may be an assumption of risk; but where it merely appears that a person could or should have discovered the danger by the exercise of ordinary care, the defense is not assumption of risk but contributory negligence."

In the 1952 pocket part of B.A.J.I. the publishers say (p. 101):

> "* * * In the light of this most recent opinion [Hayes v. Richfield Oil Corporation], the words 'or in the exercise of ordinary care would know' * * * must be omitted. Unless this is done the instruction will be erroneous. It now seems clear that the doctrine of assumption of risk may not apply unless the person in question had actual knowledge of the danger."

[3] In this case the evidence was sharply conflicting. Therefrom the jury could have found that respondents, in the maintenance of their premises, were not negligent. Equally the jury could have found, under the erroneous instruction given, that appellant, had she exercised proper care for her own safety, could have known of the

presence of the stake over which she fell and had therefore assumed the risk of its presence. From this record we cannot tell upon what the jury based its verdict, that is, whether on a correct premise or on a premise derived from the error in the instruction. Under such circumstances the error is substantial and requires a reversal of the judgment appealed from. Hoyt v. Southern Pacific Co., 6 Cal.App.2d 49, 53, 44 P.2d 363.

The judgment appealed from is reversed.

PEEK and SCHOTTKY, JJ., concur.

WILSON v. SHARP et al.*

Civ. 19540.

District Court of Appeal, Second District, Division 3, California.

Sept. 1, 1953.

Rehearing Denied Sept. 17, 1953.

Hearing Granted Oct. 29, 1953.

Action to have Civil Service Commission eligibility list and appointment made thereunder declared void, and to recover public moneys paid to appointee. The Superior Court, Los Angeles County, Ellsworth Meyer, J., entered a minute order, granting motion to strike cause of action against county attorney, and plaintiff appealed. The District Court of Appeal, Vallée, J., held that complaint could not be amended to set up a cause of action against a new defendant upon different basis of recovery or relief from that originally pleaded against original defendants.

Affirmed.

1. Appeal and Error 🔑854(1)

A reviewing court is concerned with correctness of trial court's action, and not with reasons assigned therefor.

2. Pleading 🔑248(1)

An amended complaint may not set up a new and entirely different cause of action.

3. Pleading 🔑248(2)

The test for determining whether a wholly different cause of action has been introduced by pleading amendment is whether a wholly different legal liability or obligation is pleaded from that originally pleaded, and not whether, under technical rules, a new cause of action is introduced.

4. Pleading 🔑248(2)

In determining whether an amended petition states entirely new cause of action, court will consider whether new petition states a like kind of action, such as might have been originally joined, and whether subject matter of new count is same as that of old, only a variation of form of demanding same thing.

5. Parties 🔑54

New parties may be brought into an action by amendment if they are necessary parties, and so long as there is no change in the cause of action. Code Civ.Proc. § 473.

6. Declaratory Judgment 🔑306

Petition alleging that an appointment under civil service commission's eligibility list was void and that public moneys were paid without authority of law under the void appointment, joining as defendants members of civil service commission, its examiner and acting secretary, and county, seeking a declaratory judgment that officer appointed was a de facto officer, and praying for judgment for amount of salary paid the officer, could not be amended to include as a defendant county counsel, by alleging that county counsel had failed to take proper action to recover for county public moneys paid allegedly de facto officer as salary, and praying for judgment for that money from county counsel. Code Civ. Proc. § 473.

John J. Guerin, Los Angeles, for appellant.

Harold W. Kennedy, County Counsel, John B. Anson and Arno Van Alstyne, Deputy County Counsel, Los Angeles, for respondent.

---

* Subsequent opinion 268 P.2d 1062.

VALLÉE, Justice.

Appeal from a minute order granting a motion of the defendants to strike from plaintiff's second amended complaint the second cause of action against defendant Harold W. Kennedy, County Counsel of the County of Los Angeles.

The facts alleged in the original complaint were substantially reiterated in the first and second amended complaints. The complaints alleged: A vacancy had arisen in the office of Executive Assistant, County Clerk, a position in the classified service of the County of Los Angeles. On June 5, 1946, the Civil Service Commission of the county called a promotional examination to fill the position. The Commission so fixed and determined the requirements of the applicants that only defendant Sharp was eligible, and the Commission knew that only Sharp would be able to qualify. The Commission promulgated an eligible list showing that Sharp had been the only applicant and his rating was determined by investigation and not by a competitive examination. The County Clerk, acting in reliance upon the certification made to him by the Commission that Sharp was an eligible for permanent appointment, appointed Sharp to the position. Sharp served in the position from August 5, 1946, to June 28, 1949, except for the period from October 6, 1948, to March 20, 1949. Since August 5, 1946, defendant Lowery, Auditor of the County of Los Angeles, caused public moneys to be paid to Sharp without demanding or receiving the certification of the Commission as provided in article IX, section 38, of the Charter of the county. The eligible list is void; the appointment made thereunder is void; and the public moneys paid to Sharp while serving under the permanent appointment were paid without authority of law and should be recovered and paid into the treasury of the County of Los Angeles.

The original complaint, filed December 3, 1951, named as defendants: William G. Sharp; Charles C. Mack, and Thomas J. O'Keefe, as members of the Los Angeles County Civil Service Commission; Clifford N. Amsden, as Acting Secretary and Chief Examiner of the Los Angeles County Civil Service Commission; Joseph M. Lowery, as Auditor of the County of Los Angeles; the County of Los Angeles; and six John Does. A declaratory judgment was sought declaring that Sharp was a de facto officer and had no promotional rights in the classified service. A judgment for $11,183.65, salary paid to Sharp, was also prayed for. Harold W. Kennedy, County Counsel of the County of Los Angeles, was not named a defendant and no recovery was sought against him. However, plaintiff referred to him as being, and as having been at all times therein concerned, the County Counsel of the County of Los Angeles, and that previous to the filing of the action he had made demand upon the County Counsel to institute such proceedings as were proper under the provisions of section 26525 of the Government Code for the purpose of recovering the public moneys paid to Sharp; and that he failed and refused to institute such proceedings.

The first amended complaint named the same defendants and sought: (1) a declaratory judgment that Sharp was a de facto officer and had no promotional rights in the classified service; (2) a judgment in the sum of $1,446.79 for salary paid to Sharp from March 21, 1949, through June 28, 1949; (3) an injunction restraining Lowery from paying Sharp's salary; and (4) recovery of $15,383.86, salary paid to Sharp. This complaint made the same allegations with respect to Harold W. Kennedy as did the original complaint.

The second amended complaint, for the first time, made Kennedy a defendant. The second cause of action alleged that on October 5, 1951, plaintiff made demand upon Kennedy, as County Counsel, to take such action as was necessary and proper to recover for the County of Los Angeles the public moneys paid to Sharp from August 5, 1946, through June 26, 1949; that Kennedy failed and refused to bring suit against Sharp and allowed the statute of limitations to run against all payments made to him from August 5, 1946, to December 3, 1948, in the sum of $9,736.86. Plaintiff prayed judgment against Kennedy for $9,736.86. A motion to strike this second cause of action was granted. Plaintiff appeals from the minute order granting the motion.

[1] The parties disagree as to the ground on which the motion was granted. The record does not disclose the ground. If the motion was correctly granted on any ground the order must be affirmed. A reviewing court is concerned with the correctness of a trial court's action and not with the reasons assigned therefor. Bealmear v. Southern Cal. Edison Co., 22 Cal.2d 337, 339, 139 P.2d 20.

[2] The authorities recognize the propriety of a motion to strike an amended complaint setting up an entirely new cause of action. Neal v. Bank of America, 93 Cal.App.2d 678, 682, 209 P.2d 825; Burnett v. Boucher, 108 Cal.App.2d 37, 238 P.2d 1; Shenberg v. De Garmo, 61 Cal.App.2d 326, 143 P.2d 74; Pagett v. Indemnity Insurance Co., 54 Cal.App.2d 646, 129 P.2d 700; 71 C.J.S., Pleading, § 455, p. 919. The court in Pagett v. Indemnity Insurance Co., supra, stated 54 Cal.App.2d at page 649, 129 P.2d at page 702: "It is well settled that a new and different cause of action may not be set up in an amended complaint and that the trial court should grant a motion to strike an amended complaint which sets up an entirely new and different cause of action."

[3] The test for determining whether a wholly different cause of action has been introduced by amendment is whether a wholly different legal liability or obligation is pleaded from that originally averred. "[T]he test is not whether under technical rules of pleading a new cause of action is introduced, but rather, the test is whether an attempt is made to state facts which give rise to a wholly distinct and different legal obligation against the defendant." Klopstock v. Superior Court, 17 Cal.2d 13, 21, 108 P.2d 906, 910, 135 A.L.R. 318.

[4] In applying the test, the court should consider: First, whether the new count is consistent with the former count or counts. It must be a like kind of action and such as might have been originally joined with the others. Second, whether it is the same cause of action. The subject matter of the new count must be the same as that of the old; it must not be for an additional claim or demand but only a variation of the form of demanding the some thing. Union Lumber Co. v. J. W. Schouten & Co., 25 Cal.App. 80, 82, 142 P. 910; 21 Cal.Jur. 199, § 137. See 71 C.J.S., Pleading, § 290, p. 649.

[5] New parties may be brought into an action by amendment, but only if they are necessary parties. Code of Civ.Proc. § 473; 1 Bancroft's Code Pleading, 821, § 567. A complaint may be amended to add a defendant as long as there is no change in the cause of action. Karlik v. Peters, 106 Cal.App. 126, 288 P. 863.

[6] Here Kennedy as a new defendant is required to answer a wholly different legal liability or obligation from that alleged against the original defendants. The second amended complaint attempts to set up a cause of action on a different basis of recovery or relief from that originally pleaded against the other defendants. The basis of the action against Kennedy is that he did not correctly exercise his judgment and discretion in refusing to institute a suit against Sharp and that he thereby allowed the statute of limitations to run. Plaintiff seeks to hold him liable for the barred payments. The second cause of action is not a mere variation of the original allegations, but it is an entirely new, distinct, and independent cause of action against Kennedy and not against the other defendants. It does not arise out of the same transaction as that out of which the other causes of actions arose, and is a cause of action which cannot, with propriety, be joined with the others.

The court did not abuse its discretion in granting the motion to strike the second cause of action from the second amended complaint.

Affirmed.

SHINN, P. J., and WOOD, J., concur.

CLEMENTS et al. v. T. R. BECHTEL CO. et al.*

Civ. No. 15426.

District Court of Appeal, First District, Division 2, California.

Aug. 31, 1953.

Hearing Granted Oct. 29, 1953.

Action to foreclose mechanics' lien of street and drainage contractor who had done certain work in an area that had been subdivided into lots. The Superior Court of Contra Costa County, Harold Jacoby, J., sustained defendants' demurrer and contractor appealed. The District Court of Appeal, Goodell, J., held that although county surveyor had not approved such construction as required by county ordinance, and lien statute provided that where improvement was subject to acceptance by municipal board or officer the time for filing claim should not commence to run until such acceptance, lien claim filed six months after completion of work was barred by 90-day statute of limitations.

Affirmed.

1. Statutes 🔑190

If the language of a statute is free from ambiguity, the court should give words used their ordinary and usual meaning and should not change its effect by giving words some unusual or seldom used meaning.

2. Mechanics' Liens 🔑132(1)

Provision of lien statute that where improvement is subject to acceptance by any "municipal board or officer" the time for filing lien shall not "commence to run until after acceptance has been made" means a board or officer of city or town and does not include a county surveyor. Code Civ.Proc. §§ 1187, 1191.

See publication Words and Phrases, for other judicial constructions and definitions of "Municipal Board or Officer".

3. Mechanics' Liens 🔑132(4)

Where contractor had completed street and drainage improvements in suburban area which under county ordinance required approval of county surveyor, contractor's lien claim filed six months following completion of work was barred by 90 day statute of limitations even though county surveyor had not accepted work and statute provided that as to improvements subject to acceptance by any municipal board or officer, time for filing claim should not run until improvements were accepted. Code Civ.Proc. §§ 1187, 1191.

4. Mechanics' Liens 🔑132(1)

Where statute giving lien to secure improvement within incorporated town or city was amended to include suburban tracts and to provide that where improvement is subject to acceptance by municipal board or officer the time for filing lien shall not commence to run until such acceptance, history of the legislation did not indicate intent to extend the 90-day statute of limitations to improvements upon suburban tracts. Code Civ.Proc. §§ 1187, 1191.

◆

Price, Macdonald & Knox, Orlando J. Bowman, Oakland, for appellants.

Royal E. Handlos, San Francisco, for respondents.

GOODELL, Justice.

The plaintiffs sued to foreclose a mechanics' lien on a tract of land known as "Tree Haven, Contra Costa County, California". The principal defendants are the contractors for whom the work was performed and materials furnished, namely, T. R. Bechtel and T. R. Bechtel Co. Among numerous defendants are Pioneer Investors Savings & Loan Association, First Pioneer Co., and Northwestern Mutual Life Insurance Co. The demurrer of these three to the complaint was sustained. Plaintiffs declined to amend, and judgment was entered for costs. This appeal followed.

The complaint alleges the following facts: In March, 1950 John and Rose Ragghianti owned a portion of the Rancho San Miguel, which they caused to be subdivided into 220 lots, all of which have been conveyed to new owners. As a condition to the recordation of the subdivision map the Ragghiantis made an agreement with the county to cause road and street improvements and tract drainage to be completed as required by a county ordinance, by the construction of eight streets, drives, lanes, and courts within the subdivision. Between May 25, 1950 and February 9, 1951 plaintiffs did this construction, paving and drainage work, valued by them at $48,161.93, of which $12,073.04 was paid, leaving $36,088.89 owing. The county ordinance provides that all work and materials shall be subject to the inspection and approval of the County Surveyor. He has not accepted or approved the work, although plaintiffs allege that they have satisfactorily completed it.

---

* Subsequent opinion 273 P.2d 5.

On August 9, 1951 appellants recorded their lien, exactly six months after the completion.

The complaint alleges that defendants claim some right, title or interest in the land but that such claims are subject and subordinate to plaintiffs' lien.

One of the grounds of demurrer is that the action is barred by § 1187 Code Civ. Proc. At the time the work was done that section read: "* * * all persons claiming the benefit of this chapter, shall have 90 days after the completion of said work of improvement within which to file their claims of lien. * * *" If § 1187 applies, the lien was 90 days late.

Appellants rely on § 1191 which read at the time: "(a) * * * provided, that in cases where the improvement made or work done is subject to acceptance by *any municipal board or officer*, the time for filing claims of lien shall not commence to run until after such acceptance shall have been made." (Emphasis added.) If § 1191 applies, the filing on August 9, 1951 was not too late since there was no acceptance by the County Surveyor.

To bring the case within § 1191 appellants have to show that the County Surveyor is a municipal officer. They state the problem thus: "The issue is solely a question of statutory interpretation, i. e., *Is the County Surveyor a municipal officer within the meaning of the foregoing provision of Section 1191(a)?*"

The principal if not the only basis for appellants' contention is that in the law the word "municipal" means public or governmental, not city or town. In their brief respondents say that they "have no argument with the appellants that the word municipal, when used generally as municipal law, is broad enough to include all governmental law" but they argue that "it is not so used, nor is that the sense of the meaning of the language in Section 1191 * * *."

Webster's New International Dictionary (2d ed. 1938) gives the third and last meaning of "Municipal" as: "3. Of or pertaining to the internal or governmental affairs of a state, kingdom, or nation;—*used chiefly in the phrase municipal law.*" (Emphasis added.) Funk & Wagnalls' Standard Dictionary, 1911, gives the primary meaning of "Municipal" as: "1. Of or pertaining to a town or city, or to its corporate or local government; hence, pertaining to local self government in general; as, municipal politics; municipal freedom" and the secondary meaning as: "2. *Of or pertaining to the internal government of a state, kingdom, or nation.*" (Emphasis added).

As early as 1866, in People v. Johnson, 30 Cal. 98, 99, the same argument as that now made by appellants was unsuccessfully addressed to the Supreme Court as follows: "The word *municipal* has long since ceased to be limited in its application to cities; perhaps in America it never had any such limited acceptation. It is the particular law of a State or nation, as distinguished from public or international law. 2 Bouvier's Law Dict., Rawles Third Rev., page 2269, and Burrill's Law Glos.; 1 Black's Com. 44; 1 Kent's Com. 447. Hence, a municipal offense, in its legitimate and constitutional significance, is one against the law of the State or nation." The court rejected this argument and dismissed the appeal for lack of jurisdiction saying 30 Cal. at page 102: "As to the first point, the argument turns upon the meaning of the word 'municipal,' as used in the Constitution, and it is insisted that the word is used in its broadest and most enlarged sense, and therefore includes all fines imposed by the laws of the State, and is not limited to such as are imposed by the local laws of particular places, such as towns or cities. Such, however, cannot be the case. To give it the broad meaning contended for, would be to strip it of all meaning in the place where we find it, for the meaning of the sentence would be the same without it as with it. Under the definition of counsel, the word 'fine' would mean precisely the same thing as if the qualifying word 'municipal' had been omitted, which in effect strips the latter word of all meaning in the connection in which it is used. The word 'municipal' is obviously used in its strictest sense, as indicating an inferior power or jurisdiction. There would seem to be no occasion for using the word in the Constitution or organic law of a State or Government, except for the purpose of indicating an inferior or local jurisdiction, and it was undoubtedly used in that sense here. It qualifies and limits the word 'fine', and thus serves to distinguish the fine intended from all other fines."

Appellants' contention that the word "municipal" was used in § 1191 in its broadest and most enlarged sense is virtually the same as the government's contention in Re Estate of Burnison, 33 Cal.2d 638, 204 P.2d 330, 331, that the words "the state" were so used in § 27 Prob.Code. In that case the testator bequeathed his entire estate to "The United States government U.S.A." The government contended that it was entitled to take by will under California law. Section 27 names "the state" among those to whom testamentary disposition may be made, and the government argued that those words included the Federal Government, since in their broadest and most enlarged sense they mean sovereignty. The Supreme Court said:

> "The Government cites the opening language of the statute, in its designation of 'the state' as a proper recipient of a 'testamentary disposition,' as embracing the United States. But in construing a statute, words are to be taken in their ordinary sense and normal signification, 23 Cal.Jur. sec. 109, p. 730; Taylor v. Lundblade, 43 Cal.App.2d 638, 641, 111 P.2d 344; Gayer v. Whelan, 59 Cal.App.2d 255, 262, 138 P.2d 763, and the Government's suggested extension of the meaning of 'the state' runs counter to this settled rule. Although it must be recognized that historians and other writers frequently use the literary or rhetorical expression and refer to the nation as 'the state,' the draftsmen of legislation as a rule employ language notable for its precise and definitive character rather than for its elegance. So it would appear that if the legislature had intended to include the United States within the purview of the statute, ' "the ordinary dignities of speech would have led" to its mention by name.' United States v. Cooper Corporation, 312 U.S. 600, 606, 61 S.Ct. 742, 744, 85 L.Ed. 1071, citing Davis v. Pringle, 268 U.S. 315, 318, 45 S.Ct. 549, 69 L.Ed. 974."

[1] In Gayer v. Whelan, 59 Cal.App.2d 255, 262, 138 P.2d 763, 767, cited in the Burnison case, the court said:

> "It is a cardinal rule of statutory construction that where the language of a statute is free from ambiguity, when the words used are given their ordinary and usual meaning, the courts should not look further in its interpretation and should not change its effect by giving the words some unusual or seldom used meaning. Bagg v. Wickizer, 9 Cal.App.2d 753, 50 P.2d 1047; Taylor v. Lundblade, 43 Cal. App.2d 638, 111 P.2d 344; People v. Stanley, 193 Cal. 428, 225 P. 1; Pacific Coast Dairy v. Police Court, 214 Cal. 668, 8 P.2d 140, 80 A.L.R. 1217."

[2, 3] If, as we have seen, in construing a statute, words are to be taken in their ordinary sense and normal signification, then certainly when § 1191 speaks of "acceptance by any municipal board or officer" it must be held to mean a board or an officer of a city or town. That is in accord with the primary sense given in the dictionary definitions of the word "municipal" and with the sense in which the California cases use the word. For example, in the case of In re Werner, 129 Cal. 567, 572–573, 62 P. 97; cited, by the way, by appel-

lants, the Supreme Court discussed the subject at some length as shown in the footnote.[1]

[4] Appellants' second contention is that "Legislative history requires interpretation of 'municipal officer' to include county officer." They point to the change made in § 1191 in 1913. After § 1191 was amended in 1901 it read: "Any person who, at the request of the owner of any lot *in any incorporated city or town*, grades, fills in, or otherwise improves the same, or the street or sidewalk in front of or adjoining the same * * * has a lien upon such lot for his work done and materials furnished" (then follows a provision for the filing of a lien after completion; emphasis added).

In 1913 § 1191 was again amended. The principal change was to strike out the words "in any incorporated city or town," emphasized above, thereby extending the right to lien to suburban tracts as well as city lots. The legislature added "or tract of land" after "lot", and "highway" after "street", and extended the right to lien to an outlying tract as well as to a lot. The fact that it then added the proviso (now involved and already quoted) respecting "acceptance by any municipal board or officer" by no means shows (as appellants contend) that it intended to extend the 90-day statute of limitations to work done on tracts lying outside city or town boundaries. Had such been the intention " 'the ordinary dignities of speech'," see 33 Cal.2d at page 641, 204 P.2d at page 332, would have led to the addition of some such language as "acceptance by any *county or* municipal board or officer." There is of course a marked difference between a county government and that of a city or town, and the question was exclusively legislative. We find nothing "incongruous" or "unreasonable" about the proviso.

There seems to be no reason to discuss the other points raised by the demurrer—which was special as well as general. The plea of the statute of limitations was alone sufficient, and ended the case as to the three demurring defendants.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

---

120 Cal.App.2d 53

KRUPP et al. v. MULLEN et al.

Civ. 8132.

District Court of Appeal, Third District, California.

Sept. 1, 1953.

Action by purchasers against vendors for specific performance of land contract, or in alternative for damages for breach of contract. The Superior Court, Siskiyou County, granted vendors' motion for summary judgment, and purchasers appealed. The District Court of Appeal, Peek, J., held that vendors who did not plead estoppel as defense and who did not request to amend their answer to so plead waived question of estoppel and could not assert such question on their summary judgment motion.

Reversed.

---

[1] "Webster defines 'municipal' as pertaining to a city or corporation having the right of administering local government—as municipal rights, municipal officers; and 'municipality' is defined as a municipal district, a borough, a city, town or village. The Century Dictionary defines 'municipal' as pertaining to local self-government or corporate government of a city or town; and 'municipality,' as a town or city possessed of corporate privileges of local self-government; a community under municipal jurisdiction. Bouvier's Law Dictionary says 'municipal' strictly applies only to what belongs to a city. Among the Romans cities were called municipia. In a general sense, we say that all law other than international is municipal law, but when we speak of corporations as municipal we mean cities or towns. These existed before the constitution. They came down to us from former times, and they have always formed an important part of our system of government."

1. Estoppel ⚷107, 110

Generally a party who has an opportunity to plead an estoppel upon which his cause of action or defense depends must do so.

2. Judgment ⚷185

Affidavits in support of a motion for summary judgment do not constitute a second set of pleadings their purpose being to show whether issues apparently made by formal pleadings are genuine and whether either party has competent evidence to offer which tends to support his side of issues.

3. Judgment ⚷186

If either party finds on hearing of a motion for summary judgment that his pleading is inadequate either by way of allegation or denial, the court may and should permit him to amend, and in absence of request for amendment, there is no occasion to inquire about possible issues not raised by pleadings.

4. Estoppel ⚷110

Vendors not pleading estoppel as defense to purchasers' suit for specific performance of contract for sale of land and not requesting to amend their answer to so plead waived the question of estoppel and could not assert such question on their summary judgment motion.

5. Judgment ⚷185

Allegation in support of defendants' motion for summary judgment that suit for specific performance of land contract was brought two days after contract had expired was a mere conclusion of law, and was ineffective as an allegation that contract was automatically at an end at date suit was brought. Code Civ.Proc. § 437c.

6. Specific Performance ⚷114(4)

Allegations of purchaser suing for specific performance of contract for sale of land requiring $500 down payment, that they had paid $500 in accordance with contract and that they had demanded delivery of deed and that vendors had refused and that in all other respects the purchasers had performed all of the conditions on their part to be performed sufficiently alleged the performance of all conditions precedent as set forth in contract. Code Civ.Proc. § 457.

7. Judgment ⚷181(30)

Where provision of contract for sale of unpatented land relative to procurement of patent within an 18 month period might present question of fact for determination, vendors sued for specific performance of contract were not entitled to summary judgment on any theory that suit had been brought after expiration of contract. Code Civ.Proc. § 437c.

8. Contracts ⚷176(2)

When the meaning of language used in contract is uncertain or doubtful, and parol evidence must be introduced to aid in its interpretation, question of meaning is one of fact.

◆

Barr and Hammond, Yreka, for appellants.

Mark M. Brawman, Yreka, for respondents.

PEEK, Justice.

This is an appeal by plaintiffs from a summary judgment in favor of defendants.

The record shows that two days after the expiration of the term set forth in a written agreement between the parties, plaintiffs filed a complaint by which they sought to compel defendants to perform said agreement. By the terms thereof defendants agreed to sell and plaintiffs agreed to buy certain unpatented land located in Siskiyou county for the sum of $2,500; of this sum $500 was to be paid upon the execution of the agreement and the balance upon the execution of the deed. It was further provided that if a patent was not granted within eighteen months, or if at any time during that period it was refused, the $500 was to be refunded. Time was not declared to be of the essence and no provision was made as to possession in the interim between the making of the contract and the transfer of the deed. Subsequently two amended complaints were filed, the third and last, which is the one now before this court, being filed approximately fourteen months after the proceedings were commenced. The allegations of the complaint were that in accordance with said agreement plaintiffs paid to defendants the sum of $500 and thereafter performed all of the conditions on their part; that they demanded of defendants the delivery of the deed to the property but that defendants refused. They also alleged that prior to the expiration date of said agreement they orally stated to defendants that they would accept a deed without first having the property patented. The reasonable value of the property was alleged to be the sum of $2,500. In a second count they alternatively prayed for damages for the alleged breach if performance could not be had. Defendants' answer denied the material allegations of the complaint; that $2,500 was the fair and reasonable value at the time the contract was made, and further alleged that at the time of the filing of the action the value of the property was the sum of $8,500.

On the same day their answer was filed the defendants filed a notice of motion for summary judgment supported by the affidavit of the defendant William W. Mullen, who therein averred that on the day following the execution of the agreement their house was destroyed by fire; that the construction of a new home was started immediately thereafter; that for one day plaintiff Fred Krupp assisted in the building thereof; that the cost of the home was approximately $6,000; that both of the plaintiffs observed the construction of the home almost daily; that plaintiffs stated to defendants they were tired of waiting to complete the purchase and had bought another piece of land upon which they had begun construction of a house which construction continued until the filing of the present action when it was stopped; that plaintiffs visited defendants in their new home on a date prior to the expiration of the eighteen month term and asked defendants how they (plaintiffs) stood on the agreement; that they were informed by defendants that it could be renewed provided the cost of the new house was added to the original purchase price, making a total of $8,500, and that plaintiffs made no reply thereto but later instituted this proceeding. The affidavit further averred that Mullen was present during the course of the taking of the deposition of plaintiff Fred Krupp who, on that occasion, stated that at no time had he waived the requirement of a patent until the allegation of waiver was made in his complaint; that he had not offered to pay the purchase price nor demand a deed prior to the filing of the complaint and that he believed the value of the property to be in exceess of $2,500. Mullen also averred that Mrs. Adele Krupp had made like statements in her deposition.

A counter affidavit was filed by Adele Krupp wherein she merely stated that on many instances before the action was begun plaintiffs had talked with defendants concerning the patent, and had been told that the reason it was not issued was because a survey and maps had not been filed. There was a further averment that plaintiffs had requested a renewal of the agreement, relying upon the statements of defendants that the application for patent had not yet been filed. The balance of the contents of the affidavit were clearly hearsay and hence of no value. Thereafter plaintiffs filed their notice of motion for leave to file a fourth amended complaint, which motion was supported by the affidavit of their counsel. No purpose would be served in summarizing the averments therein set forth since all were based upon hearsay, and hence, as to which said counsel was not a competent witness, his affidavit must be disregarded.

The motion for leave to file the fourth amended complaint was heard on March 12, 1951 and was denied. Immediately thereafter defendants' motion for summary judgment was heard and submitted and on March 27, 1951, the same was granted.

It is evident from the memorandum opinion of the trial court that its order granting defendants' motion was predicated first upon the time element as set forth in the agreement, and secondly upon the element of estoppel. As to the latter the court specifically stated: "I believe that Vol. 174 A. L.R. 713 states the true rule as follows: 'a purchaser under a contract for purchase of land, who has led the vendor to believe the contract has been abandoned is estopped from obtaining specific performance after the vendor, in reliance upon the abandonment, has made valuable improvements on the property.' This is the exact situation set forth here in defendants' affidavits, which are not denied."

Although the situation presented by defendants' affidavit in support of the motion likewise is predicated on the issue of estoppel in pais, that defense was not pleaded nor was there any request to amend the answer so to plead.

[1-4] As stated in 10 Cal.Jur. section 30, page 654: "* * * it may now be regarded as firmly settled that, as a general rule, a party who has an opportunity to plead an estoppel upon which his cause of action or defense depends must do so." The affidavits in support of a motion for summary judgment do not constitute a second set of pleadings. "Their purpose is only to show whether the issues apparently made by the formal pleadings are genuine," Gardenswartz v. Equitable etc. Soc., 23 Cal.App.2d Supp. 745, 752, 68 P.2d 322, 326, and if either party has competent evidence to offer which would tend to support his side of the issues. However, as the court stated in 23 Cal.App.2d Supp. at page 753, 68 P.2d at page 326, of the case last cited, "If either party finds, on the hearing of such a motion, that his pleading is not adequate, either by way of allegation or denial, the court may and should permit him to amend; but in the absence of some request for amendment there is no occasion to inquire about possible issues not raised by the pleadings." Therefore when the motion for summary judgment was presented to the trial court for consideration, the question, if any, of estoppel stood as waived by defendants.

[5, 6] We find nothing in the remaining portions of defendants' affidavits which would make out a defense on the merits. Thus in regard to the first point made by the court: if defendants' averment that the plaintiffs' promise to buy the property expired two days before the action was begun, is intended as an allegation that the contract was automatically at an end on that day, it is of no force, since it is a pure conclusion of law and not such a statement of fact as is required by section 437c of the Code of Civil Procedure. Defendants in their affidavit admit that plaintiffs made demands for a patent. Furthermore the plaintiffs alleged payment of the sum of $500 in accordance with the agreement; that they demanded delivery of the deed to the property but that defendants refused, and that in all other respects they had performed all of the conditions on their part to be performed. Such allegations of performance of all of the conditions precedent as set forth in the agreement was sufficient under the provisions of section 457 of the Code of Civil Procedure. See also Gilfallan v. Gilfallan, 168 Cal. 23, 32, 141 P. 623.

[7, 8] Lastly it should be noted that the provision of the agreement relative to the procurement of a patent by defendants may well present a question of fact for determination. Hence defendants' motion is also subject to the established rule that when the meaning of the language used in a contract is uncertain or doubtful and parol evidence must be introduced in aid of its interpretation, the question of its meaning is one of fact. Walsh v. Walsh, 18 Cal.2d 439, 444, 116 P.2d 62.

The judgment is reversed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

KARSH et al. v. HAIDEN et al.

Civ. 15384.

District Court of Appeal, First District, Division 2, California.

Sept. 4, 1953.

Action by buyers of automobile wrecking business in San Francisco, including good will and right to continue the use of business name, for an injunction, damages and an accounting of profits. The Superior Court, Alameda County, rendered judgment for defendants, and plaintiffs appealed. The District Court of Appeal, Nourse, P. J., held that the evidence established that operation of similar business in Oakland subsequently acquired by seller of San Francisco business and another, resulted in confusion or likelihood of confusion and that hence buyers of San Francisco business were entitled to injunction requiring reasonable precautions to differentiate Oakland business from San Francisco business which had opened a branch yard in Oakland.

Judgment affirmed in part and reversed in part.

1. Trade-Marks and Trade-Names and Unfair Competition ⚷100

In action by buyers of automobile wrecking business in San Francisco, including good will and right to continue use of business name containing name of seller, to enjoin seller and another from using for business purposes seller's name, name of business sold or any colorable imitation without differentiating such business from business sold, findings that business sold had no valuable good will, that neither business name nor name of seller had a valuable reputation and that defendants did not operate new business in Oakland in competition with plaintiffs and did not announce to public that seller was part of their firm were contrary to the evidence. Civ.Code, § 3369.

2. Trade-Marks and Trade-Names and Unfair Competition ⚷73(1)

Where contract of sale of automobile wrecking business in San Francisco with right to continue use of business name containing name of seller expressly restricted noncompetition clause to San Francisco only and did not otherwise expressly limit seller in use of his own name, use of seller's name in connection with similar business in Oakland subsequently acquired by seller and another, announcement that seller was part of firm operating such business and actively trying to cash in on seller's personal reputation did not necessarily constitute unfair competition. Civ.Code, § 3369.

3. Good Will ⚷6(1)

The elements of good will personal to seller of a business, such as his personal experience, skill and reputation, do not pass to buyer of business as a part of the good will thereof.

4. Trade-Marks and Trade-Names and Unfair Competition ⚷73(1)

The right to use one's own name in business may be relinquished by contract, but, in absence of express language to that effect, the intention to part with such right will not be presumed.

5. Trade-Marks and Trade-Names and Unfair Competition ⚷73(1)

Seller of a business and good will may not use the firm name he has assigned or another similar firm name likely to cause confusion or in any way cause such confusion or detract from the good will sold, and he must avoid the appearance of continuing the business sold or of being its successor.

6. Good Will ⚷6(1)

Seller's contractual relation to buyer of a business and good will implies the obligation of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of agreement.

7. Trade-Marks and Trade-Names and Unfair Competition ⚷73(1)

The rule that every man in absence of proved fraud or misleading artifices has the absolute right to use his own name, even though he may thereby interfere with and injure business of another, is not applicable to seller of a business, including good will and right to continue use of business name containing seller's name.

8. Trade-Marks and Trade-Names and Unfair Competition ⟹97, 100

In action by buyers of business, including good will and right to continue use of business name containing name of seller, to enjoin seller and another from using seller's name, name of business sold or any colorable imitation, findings negativing intentional fraud and misleading artifices, which findings could reasonably be inferred from the evidence, were conclusive on appeal, but such findings were not decisive against the granting of injunction. Civ. Code, § 3369.

9. Trade-Marks and Trade-Names and Unfair Competition ⟹92

That plaintiffs alleged intentional fraud and misleading artifices as basis of action for unfair competition did not prevent them from obtaining an injunction without proof and finding as to truth of such allegations, if under the circumstances alleged and proved the injunction was justified on the basis of violation of obligations of seller of good will of a business or unfair competition. Civ.Code, § 3369.

10. Injunction ⟹61(2)

Trade-Marks and Trade-Names and Unfair Competition ⟹97

Fraud or misleading artifices are not essential to injunctive relief against violation of contractual obligations of seller of the good will of a business, and also in the field of unfair competition injunctive relief may be available without such proof, if the conduct is unfair. Civ.Code, § 3369.

11. Good Will ⟹6(1)

In determining the unfairness of conduct of subsequent associates of seller who were not parties to contract of sale of business and good will thereof, their knowledge of contract and fact that they will participate in any profits derived through violation of contractual obligations of seller must be considered.

12. Trade-Marks and Trade-Names and Unfair Competition ⟹73(1), 75

Seller of business, including good will and right to continue use of business name, may be required by injunction to take reasonable precautions against confusion of new business conducted by him and others with business sold, and proof that any individual has been actually confused is unnecessary, if such confusion is likely to result.

13. Trade-Marks and Trade-Names and Unfair Competition ⟹93(3)

In action by buyers of automobile wrecking business in San Francisco, including good will and right to continue use of business name containing name of seller, to enjoin seller and another from using seller's name, name of business sold or any colorable imitation, evidence established that use of seller's name and portrait in connection with similar business in Oakland subsequently acquired by seller and another and operated by them under a different name resulted or would probably result in confusion, causing defendants to be considered the same as or the successors of business sold, notwithstanding seller's testimony to the contrary. Civ.Code, § 3369.

14. Trade-Marks and Trade-Names and Unfair Competition ⟹73(1)

Where evidence established confusion or likelihood thereof, buyers of automobile wrecking business in San Francisco, including good will, which included many Oakland customers, and right to continue use of business name "Haiden Auto Wrecking," were entitled to injunction requiring reasonable precautions to differentiate similar business in Oakland subsequently acquired by seller and another and operated under different name from business sold, though such business had been acquired by defendants before buyers of San Francisco business opened branch yard in Oakland. Civ.Code, § 3369.

15. Trade-Marks and Trade-Names and Unfair Competition ⟹98

Though evidence established that operation of automobile wrecking business in Oakland by former owner of similar business in San Francisco and another after sale of San Francisco business, including good will and right to continue use of business name, resulted in confusion or likelihood thereof, buyers of San Francisco business were not entitled to an accounting of profits of Oakland business or any award of damages, in absence of evidence of fraudulent intent or misleading artifices or that any actual damage was suffered by San Francisco business or any profit actually derived from transactions unfairly diverted from such business. Civ.Code, § 3369.

16. Trade-Marks and Trade-Names and Unfair Competition ⚿98

In matters of unfair competition, absence of fraud may justify refusal to impose damages, though confusion is caused or threatened. Civ.Code, § 3369.

◆

Theodore Golden, J. Bruce Fratis, Robert N. Stefan, Oakland, for appellants.

Harry M. Gross, Oakland, for respondents.

NOURSE, Presiding Justice.

This is an action of unfair competition in connection with an agreement transferring a business formerly operated by defendant George P. Haiden with its goodwill and firm name to plaintiffs. All findings were indiscriminately for defendants, and plaintiffs, appealing from the adverse judgment, contend that they are not supported by the evidence, whereas respondents urge that the denial of relief is justified on the facts and that in so far as the findings are unsupported they are not decisive of the dispute and are surplusage.

The following facts are mainly undisputed: In the year 1939 defendant George P. Haiden started in San Francisco a pleasure auto wrecking business under the name "Haiden Auto Wrecking." Prior to that time he had since 1910 been in similar business in Oakland, since 1918 under the name "Haiden Auto Parts." On April 14, 1947 Haiden sold the San Francisco business located at 655 Potrero Avenue for $22,500 to plaintiffs by written contract which contained among others the following provisions: "The sale of said business includes the goodwill thereof, and the right to continue the use of the name 'Haiden Auto Wrecking' in connection with said business. And seller agrees not to engage in the Auto Wrecking business in the City and County of San Francisco, State of California, in competition with buyers, either as proprietor or employee * * *. It is understood and agreed that 'Haiden Auto Wrecking' business as sold herein shall appy only to pleasure cars and pleasure car parts, and shall not include or apply to the business of truck wrecking and handling truck parts and used cars and trucks, as now conducted by seller at 777 Potrero Avenue, San Francisco, California." Although the business transferred was located in San Francisco only, it had many customers in Northern California outside San Francisco. Among the active accounts at the time of the transfer were many from customers in Oakland. The names "Haiden Auto Wrecking" and "Haiden" were favorably known in the line of business involved. The right given to the buyers to use the name "Haiden Auto Wrecking" was for the purpose of assisting them in holding to the best of their ability the accounts of the business sold, also those outside San Francisco.

After the sale defendant Haiden continued the truck wrecking business in San Francisco together with defendant Thomas E. Miles under the name "Haiden & Miles Truck Exchange." In January 1949 they acquired the "Karren Auto Wrecking" of 3263 San Pablo Avenue, Oakland which they operated through a corporation, the defendant "Haiden and Miles, Inc." After four or five months they changed the name into "H. and M. Auto Wrecking" under which name they still operate it. After the change of name they advertised their firm in the Oakland telephone directory printing the name H. and M. Auto Wrecking with large letters and adding portrait heads of defendants Haiden and Miles with their names in very small print under them. The head of Haiden was much larger than that of Miles and at the top of the advertisement next to the name of the firm. Next to this portrait and under the name of the firm was in small letters: "40 years Wrecking Experience". In an advertisement in a later edition of said directory there is inserted between the firm name and "40 years wrecking experience" in small letters: "The original Geo. T. Haiden of Haiden Auto Parts." As soon as the first advertisement had appeared plaintiffs received telephone calls asking whether the Oakland place was theirs or who was running each place. (Testimony of plaintiff Harry Karsh; defendant Haiden testified he thought there was no confusion.) Defendants also used "the original Geo. P. Haiden of Haiden Auto Parts, 40 years Wrecking Experience" in small print on their printed matter which carried in heavy lettering "H. and M. Auto Wrecking." Later they placed on their roof (on San Pablo) a large sign "The original George P. Haiden and John Miles" and in much smaller letters "H. & M. Auto Wrecking".

Earlier, in November 1949, plaintiffs had opened a branch yard in Oakland at 6325 San Leandro Boulevard under the name "Haiden Auto Wrecking". Claude Cardwell, the manager of this branch (who previously had been in the employ of defendants when they operated their new Oakland business under the name "Karren Auto Wrecking") testified that after the opening of the yard on San Leandro they received frequent calls for George Haiden, and customers asked whether their San Pablo store would have a part which they did not have in stock or told them that they had been on San Pablo instead of San Leandro. There was received in evidence a letter of the Department of Motor Vehicles to a third party of March 24, 1950 in which it was stated that according to the records of the Department Haiden Auto Wreckers no longer operated at 655 Potrero Avenue, San Francisco, but were then located at 6235 (sic) San Pablo Avenue, Oakland.

The evidence further showed that defendants had done no business and had not advertised in San Francisco and that they thought that they were free in the use of the name Haiden outside of San Francisco, that plaintiffs had objected to the use made in Oakland of the name Haiden and that defendants had not objected to the use by plaintiffs of the firm name "Haiden Auto Wrecking" in Oakland. The San Francisco business after the purchase by plaintiffs showed a continuous growth so that the gross volume at the time of the trial was about $250,000 a year. The new business of plaintiffs in Oakland moreover had then a gross annual volume of about $65,000.

The complaint alleged in substance that the stated acts of defendants, particularly the use of the words "The Original Haiden" were intentionally fraudulent, for the purpose of causing confusion between defendant's new business and the business now operated by plaintiffs under the name "Haiden Auto Wrecking" and of appropriating the goodwill of the latter business and also that because of said fraud confusion and damage were caused. The prayer was in effect for an injunction restraining defendants from using for business purposes the name "George T. Haiden", or "Haiden" or the "Original Haiden" or "Haiden Auto Wrecking" or any colorable imitation thereof without a qualifying statement differentiating the business so indicated from plaintiffs' business under the name "Haiden Auto Wrecking", for an accounting of all the profits of defendants' Oakland business, for damages caused plaintiffs by the use of the name Haiden by defendants and for $10,000 for damages to the goodwill and trade name of plaintiffs' business.

Appellants contend that findings to the following effect are not supported by the evidence: *a.* That the business sold had no valuable goodwill and that neither the names "Haiden Auto Wrecking" nor "Haiden" had a valuable reputation; *b.* that defendants did not operate their business ("H. and M. Auto Wrecking") in competition with plaintiffs' and did not announce to the public that defendant George P. Haiden was part of their firm; *c.* that the acts of defendants were not intentionally fraudulent, not for the purpose of deceiving plaintiffs' customers into the belief that plaintiffs' San Pablo business was the same as the business of defendants or of filching the goodwill of said business; *d.* that defendants did not represent that George P. Haiden was connected with plaintiffs' business and did not use any artifices to mislead the public as to the identity of plaintiffs' and defendants' establishments; *e.* that no confusion was caused between the establishments of the parties and no business was done with defendants under the belief the transactions were with plaintiffs, and that such would not happen in the future either; *f*. that no damage was done to plaintiffs and that none will result in the future.

[1] It is clear at first sight that the findings succinctly stated by us under *a*. and *b*. are contrary to the evidence stated before. There can be no doubt that the parties are competing for the Oakland business and that in their competition they consider the name Haiden and firm names containing that name as valuable—according to the evidence rightly so. It is also undisputable that defendants not only announced that defendant Haiden was part of their firms but that they actively tried to cash in on defendant Haiden's personal reputation.

[2–4] However, this in itself is not necessarily unfair. The contract of sale of the business expressly restricted the non-competition clause to San Francisco only. It gave plaintiffs the use of the name "Haiden Auto Wrecking" in connection with the business sold but did not expressly limit defendant Haiden in the use of his own name wherever the contract permitted him to compete. There was no evidence that prior to the sale the old firm used the name Haiden in any other manner than as a part of the firm name "Haiden Auto Wrecking" and no use of the name "Haiden" as such was sold to the plaintiffs. The elements of the goodwill personal to the seller do not pass to the purchaser of the business. "The personal experience, skill and reputation of the seller remains his, and cannot pass as a part of the goodwill of a business." I Nims, Unfair Competition and Trade-Marks, 4th Ed., p. 95. The right to use one's own name in business may be given up by contract, but in the absence of express language to that effect the intention to part with that right will not be presumed. I Nims, supra, pp. 110–111; 3 Callmann, Unfair Competition and Trade-Marks, 2nd Ed., p. 1326; 63 C.J. 437–38. By the limited extent of the injunction prayed for plaintiffs themselves recognized that defendant Haiden had not generally given up his right to use his own name and reputation in the car wrecking business outside of San Francisco.

[5–7] However the seller of a business and goodwill may not use the firm name he has assigned or another similar firm name likely to cause confusion and he must avoid the appearance of continuing the business sold, or of being its successor. He may not in any way cause confusion between his new business and the one operated by the purchaser under the contract of sale or detract from the goodwill he has sold. I Nims, supra, pp. 106–108; 2 Callmann, supra, pp. 964–966; see also 24 Am.Jur. 816; 38 C.J.S., Good Will, § 8, p. 955. Violation of said duties is open to injunction, 24 Am. Jur. 819; 38 C.J.S., Good Will, § 16, p. 963; 43 C.J.S., Injunctions, § 84, pp. 566, 570; Speiker v. Lash, 102 Cal. 38, 45, 36 P. 362, and is often considered unfair competition. 2 Callmann, supra, p. 967. The seller who goes again into business after having sold the goodwill of an establishment to which his name was linked is not in the same position as a person who newly enters a line of business in which a firm which accidentally makes use of the same name has gained a reputation. The seller's contractual relation to the purchaser implies an obligation "of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement." Brown v. Superior Court, 34 Cal.2d 559, 564, 212 P.2d 878, 881; Wilson v. Wilson, 96 Cal.App.2d 589, 595, 216 P.2d 104 and cases there cited. Therefore the rule, often held applicable to accidental similarity of personal names in business and urged by respondents in this case, that every man in the absence of proved fraud or misleading artifices has the absolute right to use his own name, even though he may interfere with and injure the business of another, see for instance Ida May Co., Inc., v. Ensign, 20 Cal.App.2d 339, 344, 66 P.2d 727, cannot be applicable to the situation before us.

[8, 9] The findings negativing intentional fraud and misleading artifices (stated herein under *c*. and *d*.) could by reasonable inference be based on the evidence,

considering the absence of competition by defendants in San Francisco and the prominence given by them to the firm name "H. and M. Auto Wrecking" and to the name of defendant Miles as a co-partner in that business. Even if contrary inferences could also reasonably have been drawn we are bound by the decision of the trial court in that respect. Industrial Indem. Co. v. Golden State Co., 117 Cal.App.2d 519, 256 P.2d 677. However these findings are not decisive against the granting of an injunction as prayed for. The fact that plaintiffs alleged intentional fraud and misleading artifices as basis of an action of unfair competition does not prevent them from obtaining said injunction without such proof and finding if under the circumstances alleged and proved the injunction is justified on the basis of violation of the obligations of the seller of a goodwill or unfair competition or both. Alonso v. Hills, 95 Cal.App.2d 778, 784, 214 P.2d 50, and cases there cited.

[10, 11] It is obvious that for the injunction of violation of contractual obligations as to a sold goodwill fraud or misleading artifices are not essential and also in the field of unfair competition injunctive relief may be available without such proof, if the conduct is unfair. Section 3369, Civil Code relating to the injunction of unfair competition includes therein unfair *or* fraudulent business practices and unfair, untrue *or* misleading advertising all in the disjunctive. Wood v. Peffer, 55 Cal.App.2d 116, 124, 130 P.2d 220. In judging the unfairness of the conduct of the defendants who were not parties to the contract of sale their knowledge of that contract and the fact that they will participate in the profits, if any, of the violation, must be considered. Fleckenstein Bros. Co. v. Fleckenstein, 66 N.J.Eq. 252, 57 A. 1025, 1028.

[12, 13] The crucial findings as to the injunction are therefore those which deny that any confusion between the business of plaintiffs and defendants was caused by the latter, compare Jackman v. Mau, 78 Cal.App.2d 234, 177 P.2d 599. If there was proof of such confusion, actually resulting or probably to result from the acts complained of, causing defendants to be considered the same as or the successors of the business sold, then they could be forced by injunction to take reasonable precautions against such confusion by the use of explanatory phrases differentiating their new business from the old one as prayed for. It is not necessary to prove that any individual has been actually confused if such confusion is likely to result, see Winfield v. Charles, 77 Cal.App.2d 64, 70, 175 P.2d 69. We think the evidence supports the presence or likelihood of such confusion and that the contrary findings cannot stand.

The evidence of plaintiff Karsh as to the telephone calls received after the first advertisement of H. and M. Auto Wrecking, the letter of the Motor Vehicle Department and the evidence of the witness Claude Cardwell as to questions and statements of customers at plaintiffs' Oakland yard, all stated before, show such confusion. The evidence as to telephone calls and correspondence for defendant George P. Haiden received by plaintiffs is in itself of no importance in that respect as it only shows the too great effectiveness of the assignment of the old firm name to the detriment of defendant Haiden. However it also illustrates the degree to which the name of George P. Haiden was identified with the old firm and the probability that the prominent use of his name and portrait in connection with defendants' new business would cause confusion. This probability would only be strengthened by the addition of the words "of Haiden Auto Parts" because of its similarity to "Haiden Auto Wrecking." Symptomatic in the latter respect is the testimony of H. L. Haines, an insurance adjuster who used the services of auto wrecking companies since 1927 and who thought that he had heard the name "Haiden Auto *Wrecking* Company" in 1927 and throughout his work since then. (Actually the name had been in use only since 1939 and had been preceded since 1918 in the auto wrecking business by "Haiden Auto *Parts*.") As against the above evidence the testimony of defendant George

P. Haiden that he did not *think* there were instances of persons confusing "his particular firm as Haiden Auto Wrecking Company" cannot cause a substantial conflict.

[14] Respondents' contention that appellants are not entitled to protection against confusion as to the assigned firm name in Oakland because respondents started their business in Oakland first is without merit. The evidence shows confusion actual or probable not only with the business of appellants in Oakland but also with the original San Francisco business. Moreover in the goodwill sold was included a large number of Oakland customers. There is nothing in the contract that restricts appellant's rights to the advantages of their patronage to exploitation by means of the original San Francisco business to the exclusion of the opening of a branch office in Oakland itself under the firm name transferred. The duty of defendants to refrain from disturbing the patronage of the Oakland customers remains unaltered. We conclude that the judgment so far as it relates to an injunction must be reversed.

[15, 16] However no reversal is required as to the denial of the further relief prayed for. There was no evidence showing any actual damage suffered by plaintiffs' thriving business or any profit actually derived by defendants from transactions unfairly diverted from that business because of confusion caused by the acts complained of. We have moreover upheld the findings of absence of fraudulent intent and misleading artifices. In matters of unfair competition absence of fraud may be a reason not to impose damages although confusion is caused or threatened. Restatement Law of Torts, § 745, Comment b. The absence of fraudulent intent justified also the denial of an accounting of profits in equity. Wood v. Peffer, supra, 55 Cal. App.2d 116, 125, 130 P.2d 220.

In so far as the judgment denies an injunction it is reversed, in all other respects it is affirmed. Appellants to have their costs.

DOOLING, J., concurs.

---

120 Cal.App.2d 50

PEOPLE v. HENDERSON et al.

Crim. No. 4972.

District Court of Appeal, Second District, Division 1, California.

Sept. 1, 1953.

Hearing Denied Oct. 1, 1953.

Defendant and others were indicted upon two counts of grand theft and one of conspiracy. The Superior Court of Los Angeles County, Charles W. Fricke, J., entered judgment and the defendant appealed. The District Court of Appeal, Doran, J., held that evidence was sufficient to sustain judgment.

Affirmed.

1. Conspiracy ⚷47

Larceny ⚷65

Evidence was sufficient to sustain conviction for conspiracy and grand theft. Vehicle Code, § 236; Pen.Code, § 487, subd. 3.

2. Criminal Law ⚷665(4)

In grand theft and conspiracy prosecution, trial court did not abuse its discretion in refusing to exclude witnesses. Vehicle Code, § 236; Pen.Code, § 487, subd. 3.

3. Conspiracy ⚷23

Section of Penal Code relating to conspiracy is constitutional. Pen.Code, § 487, subd. 3.

◆

Everett W. Leighton, and Lionel Richman, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Alan R. Woodard, Deputy Atty. Gen., for respondent.

DORAN, Justice.

This is an appeal from the judgment and the order denying a motion for a new trial.

Defendant and appellant together with two other defendants, Robert Henderson and D. W. Henderson, are charged by information with grand theft in Counts I and II and with "conspiracy to violate section 236 of the Vehicle Code, a misdemeanor, and section 487, subd. 3 of the Penal Code." In the third count ten overt acts are alleged.

At the trial, before a jury, appellant appeared in propria persona. The defendants did not testify.

The offenses involve the theft of automobiles, remodeling and sale thereof, and other transactions relating to stolen automobiles and their resale. The defendants did the work on the cars—altering, painting and otherwise changing their appearance. The trial consumed several days.

Appellant submits the following questions on appeal:

1. Is the evidence sufficient to sustain the conviction of Grand Theft contained in Counts I and II?

2. Is the evidence sufficient to sustain the conviction of Conspiracy contained in Count III?

3. Did the Court abuse its discretion in refusing to exclude witnesses?

4. Is the Conspiracy statute unconstitutional as applied to the facts of this case?

5. Was the district attorney guilty of prejudicial misconduct in his argument to the jury?

Appellant argues that, "possession alone is insufficient to sustain the conviction for in addition to the mere possession of stolen property shortly after it is stolen, there must be corroborating circumstances tending to show the defendants guilty." and that "A complete search of the record completely fails to show a specific intent to commit the crime of larceny. This specific intent is an essential fact to be proved by the prosecution. * * * The specific intent requisite to constitute the offense charged may not be manufactured and the appellant concedes that the prosecution need not prove the specific intent directly, but by the same token, appellant maintains that the evidence must be sufficient to reflect the specific intent."

With regard to the conspiracy offense, appellant argues that "An examination of the record shows no concerted activity between this appellant and any other defendant. In the absence of any knowledge on the part of appellant that the vehicle which he was offering for sale contained a transmission from the disappeared Bel Air Chevrolet, he could not be a party to an agreement to commit an unlawful act. On the contrary, the record shows that in offering the vehicle for sale, he acted openly and honestly."

[1] Appellant's argument above noted that, "possession alone is insufficient to sustain the conviction", is answered by respondent as follows, "Appellant next contends that possession of stolen property alone is insufficient to sustain the conviction since there must also be corroborating circumstances tending to show the defendant's guilt. The record in the instant case supplies what, respondent believes, amounts to more than ample corroboration. Appellant had been seen on premises rented by him working on automobiles, some of which answer the description of those stolen from the Angelus and Bellwood Companies. Documents were filed with the Department of Motor Vehicles bearing the purported signature of appellant. He held himself out as the owner of the Bel Air Chevrolet in negotiating with two potential buyers to whom he was going to sell for $1,300, a price considerably under the then current market price. He contacted one Nancy Burris in connection with the storing of the burned out 1949 Fleetline Sedan in her garage. The motor number on this car had been tampered with but a subsequent investigation revealed that it contained the motor from the car taken from the Bellwood Company. After the two cars were seized, appellant sought to have them released, stating that they were both his." The record contains other evidence in addition to the foregoing. That the evidence is sufficient to support the judgment as a matter of law there can be no question.

[2] From an examination of the record there appears to have been no abuse of discretion by the court in refusing to exclude witnesses.

[3] The constitutionality of the Penal Code section on conspiracy is well settled and requires no citation of authority.

As to the alleged misconduct of the district attorney no exceptions were noted at the trial. It does not appear that such remarks were prejudicial or improper.

The record reveals no prejudicial errors. The judgment and order are affirmed.

WHITE, P. J., and SCOTT, J. Pro Tem., concur.

120 Cal.App.2d 904

PEOPLE of the State of California, Plaintiff and Respondent, v. Robert HENDERSON, Defendant and Appellant.

Cr. No. 5052.

District Court of Appeal, Second District, Division 1, California.

Sept. 1, 1953.

Rehearing Denied Sept. 14, 1953.

Hearing Denied Oct. 1, 1953.

Appeal from the judgment and order denying a motion for a new trial, Charles W. Fricke, Judge.

Robert Henderson, in pro. per. for appellant.

Edmund G. Brown, Atty. Gen., Alan R. Woodard, Deputy Atty. Gen., for respondent.

DORAN, Justice.

This is an appeal from the judgment and order denying a motion for a new trial.

Relating to the within appeal, the defendant and appellant signed the following stipulation:

> "It is hereby stipulated by and between the appellant, Robert Henderson v. respondent, by Edmund G. Brown, Attorney General, that the briefs filed in the case of the People of State of California v. Henderson, Cal. App., 260 P.2d 639, may apply to this case also by reference, and that the arguments made on behalf of counsel for the appellant in said case are incorporated by the appellant herein, and that appellant herein waives any oral argument or right to file briefs.
>
> "Dated this 21st day of May, 1953.
> (signed) Robert Henderson
> Robert Henderson In Pro Per
> (signed) Edmund G. Brown
> Attorney-General
> by Alan R. Woodard"

It was requested that said stipulation be accepted and filed by the appellate court. The request was granted and it was so ordered.

The opinion filed this day in the case of People v. Henderson covers the same trial wherein appellant Robert Henderson was one of the defendants and whereas the evidence in said case applies to defendant herein it is adopted by the court as the opinion in the within action.

Upon the authority of and for the reasons stated in the case of People v. Henderson, supra, the judgment and order from which this appeal is taken, are and each is affirmed.

WHITE, P. J., and SCOTT, J. Pro Tem., concur.

EPHRAIM v. JAMESTOWN JUDICIAL DIST. COURT et al. *

Civ. 8366.

District Court of Appeal, Third District, California.

Sept. 1, 1953.

Hearing Granted Oct. 29, 1953.

Original proceeding to prohibit district court from further proceeding in action against petitioner for violation of Labor Code, on the ground that dismissal of first complaint barred prosecution under second complaint. The District Court of Appeal, Peek, J., held that dismissal of first complaint would not bar prosecution under second complaint which charged separate offenses.

Writ denied insofar as it pertained to separate offenses not contained in first complaint, and cause remanded with instructions.

---

* Opinion vacated 262 P.2d 56.

1. Criminal Law ⚿196

The presence of a fact necessary in one offense and absence in another determines whether offenses are separate.

2. Criminal Law ⚿178

Where employee filed complaint against employer alleging that he failed to maintain semimonthly payroll as prescribed in Labor Code, and the complaint was dismissed, the dismissal would bar further prosecution for the same offense. Labor Code, § 204; Pen.Code, § 1387.

3. Criminal Law ⚿202(1)

Where complaint alleging that employer failed to maintain semimonthly payroll as prescribed in Labor Code, was dismissed, second complaint charging employer with wilful failure to pay wages, failure to have assets sufficient to pay employees, and failure to pay employees within seventy-two hours after quitting employment, was not barred by dismissal of first complaint. Labor Code, §§ 202, 204, 216(a), 270; Pen.Code, § 1387.

4. Constitutional Law ⚿83(3)

An employer who wilfully refuses to pay wages he knows are due, perpetrates a "fraud" within constitutional provision which excepts cases of fraud from the prohibition against imprisonment for debt. Labor Code, § 204; Const. art. 1, § 15.

See publication Words and Phrases, for other judicial constructions and definitions of "Fraud".

5. Constitutional Law ⚿83(3)
Labor Relations ⚿1642

Penal provision of Labor Code which makes it a crime for employer to refuse to pay wages, and to fail to have sufficient assets on hand to pay employees, and to fail to pay employees within seventy-two hours after they quit, does not violate constitutional provision prohibiting imprisonment for debt. Const. art. 1, § 15; Labor Code, §§ 202, 204, 216(a), 270.

◆

H. J. Kleefisch, Reed M. Clarke, San Francisco, for petitioner.

T. R. Vilas, Dist. Atty., Sonora, for Real Party in Interest.

PEEK, Justice.

On December 19, 1949 a complaint was filed in the respondent court charging petitioner with a violation of section 204 of the Labor Code of this state in that he had failed to maintain a semi-monthly payroll for his employee during the period of August 19 to August 27 of that year. The petitioner appeared, entered a plea of not guilty and demanded a jury trial. On August 11, 1950, the case not having been set for trial, he again appeared in said court and moved that the complaint be dismissed pursuant to the provision of section 1382(3) of the Penal Code for failure to bring the cause to trial within thirty days, which motion was granted. Three days thereafter a second complaint was issued in which petitioner was again charged with a violation of section 204 of the Labor Code, and in addition was charged with violations of sections 202, 216(a) and 270 of the same code. More than two and one-half years thereafter he filed in this court his petition by which he now seeks to prohibit respondent court from further proceedings in said action.

In support thereof he makes three contentions: (1) That the dismissal of the first complaint operates as a bar to the prosecution under the second complaint since the offenses therein set forth all arose out of and are included in the offense charged in the first complaint; (2) that the penal provisions of said section 216(a) are unconstitutional in that they are in violation of Article I, § 15 of the Constitution of this state prohibiting imprisonment for debt, and (3) that the trial court erred in refusing the application of petitioner for a change of venue predicated upon the charge of bias and prejudice of the judge of said respondent court, citing Penal Code section 1431(1).

An examination of the record shows that the specific crime charged in the first complaint, which was sworn to by one John F. Graham, Sr., was that petitioner on the 26th day of August 1949 wilfully and unlawfully continued to employ the said John

F. Graham, Sr., without maintaining semi-monthly pay days for said employee as required by section 204 of the Labor Code of the State of California.

The second complaint which was sworn to by John Graham, Jr., charged in the first count thereof that petitioner, having the ability to pay, refused to pay wages to John Graham, Jr., John Graham, Sr., C. F. Porter, Jr., and Jerry P. Graham when the same were demanded of him. Section 216 (a).

Count two of said complaint charged that petitioner wilfully and unlawfully failed to pay John Graham, Jr., C. F. Porter, Jr., and Jerry P. Graham, semi-monthly. Section 204.

Count three of that complaint charged that petitioner wilfully and unlawfully, while engaged in the business of extracting and refining metals, failed to have on hand or on deposit cash or readily salable securities sufficient to pay the wages of the persons employed in such operation. Section 270.

Lastly, count four charged that petitioner wilfully and unlawfully failed to pay John Graham, Jr., John Graham, Sr., C. T. Porter, Jr., and Perry P. Graham within seventy-two hours after said employees quit their employment with petitioner. Section 202.

[1] It is the general rule in this state that " 'It is not the great similarity in most of the facts constituting separate offenses but the presence of a fact necessary in one offense and absent in another, that determines whether offenses are separate.' " People v. Coltrin, 5 Cal.2d 649, 661, 55 P.2d 1161, 1167.

Analyzing the two complaints in light of the enunciated rule it is apparent that the sole offense charged in the first complaint was the alleged failure of petitioner to maintain a semi-monthly pay roll as prescribed in Labor Code section 204. The offense so charged is identical to that charged in count two of the second complaint. The only difference in the two violations is that the name of John F. Graham, Sr., is the only name appearing in the first complaint while in the second count of the second complaint his name does not appear but the names of John Graham, Jr., C. F. Porter, Jr., and Jerry P. Graham were set forth.

[2] In each instance the essence of the crime charged was in no way connected with a failure to pay a particular employee but was a failure to maintain a semi-monthly pay roll. Hence the violation charged in count two of the second complaint was identical with the crime charged in the first complaint which was dismissed. It necessarily follows, under the provisions of section 1387 of the Penal Code, that the dismissal thereof operates as a bar to further prosecution.

[3] Such is not the case, however, with counts one, three and four of the second complaint. The necessary elements of those crimes are wholly separate and distinct from that charged in count two. Illustrative of this is the fact that the wilful failure to pay wages as charged in the first count, Labor Code section 216(a), in no way includes any of the elements necessary to prove that petitioner failed to maintain a semi-monthly pay roll as charged in count two or that he did not have assets sufficient to pay his employees in accordance with section 270 as charged in the third count or any of the facts necessary to prove that petitioner failed to pay his employees, within seventy-two hours after quitting their employment, in violation of section 202 of the code as charged in the fourth count. While the dismissal of the first complaint would bar further proceedings under count two of the second complaint such dismissal would not bar prosecution of the offenses charged in counts one, three and four since they were separate and distinct offenses.

[4] The precise point raised by petitioner in his next contention was determined adversely to him by the Supreme Court in the case of In re Trombley, 31 Cal.2d 891, 193 P.2d 734. There the court, in holding that section 216 of the Labor Code was constitutional, stated that "The word 'wilfully' as used in criminal statutes implies a purpose or willingness to commit the act (Pen.Code § 7. Subd. 1), and although it does not require an evil

intent, it implies that the person knows what he is doing, intends to do what he is doing, and is a free agent." 31 Cal.2d at page 807, 193 P.2d at page 739. Hence, when subdivision (a) of section 216 of the Labor Code is construed together with the above mentioned Penal Code section defining the word "wilful" an employer having the ability to pay who knowingly and intentionally refuses to pay wages which he knows are due, is guilty of a crime denounced by that section. The court therein further observed that the historical background of the constitutional provision shows that the provisions were adopted to protect the poor but honest debtor who is unable to pay his debts but such guarantees "were not intended to shield a dishonest man who takes an unconscionable advantage of another." Under such circumstances the employer who wilfully refuses to pay wages he knows are due, perpetrates a fraud within the meaning of the provision which excepts cases of fraud from the prohibition against imprisonment for debt.

[5] The same conclusion must follow as regards the alleged violations of sections 202 and 270. As to section 202 it is not the failure to pay an employee which constitutes the crime since it is conceivable that an employer ultimately might have paid an employee all wages he had coming and yet the employer could be found in violation of the statute for failure to pay within the seventy-two hour period prescribed therein. The same conclusion must also be applied to the alleged violation of section 270. No element of wilful failure to pay wages is present. The crime consists in not having sufficient money or securities on deposit or on hand to pay the wages of all persons employed on the mining property or in connection therewith. Therefore neither violations would come within the constitutional prohibition.

By reason of the concession made by respondent, that since he believes petitioner is entitled to a change of venue and that the case should be transferred to an adjoining township, it becomes unnecessary to discuss petitioner's final contention.

The writ is granted insofar as it pertains to any proceeding under count two of the second complaint. The writ is denied insofar as it pertains to counts one, three and four of said second complaint, and the cause is remanded to respondent court with instructions to transfer the same to the Justice Court of the First Judicial District.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

KIPP et al. v. KIPP.*

Civ. 4596.

District Court of Appeal, Fourth District, California.

Sept. 2, 1953.

Rehearing Denied Sept. 29, 1953.

Hearing Granted Oct. 29, 1953.

Action for partition of real estate brought by holders of certificate of sale under street assessment bond against holder of tax deed. The Superior Court of San Diego County, Burch, J., entered judgment for plaintiffs and defendant appealed. The District Court of Appeal, Mussell, J., held that where property was sold by state to defendant, plaintiffs' privilege of redemption was terminated, but the plaintiffs' bond lien, which was on parity with defendant's tax lien, was not extinguished.

Judgment affirmed.

1. Taxation 🔑509

Tax deed to state based on title acquired for unpaid city and county taxes, and street assessment bond were liens of equal rank and on a parity with each other. Civ.Code, § 2911; Revenue and Taxation Code, § 3691 et seq.

2. Municipal Corporations 🔑529
Taxation 🔑697(1)

Holder of bond lien could not foreclose street assessment bond against tax title held by state because of sovereign immunity doctrine, and because of parity existing between the state tax title and the bond lien, but could foreclose the bond against former owner's right of redemption and satisfy the bond lien or redeem the property from the state. Civ.Code, § 2911; Revenue and Taxation Code, § 3691 et seq.

---

* Subsequent opinion 269 P.2d 1.

3. Taxation ⚷732

When property was sold by state, which held tax title, to defendant, privilege of redemption of holders of street assessment bond terminated, but bondholders' lien was not extinguished. Civ.Code, § 2911; Revenue and Taxation Code, § 3691 et seq.

4. Municipal Corporations ⚷519(5)

Where state issued to defendant a tax deed in August, 1945, but plaintiffs had filed action in 1943 against owners of the property to foreclose street improvement bond, due January 2, 1944, and on December 31, 1946, decree of foreclosure was entered, and sale was held in February 1947, and commissioner's certificate of sale was issued, plaintiffs' lien was not extinguished by provisions of statute which raises the presumption of extinguishment of assessment liens at expiration of four years after due date of assessment, or last installment, or last principal coupon attached, or January 1, 1947, whichever is later. Civ.Code, § 2911.

◆

Kipp & Gaskins, San Diego, for appellant.

Solon S. Kipp and W. E. Starke, San Diego, for respondents.

MUSSELL, Justice.

Defendant appeals from an interlocutory judgment of partition in an action brought by plaintiffs pursuant to the provisions of Section 752 of the Code of Civil Procedure.

Plaintiffs allege that they are the owners in fee of an undivided one-half interest in the real property involved subject to a lien in favor of the defendant; that the defendant is the owner of the remaining interest in said property, subject to a lien in favor of the plaintiffs; and that they are tenants in common with the defendant. Plaintiffs claim title through a certificate of sale and commissioner's deed following the foreclosure of a street improvement bond. Defendant's title is founded on a tax deed to the State of California and a tax deed to him from the State.

Defendant here attacks the validity of the foreclosure action and the commissioner's deed to plaintiffs, contending that said foreclosure and deed did not operate to convey any title to plaintiffs and that the bond lien on which the commissioner's deed is based was extinguished on January 1, 1947, by the provisions of Section 2911 of the Civil Code as amended in 1945. Stats. 1945, Ch. 361, § 1, p. 821. We do not agree with these contentions.

On July 19, 1930, street improvement bond No. 21, Series 1382, was issued by the city of San Diego under the Improvement Act of 1911 and on that date became a lien on the real property here involved. The last coupon on this bond was due and delinquent on January 2, 1944. The city and county taxes for 1932 became delinquent and the property was sold to the State of California in 1933 and deeded to the State on July 1, 1938. On August 21, 1945, the State, under Chapter 7, Part 6, Division 1 of the Revenue and Taxation Code, sold and conveyed the property by tax deed to the defendant Virgil S. Kipp.

On December 30, 1943, C. G. Starke, acting for the plaintiffs, filed an action against Harry E. Bardot and Margaret Bardot, owners in fee of the real property, to foreclose the said street assessment bond. On December 31, 1946, a decree of foreclosure of sale was entered in said action and on January 9, 1947, writ of enforcement was issued. On February 4, 1947, the sale was held and a commissioner's certificate of sale was issued to plaintiffs. On March 31, 1948, plaintiffs obtained a commissioner's deed to the property.

[1–3] It is conceded that plaintiffs' foreclosure action was filed in time and within the four-year period following the due date of the last coupon attached to the bond. Plaintiffs were the owners of the bond and had a lien on the property of equal rank and on a parity with that of the State. Monheit v. Cigna, 28 Cal.2d 19, 24, 168 P.2d 965, 167 A.L.R. 995. While plaintiffs could not, at the time the complaint was filed, have foreclosed the bond lien against the tax title held by the State because of the sovereign immunity doctrine and because of the parity existing between the State's tax title and plaintiffs' bond lien, they were in a position to foreclose the bond against the former owner's right of redemption and satisfy the bond lien or redeem the property from the State. Sipe v. Correa, 38 Cal.2d 131, 135, 238 P.2d 989. When the property was sold by the State to defendant on August 21, 1945, plaintiffs' privilege of redemption was terminated, but plaintiffs' lien, which was on a parity with the tax lien, was not thereby extinguished.

[4] Under the circumstances presented by the record, plaintiffs' lien was not extinguished by the provisions of Section 2911 of the Civil Code as amended in 1945, which raises the presumption of the extinguishment of assessment liens at the expiration of four years after the due date of assessment bonds or of the last installment thereof, or of the last principal coupon attached thereto, or on January 1, 1947, whichever is later. The foreclosure action was filed in time and while the commissioner's deed was not issued to plaintiffs until March 31, 1948, a decree of foreclosure and order of sale was obtained and entered in the action on December 31, 1946, one day prior to the limitation date set forth in Section 2911 of the Civil Code.

Appellant cites Kipp v. Luberco, Ltd., 116 Cal.App.2d 656, 254 P.2d 150, decided by this court, as sustaining his contention of extinguishment of the bond lien. However, in that case, although plaintiff had filed a complaint in the foreclosure action, she did nothing further until September 30, 1947, eight months after the presumed extinguishment date of the bond, and in the instant case, plaintiffs had obtained a decree of foreclosure prior thereto, thereby overcoming the disputable presumption of extinguishment of the bond lien.

Judgment affirmed.

BARNARD, P. J., concurs.

---

119 Cal.App.2d 787

KELLY v. DAVID D. BOHANNON ORGANIZATION et al.

Civ. 15462.

District Court of Appeal, First District, Division 1, California.

Aug. 21, 1953.

Action for balance due for mechanical and electrical engineering services rendered in connection with building project. The Superior Court, County of San Mateo, Strother P. Walton, J., entered judgment for plaintiff, and a defendant appealed. The District Court of Appeal, Fred B. Wood, J., held, inter alia, that where engineer applied for registration as mechanical and electrical engineer pursuant to statute providing for such registration without examination for persons who possess certain minimum qualifications, engineer signed offer, resulting in April, 1948, in contract for engineering services, over typed designation, "professional engineer", contract was performed during April to June and thereafter registration as electrical engineer was refused, contract was not thereby rendered illegal and unenforceable.

Judgment affirmed.

1. Licenses ⚷39.40

Where engineer, who had applied for registration as a mechanical and electrical engineer pursuant to statute providing for such registration without examination, signed offer resulting in contract in April, 1948, over typewritten designation, "professional engineer", and in May or June, 1948, engineer received notice of unfavorable action by Board of Registration as to electrical engineering application, subject to further proceedings before board, even if action in May or June had been final, it would not in itself operate retroactively to invalidate contract. Business and Professions Code, §§ 6800-6814.

2. Licenses ⚷39.40

Legislature in enacting statute providing for registration without examination of professional engineers in branches of chemical, electrical, mechanical, and petroleum engineering, did not intend to render unenforceable contracts executed and performed by engineers prior to final action of Board of Registration denying registration. Business and Professions Code, §§ 6800–6814.

3. Licenses 🔑39.40

Where engineer applied for registration as mechanical and electrical engineer pursuant to statute providing for such registration without examination for persons who possessed certain minimum qualifications, engineer signed offer resulting in contract for engineering services in April, 1948, over typed designation, "professional engineer", contract was performed during April to June and thereafter registration as electrical engineer was refused, contract was not thereby rendered illegal and unenforceable. Business and Professions Code, §§ 6800–6814.

4. Accord and Satisfaction 🔑1
Compromise and Settlement 🔑2

An accord and satisfaction must be predicated upon a bona fide dispute. Civ. Code, §§ 1521, 1523, 1524.

5. Accord and Satisfaction 🔑26(3)

In action for balance due for mechanical and electrical engineering services for building project, where there was evidence that manager of a defendant terminated contract prior to completion of work, that manager refused to pay full amount due and that engineer accepted check marked payment in full only after making statement that he was not accepting it as full payment, evidence supported implied finding that there was no bona fide dispute to serve as basis for accord and satisfaction. Civ. Code, §§ 1521, 1523, 1524.

6. Appeal and Error 🔑1002, 1005(3)
New Trial 🔑71
Trial 🔑143

Conflicts in evidence are for jury and for trial court to consider upon motion for new trial and it is not function of reviewing court to disturb jury determinations or action of trial court in denying new trial.

7. Accord and Satisfaction 🔑25(4)

In action for balance due for mechanical and electrical engineering services for building project, contention that if a defendant did not prove accord and satisfaction in respect to all of engineer's claims, it did so in respect to those which pertained to preparation of plans and specifications was not sustainable, since such defendant pleaded full, not partial, accord and satisfaction and there was no segregation of costs as between preparation of plans and specifications and other services rendered.

8. Accord and Satisfaction 🔑26(1)

In action for balance due for mechanical and electrical engineering services for building project, where a defendant claimed that there had been an accord and satisfaction as to part of work consisting of preparation of plans and specifications, such defendant had burden of showing segregation of costs as between preparation of plans and specifications and other services rendered. Civ.Code, §§ 1521, 1523, 1524.

9. Accord and Satisfaction 🔑1
Compromise and Settlement 🔑2

In action for balance due for mechanical and electrical engineering services for building project, even if accord and satisfaction in respect to payment for plans and specifications had been pleaded and cost pertaining thereto had been segregated, asserted partial accord and satisfaction would fail, since there was no bona fide dispute to serve as foundation therefor. Civ.Code, §§ 1521, 1523, 1524.

Bullock, Wagstaffe & Daba, Redwood City, for appellant.

Hancock, Elkington & Rothert, San Francisco, for respondent.

FRED B. WOOD, Justice.

Defendant David D. Bohannon Organization, a corporation, has appealed from a judgment against it in the sum of $5,642.72 as the balance due for services rendered by the plaintiff.

Defendant presents three questions: (1) Illegality of contract, (2) Full accord and satisfaction, and (3) Partial accord and satisfaction.

(1) *Was plaintiff unlawfully using the title "professional engineer" and thereby precluded from recovering for engineering services?*

Defendant's claim is predicated upon a statute enacted in 1947, Stats.1947, ch. 1469, p. 3045, effective September 19, 1947, which amended the Civil Engineers' Act by adding Article 8, §§ 6800–6814 of the B. & P. Code, for the "registering of professional engineers in the branches of chemical, electrical, mechanical and petroleum engineering." § 6800.

This statute provided for registration, without examination, of any person who possessed certain minimum qualifications, including six years of experience, §§ 6804 and 6805, if he applied to the State Board of Registration of Civil and Professional Engineers on or before June 30, 1948. The board would have "a reasonable time after June 30, 1948, to process all applications", § 6803. Later applicants would have to take an examination to establish their eligibility for registration.

The statute declared it unlawful for any person to use the title "professional engineer," "mechanical engineer," or "electrical engineer," unless registered, §§ 6802, 6812, 6813, and prescribed a misdemeanor penalty, § 6787.

It did not in terms make it unlawful for an unregistered person to practice professional engineering;[1] nor did it in terms declare illegal a contract for mechanical or electrical engineering services performed by an unregistered person. By implication only, could we arrive at any such intended proscription.

When this statute took effect plaintiff had had about twenty years of engineering experience (4 years study followed by 18 years of practice), in part mechanical and in part electrical. He applied for registration in each of those branches. In November, 1947, the state board acknowledged receipt of his application. In its letters to plaintiff transmitting these receipts, the board said in part: "It is anticipated that several thousand applications will be received within the next few weeks; therefore, please be patient, as it takes on an average of thirty days after an application is processed before it is ready for board action. Since the board does not meet regularly, but only when the volume of business justifies, it may be *several months* before you are advised of the board's action."

A certificate of registration in mechanical engineering was issued to plaintiff on January 3, 1949, retroactively as of June 30, 1948, expiring June 30, 1948, the end of the first fiscal year under the new registration statute. Thereafter his registration would be evidenced by an annual renewal certificate.[2]

[1] His electrical engineering application was not granted. In late May or early June of 1948, he received notice of unfavorable action but the application was the subject of further proceedings before the board, continuing into the year 1950. Even if the May or June, 1948, denial had been final, it would not in itself alone operate retroactively to invalidate the contract made in April, 1948.

Meanwhile, the services in question were contracted for and rendered during the period April to June, inclusive, 1948.

The asserted illegal use of the title professional engineer (in mechanical and electrical engineering) consisted of plaintiff's use, on his letterhead, of the designation "Edward L. Kelly . Professional Engineer . Mechanical and Electrical," and his signing his offer of contract with defendant over the typed designation "Edward Kelly, Professional Engineer."[3]

---

1. In contrast, *in respect to civil engineering,* the very act of which the professional engineering article became a part, made it unlawful "to practice or offer to practice as a civil engineer * * *, unless * * * duly registered * * * or specifically exempted" from registration as a civil engineer. B. & P. Code, §§ 6730 and 6795.

2. The statute provided for annual renewal upon payment of a $6 renewal fee; if delinquent $5 additional per month of delay in payment. See §§ 6811 and 6799.

3. There is no suggestion that he came to defendant under any false colors or that a belief that he was registered was an inducement to defendant in making the contract with him. Indeed, one of defendant's representatives, formerly associated with plaintiff in government work, invited him to make an offer, the offer which was accepted.

[2] We cannot ascribe to the Legislature an intent by this statute to declare illegal and unenforceable a contract for the rendition of mechanical and electrical engineering services executed and performed during the period of time and under the circumstances here disclosed.

[3] The blanketing in of persons already engaged and experienced in this line of work, allowing them nearly 9½ months (September 19 to June 30) within which to apply, and the board an indefinite period of time thereafter within which to process the applications, indicates no legislative intent to prohibit plaintiff (during the pendency of his applications for registration) from using the titled "professional engineer," "mechanical engineer," "electrical engineer," or from practicing either of those branches.[4] In the absence of such a prohibition no illegality attached to the contract in suit.

The judicial decisions invoked by defendant are inapplicable.

In Orlinoff v. Campbell, 91 Cal.App.2d 382, 205 P.2d 67, the court construed and applied certain of the provisions of chapter 223 of the statutes of 1935, page 878, which provided for the regulation of highway carriers. As enacted, section 3 of the statute prohibited, with certain exceptions, any highway carrier other than a common carrier from engaging in the business without first obtaining a permit. A highway carrier in business on the effective date of the act was to file its application within 30 days. "Pending the issuance of any permit * * *, the continuance of such operation shall be lawful." Stats.1935, p. 879, § 3. The clause just quoted having served its purpose, was deleted at the next legislative session. Stats.1937, ch. 722, pp. 2006, 2008. The Orlinoff case, decided in 1949, involved a contract for transportation of goods by a highway carrier who held no permit to operate as such. We do not know the date of execution of the contract but there is every indication it was not entered into by a person who was in business when the act took effect in 1935 and while his application for a permit was still pending before the Railroad Commission. That case, obviously, bears no analogy to our case.

The other cases cited by defendant likewise have no similarity to our case: Levinson v. Boas, 150 Cal. 185, 88 P. 825, 12 L.R.A.,N.S. 575, pawnbroker, doing business without a regulatory license; Wood v. Krepps, 168 Cal. 382, 143 P. 691, L.R.A. 1915B, 851, money lending without paying revenue license fees, not illegal; Payne v. De Vaughn, 77 Cal.App. 399, 246 P. 1069, contract to render architectural services by unlicensed architect, under a statute which prohibited practice without a license.

We find no basis for holding illegal the contract here involved.

(2) *Did the parties effect an accord and satisfaction which prevented plaintiff from pursuing such right of recovery as he might otherwise have had?*

Defendant's payments on account were made by check. The last check of the series (dated June 23, 1948, payable to plaintiff in the sum of $2,360) bore this statement upon the back: "Payment in full for mechanical and electrical plans and specifications. Project No. 121–42013." Plaintiff endorsed and cashed the check that same day, June 23rd.

This is the "accord and satisfaction" claimed by defendant. If this was an agreement and this the whole of it, defendant's position would be tenable if the production of the plans and specifications represented all of the work in question.

"An accord is an agreement to accept, in extinction of an obligation, something different from or less than that to which the person agreeing to accept is entitled", Civ.Code, § 1521; "Acceptance, by the creditor, of the consideration of an accord extinguishes the obligation, and is called satisfaction", § 1523; "Part performance of an obligation * * * where expressly accepted by the creditor in writing, in satisfaction, or rendered in pursuance of an agreement in writing for that purpose, though without any new consideration, extinguishes the obligation". § 1524.

---

[4] Perhaps the statute did not under any circumstances prohibit an unregistered person from "practicing" as a mechanical or as an electrical engineer; a question we need not and do not decide.

"'The elements of an accord are: (1) a proper subject matter; (2) competent parties; (3) consent or meeting of the minds of the parties; and (4) consideration.'" Gibbons v. Brewster, 82 Cal.App.2d 435, 442, 186 P.2d 459, 463, quoting from Moore v. Bartholomae Corp., 69 Cal.App.2d 474, 478, 159 P.2d 436.

[4] An accord and satisfaction must be predicated upon a bona fide dispute, a real dispute. "An arbitrary refusal to pay, based on the mere pretense of the debtor, whether for the obvious purpose of exacting terms which are inequitable and oppressive, is not such a dispute as will satisfy the requirements of the rule." Berger v. Lane, 190 Cal. 443, 448, 213 P. 45, 48. "'A person cannot create a dispute sufficient as a consideration for a compromise by a mere refusal to pay an undisputed claim. That would be extortion, and not compromise. There must in fact be a dispute or doubt as to the rights of the parties honestly entertained.'" 190 Cal. at page 451, 213 P. at page 49 quoting from a Minnesota case, Demars v. Musser-Sauntry etc., Co., 37 Minn. 418, 35 N.W. 1.

One of the triable issues of fact in D. E. Sanford Co. v. Cory Glass, etc., Co., 85 Cal. App.2d 724, 729, 194 P.2d 127, 130, was the question whether or not there was a "bona fide dispute respecting an *amount* due." In Stub v. Belmont, 20 Cal.2d 208, 124 P.2d 826, one of the reasons for reversal of a judgment upon the pleadings was the fact that the pleadings showed there was a "bona fide dispute" as to a certain claim for $2,000, 20 Cal.2d at page 218, 124 P.2d at page 831. For the "principle of accord and satisfaction to apply in disposition of an unliquidated claim, there must be a 'bona fide dispute' between the parties * * *." Potter v. Pacific Coast Lumber Co., 37 Cal.2d 592, 597, 234 P.2d 16, 18, quoted in Grayhill Drilling Co. v. Superior Oil Co., 39 Cal.2d 751, 753, 249 P.2d 21.

[5] In our case there is evidence sufficient to support an implied finding of the jury that there was no bona fide dispute to serve as a basis for an accord and satisfaction.

The contract for plaintiff's services was executed about April 4, 1948. Those services included "all phases of mechanical and electrical engineering, specification writing, testing, field work, utility negotiations, drafting, and other related services as necessary" for a building project of approximately 500 dwelling units. Payment was to be made upon the basis of $1.50 to $2.50 per hour for drafting and related work; $3 per hour mechanical, electrical, and civil engineering work; $3.50 per hour for plaintiff's time; 125% of salaries, for overhead; blue printing and unusual long distance phone calls, at cost; personal automobile travel expense, at 6 cents per mile; travel by other means, at cost; payments to be made on estimated 60% of total due every 30 days unless otherwise arranged.

Plaintiff testified that he commenced work immediately. He proceeded to inspect the site and orient himself to the project's needs in the way of utilities. He made preliminary sketches, entered into negotiations with utility companies regarding the needs, rates and facilities for such a project. The discussions relative to gas, sewer and electrical lines were quite detailed and elaborate. The work on preliminary plans was not started until two weeks after he took the job. At the outset, he was not told when the work was to be finished; "they said possibly some time away—six months or a year, perhaps." On May 3rd he was told to make as much speed as humanly possible, to hire extra men so they would not lose a commitment that the F.H.A. had made. He was not informed of any deadline until May 5th, when he was told the exterior utility plans had to be in by about June 12th. He protested that the results of such a procedure would be uncertain and costly. They said a few thousand dollars would not make any material difference.

June 4th he was told to bring to defendant's office whatever work he had done on the utility plans and building plans. He responded that those plans were not final but were in "the status of progressing and to some extent have not been checked," but was told to bring the tracings which he did on June 6th. Defendant's manager said they were in pretty good order, but plaintiff protested they should be checked further and wanted the right to make corrections before treating them as final plans. He testified that changes had been made every two or three days in the architectural and landscape plans which affected his work because he had to know such things as whether a sewer line was going under a tree or a paved area in order to lay out the utility lines.

Meanwhile, May 17th, plaintiff submitted a statement of, and was paid, his costs for April. June 17th he submitted statements for May 1st to 15th, $4,706.32, and for May 15th to 31st, $2,162.08, but they did not cover all the work done in May, nor for work done in June.

On June 23rd plaintiff was called to the office of the project manager who said he was not completely satisfied with the plans and was going to let plaintiff go. Plaintiff called the manager's attention to the circumstances under which he had worked (the frequent changes they had made, over which he had no control) and said, "I don't think that is justified. I have worked hours and hours and hours, and I don't feel that is justified to let me go on that kind of a basis, near the end—three-quarters of the way through a project." Continuing, plaintiff testified the manager said, "Take it or leave it * * * We are going to pay you off"; and "it won't be very much." Plaintiff replied, "Well, I have spent this money for my help. I owe them several thousand dollars on this payroll, and I will have to have the amount of money that is owing me." The manager responded, "If you are going to have the amount of money owing you, you are going to have to fix me up. You are going to have to give me a kick-back," and "I can fix this up, but you are going to have to fix me up." Plaintiff replied, "I won't do it." The manager left the room, came back with the $2,360 check and said, "Here are your payments for the out of pocket expenses for your help." The plaintiff replied, "I am going to have to cash this check to pay my help, to pay part of the help, but I am not accepting this as a payment in full." The manager replied, "Well, it says on there 'Payment in full for plans and specifications,'" and plaintiff responded, "There is lots of other work that has been done," and "I spent day after day here, and in my own offices, coordinating the work, and I get nothing for my expenses at all"; also, "I am not accepting this in full, I am cashing it, but I am not accepting it in full. I am coming back for the rest."

Plaintiff cashed the check later that day and subsequently rendered bills in the sum of $5,642.72, as the amount which he claimed remained due and unpaid.

[6] Defendant's manager gave a different version of the conversation of June 23rd; also, his testimony and that of other witnesses produced by the defendant differed from certain other portions of plaintiff's testimony. That produced a conflict which, of course, it was the function of the jury to resolve, and for the trial court upon motion for new trial to consider. It is not the function of a reviewing court to disturb the determinations made by the jury in rendering its verdict and the trial court in denying a new trial, upon this issue of fact in this case.

In view of the substantial evidence that there was no bona fide dispute, the implied finding that the parties did not effect an accord and satisfaction cannot be disturbed.

We observe, also, the evidence indicates that plaintiff rendered extensive services over and above those involved in the production of the "plans and specifications" for which the $2,360 check recited it was payment in full. Yet, defendant did not plead accord and satisfaction of claims due for "plans and specifications"; instead, it pleaded satisfaction "in full of all claims" of plaintiff against defendant.

[7, 8] (3) *Did the parties effect an accord and satisfaction of plaintiff's claims for moneys due for preparation of the plans and specifications?*

Defendant asserts that if it did not prove accord and satisfaction of all of plaintiff's claims, it did so in respect to those which pertained to the preparation of the plans and specifications.

In the first place, defendant pleaded full, not partial, accord and satisfaction. In the second place, defendant has not directed our attention to any segregation of costs as between the preparation of plans and specifications and other services rendered, nor have we discovered any. The burden of showing such a segregation would seem to rest upon the party urging such a point.

[9] Finally, even if an accord and satisfaction in respect to the plans and specifications had been pleaded and if the costs pertaining to their preparation had been segregated, the asserted partial accord and satisfaction would fail because of the lack of a bona fide dispute to serve as a foundation for it.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

---

120 Cal.App.2d 70

ROSS v. ROSS.

Civ. 4586.

District Court of Appeal, Fourth District, California.

Sept. 3, 1953.

Hearing Denied Oct. 29, 1953.

Suit by wife for divorce, wherein husband filed a cross-complaint for divorce. The Superior Court of San Diego County, John A. Hewicker, J., entered an order setting aside interlocutory decree of divorce granted husband in absence of wife and without her knowledge and an order substituting an attorney for wife, and husband appealed. The District Court of Appeal, Barnard, P. J., held that setting aside interlocutory decree of divorce was not abuse of discretion in view of surprise and excusable neglect shown.

Orders affirmed.

1. Attorney and Client ⇨88

In the interest of justice, trial court has considerable discretion in permitting an attorney not of record to specially appear for a particular purpose, such as a motion to vacate interlocutory decree of divorce. Code Civ.Proc. §§ 284, 285.

2. Attorney and Client ⇨88

Requirement that court recognize only an attorney of record may be waived by adverse party and slight circumstances of acquiescence are sufficient to show such waiver. Code Civ.Proc. §§ 284, 285.

3. Divorce ⇨165(5½)

Objection that wife's motion to vacate interlocutory decree of divorce obtained by husband was not properly before court because notice of motion was not signed by wife's attorney of record was waived, when husband's attorney, though notified of motion two weeks before hearing thereon, appeared at hearing and then for the first time made such objection and, after such objection had been overruled, submitted affidavits in opposition to the motion and argued matter on its merits, and trial court was justified in ordering substitution of new attorney for wife and hearing the matter. Code Civ.Proc. §§ 284, 285.

4. Attorney and Client ⇨86

While an attorney has broad authority in many matters affecting management and control of a case, where wife's then attorney, without her knowledge or consent, stipulated away client's entire divorce case, including any defense to cross-complaint, such stipulation could be repudiated by wife.

5. Judgment ⇨143(10)

Mistaken advice of attorney may be sufficient to show excusable neglect as ground for setting aside default judgment.

6. Divorce ⇨161

Whether interlocutory decree of divorce granted husband on his cross-complaint upon default of wife should be set aside on ground of surprise or excusable neglect was primarily a matter within sound discretion of trial court.

7. Divorce ⇨161

Where wife's then attorney, being unable to locate her after service of notice of time set for trial of her suit for divorce because she was staying with relatives in Mexico, entered into stipulation, without wife's knowledge or consent, that husband might proceed on his cross-complaint, setting aside interlocutory decree granted husband pursuant to such stipulation was not abuse of discretion.

Nottbusch & Nottbusch, San Diego, for appellant.

LeRoy Seckler, San Diego, for respondent.

BARNARD, Presiding Justice.

This is an appeal from an order setting aside an interlocutory decree of divorce, and from an order substituting an attorney for the plaintiff.

The complaint, filed on May 23, 1952, alleged cruelty as the ground for a divorce. On June 4, the defendant filed an answer and a cross-complaint seeking a divorce on the same ground. On June 26, the court entered an order requiring the defendant to pay the plaintiff $20 per week for her maintenance. On June 30, notice that trial of the cause was set for July 30 was served on plaintiff's attorney.

The cause was called on July 30, the plaintiff not being present in court. Her attorney and the attorney for the defendant then stipulated that the case might be heard the next day as a default matter; that the defendant might then proceed on his cross-complaint; and that the decree should contain no provision for support for the plaintiff but should provide for her right to seek such support within a period of six months. An interlocutory decree was entered on July 31, 1952, in which the court, after referring to this stipulation, found the allegations of the cross-complaint to be true and that a divorce should be granted to the defendant. It was further decreed that the plaintiff was entitled to no support or maintenance, with the proviso that she should have the right to petition the court for such an allowance at any time within six months of the date of the decree.

On September 10, plaintiff's attorney secured an order to show cause why the interlocutory decree should not be modified, some of the grounds being that the plaintiff was ill and staying with relatives in the interior of Mexico at the time the decree was entered, and that at all times since she has been in ill health and unable to support herself. This application for modification of the decree was denied on October 3.

On October 14, a different attorney, appearing specially for that purpose, filed on behalf of the plaintiff a notice of motion to vacate the interlocutory judgment, with the affidavits of the plaintiff and of the attorney who represented her on the previous proceedings. On the same day an order to show cause was issued, and copies of the notice of motion, the order, and the affidavits were served on defendant's attorney. The grounds stated in the notice of motion were: that at the time the decree was entered the plaintiff was ill in Mexico; that she did not know that the cause had been set for trial; that her attorney entered into this stipulation without her knowledge or approval; that she had a valid cause of action for divorce and a valid defense to the cross-complaint; and that the default judgment was taken against her through the mistake, inadvertence, surprise or excusable neglect of herself and her attorney.

The attorney's affidavit stated that he attempted to contact the plaintiff on July 20, but was unable to locate her by July 29; that on July 29, he informed the attorney for the defendant that he would have to request a continuance; that defendant's attorney told him that the holders of trust deeds on certain property were threatening to foreclose, and that he would press for a hearing on July 30 in order to protect the interests of both parties; that the affiant entered into the stipulation believing that the plaintiff had abandoned her cause of action, and believing that her property interests would be best protected by a speedy termination of the litigation; that affiant left the state on August 1, and returned on September 1; that he then learned that the plaintiff had been ill in Mexico during the latter part of July, and because thereof had been unable to communicate with him; that when affiant sought to present evidence at the hearing of the order to show cause issued on September 10 the defendant's attorney objected on the ground that the court had no jurisdiction to award support money to the guilty party in a divorce action; and that said objection was sustained.

The plaintiff's affidavit stated, among other things, that she was in ill health at the time the order for support money was made on June 26; that the defendant did not comply with that order prior to July 18: that between those dates she was without funds to purchase food, and the utilities in her apartment were cut off; that on July 15, a relative purchased for her a ticket to Mexico where she secured food, lodging and medical care from relatives; that from the time she arrived in Mexico she was under a doctor's care and unable to communicate with her attorney; that when she left San Diego County she had not been notified that the cause had been set for trial; that she returned to San Diego in August and found that her attorney was away on vacation; that she later learned from her attorney that he had entered into this stipulation; that she did not know that the case had proceeded to trial until after the decree was entered; that she has a valid cause of action and a valid defense against the cross-complaint; and that she is without funds, is unable to work or support herself, and is in ill health.

The motion to vacate the judgment was heard on October 29, 1952, on which date the affidavits of the defendant and his attorney were filed, in opposition to the motion. Insofar as material here, the affidavit of the defendant's attorney stated that he was never informed by plaintiff's attorney that the plaintiff was not available for trial. The affidavit of defendant alleged, on information and belief, that after plaintiff's arrival in Mexico she was not under a doctor's care but was at all times able to communicate with her attorney. When the hearing began defendant's counsel objected to the matter being heard on the ground that the notice of motion was not signed by plaintiff's attorney of record, and that no substitution of attorneys had been made in the manner required by sections 284 and 285 of the Code of Civil Procedure. The court overruled the objection and, at the request of the plaintiff and her new attorney, ordered him substituted as her attorney. The matter was then argued and submitted on the affidavits. The court stated that the attorneys would not have entered into the stipulation had they known that the agreement to permit the plaintiff to later seek support was unenforceable, commented on the difficulty in some instances in communicating with persons in Mexico and on the fact that the State is an interested party in a divorce proceeding, and expressed the opinion that the plaintiff is entitled to have her day in court. An order was entered vacating and setting aside the interlocutory decree. This appeal followed.

[1-3] The appellant first contends that the motion to vacate the judgment was not properly before the court since notice thereof was not signed by the attorney of record. It is argued that under sections 284 and 285 of the Code of Civil Procedure the court must recognize only an attorney of record, citing McMahon v. Thomas, 114 Cal, 588, 46 P. 732 and Jackson v. Jackson, 71 Cal.App.2d 837, 163 P. 2d 780. Those cases involve a motion for a new trial, and a notice of appeal. Assuming that the suggested rule must be more strictly applied in such cases, although it has been somewhat relaxed in some of them, it does not follow that the court was without power to act in the matter here in question. In the interest of justice a trial court should have considerable discretion in permitting another attorney to specially appear for a particular purpose, especially such as the one involved here. Moreover, it is well settled that this requirement may be waived. Among the many cases so holding is Starkweather v. Eddy, 196 Cal. 73, 235 P. 734, in which it was further held that slight circumstances of acquiescence are sufficient to show such a waiver. In this case the attorney for the defendant was notified of the motion two weeks before the hearing, he appeared at the hearing and then voiced an objection for the first time, and when his objection was overruled he submitted his affidavits and argued the

matter on its merits. A sufficient waiver appears, and the circumstances were such as to justify the court in ordering the substitution of the other attorney and in hearing the matter.

[4] It is next contended that the respondent could not repudiate the stipulation made by her attorney of record. It is argued that a party is bound to leave the management and control of a case to his attorney and can only be heard through that attorney, citing Crescent Canal Co. v. Montgomery, 124 Cal. 134, 56 P. 797; and that there is nothing to show any fraud, mistake, surprise or excusable neglect in connection with this stipulation. Conceding the general rule, it seems obvious that it should not be applied to the extent here contended for. While an attorney has a broad authority in many matters affecting the managing and control of a case, we know of no established rule of law which requires the denial of any relief where the attorney, without the knowledge or consent of the client, has stipulated away the client's entire case, including any defense to a cross-complaint. No reversible error appears in this connection.

[5–7] Finally, it is contended that the court abused its discretion in granting the motion because the evidence was insufficient to justify such action. The controlling facts, which are undisputed, should be a sufficient answer to this contention. Aside from other considerations, it clearly appears that respondent's then attorney failed to realize the legal effect of part of the stipulation, and the charitable thing is to assume that the same is true of the attorney for the appellant. Mistaken advice by the attorney has been held to be sufficient to show excusable neglect. Svistunoff v. Svistunoff, 108 Cal.App.2d 638, 239 P.2d 650. The matter was primarily one within the sound discretion of the court. A rather strong showing of surprise and excusable neglect on the part of the respondent was made, and no abuse of discretion appears.

The orders appealed from are affirmed.

GRIFFIN and MUSSELL, JJ., concur.

Hearing denied; EDMONDS and SCHAUER, JJ., dissenting.

---

120 Cal.App.2d 24

MASSOW et al. v. GIANACLIS.

Civ. 19474.

District Court of Appeal, Second District, Division 1, California.

Aug. 27, 1953.

Action to have a grant deed declared a trust deed or mortgage. The Superior Court of Los Angeles County, Thomas J. Cunningham, J., entered judgment declaring the deed to be a mortgage as security for a loan, and defendant appealed. The District Court of Appeal, Drapeau, J., held that the evidence supported the finding of the trial court.

Affirmed.

1. Appeal and Error ⚷930(1)

In reviewing evidence, on an appeal from judgment for plaintiff all conflicts must be resolved in favor of the plaintiff, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible.

2. Appeal and Error ⚷989

The power of the appellate court, when verdict is attacked as unsupported by the evidence, begins and ends with the determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the court.

3. Appeal and Error ⚷996

When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.

4. Mortgages ⚷38(1)

In a proceeding by a motion picture actress against her professional manager to have a deed declared a mortgage, finding that the manager was in a fiduciary position to actress and that actress relied upon the representations of the manager that the deed was in fact a mortgage was supported by substantial evidence.

5. Mortgages ⚷608½

Where deed to defendant was a mortgage, the defendant could at no time have acquired the position of landlord, and amounts paid to him as rental were properly set off against the indebtedness secured by the mortgage.

Cletus J. Hanifin and Thomas P. Foye, Los Angeles, for appellant.

William R. Law and E. Marvin Goodson, Los Angeles, for respondents.

DRAPEAU, Justice.

Marjorie Massow, hereinafter referred to as either plaintiff or respondent, came to Los Angeles from Iowa in 1941 when she was twenty years old. Defendant was in the restaurant supply business in Hollywood and had a wide acquaintance with persons connected with the motion picture industry. With the help of defendant, plaintiff was able to obtain contracts to appear in motion pictures.

In May of 1946, plaintiff bought a house and two adjoining lots. The house was priced at $10,000. She paid $5,000 down and defendant lent her the balance of the purchase price.

Thereafter, on June 6, 1946, plaintiff executed a grant deed at defendant's request. This purported to convey to him a half interest in the said real property. This document was not recorded.

Sometime in December of that year, defendant and plaintiff had a disagreement respecting the latter's business affairs. Defendant then revealed to plaintiff that he had an interest in said realty. And he proceeded to evict plaintiff and her family from the premises.

In January of 1947, plaintiff instituted this action to have the grant deed declared a trust deed or mortgage as security for the payment of $5,112 advanced by defendant toward the purchase price.

At the conclusion of a bitterly contested trial lasting ten days the court made its findings of fact in favor of plaintiff, in substance as follows:

That in 1942, Marjorie Massow was young and inexperienced in her pursuit of a professional career and in the management of her business affairs; that she found in defendant one who was willing to give, and who volunteered advice; that she accepted, and defendant became her business and professional manager; that she considered him honest and working for her best interests. Such relationship continued until December 6, 1946.

During this period a fiduciary relationship existed between them and plaintiff relied upon, and trusted defendant implicitly.

While defendant admired plaintiff, "he was cautious and shrewd" and controlled and dominated her actions in connection with her business and with her career.

On May 24, 1946, plaintiff borrowed $5,112 from defendant to complete the purchase of realty. On June 6, 1946, plaintiff was the owner in fee thereof. On that date, plaintiff signed a deed purporting to convey to defendant a half interest in said property, "but she believed the said deed to be security for said loan of $5112.00; * * * was ignorant in the sense of not understanding the nature of the instrument;" and did not know the difference between a grant deed and a trust deed. She believed it was in fact a trust deed and security for said loan, because defendant told her it was. Defendant knew that plaintiff was ignorant in the sense of not understanding the nature of the instrument; and to induce her to sign it, defendant fraudulently represented to her that the document was a trust deed and security for said loan.

Plaintiff relied upon defendant's representations because she trusted and had confidence in him, and signed "in obedience to his order and direction."

Defendant knew that plaintiff "relied on his representations that his interest in the property was security for a loan; that (he) made those representations with the intent that she should so rely; that she did so rely; that he knew she did so rely; that he went so far in carrying out his scheme as to take precautions to prove his theory at the right time; that in so doing, he took advantage of the highest trust and confidence placed in him by plaintiff * * *."

It was further found that defendant forcibly evicted plaintiff from the property on December 6, 1946, and "by threats and other methods of intimidation, he has unlawfully kept the same to his own enjoyment and to the exclusion of the plaintiff till the present time."

From the judgment which followed, declaring the deed to be a mortgage and security for the loan of $5,112; restoring possession of the realty to plaintiff; declaring that defendant "has no right, title, lien or charge, in, on to or upon said real property by reason of said mortgage or otherwise"; and offsetting rentals against the loan indebtedness, defendant appeals.

Appellant contends that the judgment is not supported by the evidence, in that the "weight" thereof "falls far short of establishing that the written instrument, properly executed and notarized, is not what it purports to be." Hence, "that an error of law has been made in declaring a valid grant deed to be in fact a mortgage."

Further, that it was error to grant a judgment "for rent against one who was a tenant in common."

"While the question of the sufficiency of the evidence, as a matter of law, to support a verdict or finding, may be presented to the appellate court for review, its duty stops when it has determined that there is some substantial evidence to support it. It will not weigh the evidence, pass upon the credibility of witnesses, nor substitute its judgment thereon for that of the trial court, but will uphold the verdict or finding, even though it would have decided otherwise if it had occupied the place of the trial judge or jury." 2 Cal.Jur. 912, 913, Appeal and Error, Sec. 539.

The record in this case is voluminous. And the evidence presented at the trial was highly conflicting on all of the issues.

[1–3] And, as stated in Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689, 690: "The rule as to our province is: 'In reviewing the evidence * * * all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary * * * principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any *substantial* evidence, contradicted or uncontradicted which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.' (Italics added.) (Crawford v. Southern Pacific Co., (1935), 3 Cal.2d 427, 429, 45 P.2d 183, 184.) The rule quoted is as applicable in reviewing the findings of a judge as it is when considering a jury's verdict." See, also, Richter v. Walker, 36 Cal.2d 634, 640, 226 P.2d 593.

[4] It is not deemed necessary or expedient to recite in detail the evidence which supports the judgment. Suffice it to say that a careful examination of the entire record convinces this court that both the findings and the judgment are supported by substantial evidence, which tended to prove that the grant deed was executed as security for appellant's loan of $5,112.

Appellant also argues that "If one tenant in common is in sole possession, the other cannot sue to recover rent for his occupancy", citing McWhorter v. McWhorter, 99 Cal.App. 293, 278 P. 454.

The cited case is one for partition of real and personal property by the owners who held it in joint tenancy.

[5] Under the theory upon which the instant case was tried, appellant never acquired the status of a tenant in common. As a result, it was proper to set off the rental value against the loan indebtedness.

For the reasons stated the judgment is affirmed. The appeal from the order denying a new trial is dismissed.

WHITE, P. J., and DORAN, J., concur.

PEOPLE, BY AND THROUGH DEPARTMENT OF PUBLIC WORKS v. THOMPSON et al.*

Civ. 4584.

District Court of Appeal, Fourth District, California.

Sept. 10, 1953.

Rehearing Denied Sept. 29, 1953.

Hearing Granted Nov. 5, 1953.

Eminent domain proceeding to acquire land on one side of state highway for purpose of converting it into a freeway. The Superior Court of San Diego County entered judgment pursuant to verdict awarding damages, and plaintiff appealed. The District Court of Appeal, Mussell, J., held that beach land devoted to no existing use and separated by existing state highway from farm land held under common ownership could not be considered part of farm land for purpose of determining value of portion of farm land taken by state or for purpose of assessing severance damages.

Judgment reversed.

1. Eminent Domain ⟹136

In eminent domain proceeding, court or jury must ascertain and assess damages to property owner for value of the property taken and, if such property is part of a larger parcel, for any severance damages sustained by the remaining land, but remaining land must be physically contiguous to the parcel condemned and not separated therefrom by either natural or artificial objects or ways. Code Civ.Proc. § 1248.

2. Dedication ⟹53

Grant deed by which owners without limitation granted described realty to state, its successors and assigns for highway purposes operated to convey fee title to the realty involved and not merely a right of way and easement for highway purposes, notwithstanding use of the terms "right of way" in referring to further consideration for grant. Code Civ.Proc. § 1864; Civ. Code, §§ 1066, 1069.

3. Dedication ⟹53

As used in deed granting described realty to state for highway purposes in referring to further consideration for grant of such "right of way," quoted phrase could reasonably be interpreted as describing not only the easement but also the land occupied by its use and such phrase should be regarded as used for the purpose of describing the property rather than to divide or limit the estate or interest granted. Code Civ.Proc. § 1864; Civ.Code, §§ 1066, 1069.

See publication Words and Phrases, for other judicial constructions and definitions of "Right of Way".

4. Deeds ⟹90

A deed must be interpreted as a whole for the purpose of ascertaining true intention of the parties and, if possible, effect should be given to each and every part of deed, and it must be construed most strongly against grantor. Code Civ.Proc. § 1864; Civ.Code, §§ 1066, 1069.

5. Eminent Domain ⟹137

In determining whether parcels of land held in common ownership, though separated by state highway, constituted a single parcel for purpose of determining value of portion of parcel on one side of highway taken in eminent domain proceeding and assessing severance damages, the use to which the land was put was a factor to be considered, and while unity of use is not a controlling factor, it should be considered. Code Civ.Proc. § 1248.

6. Eminent Domain ⟹136

Severance damages are ordinarily limited to property contiguous to that taken in eminent domain proceedings, and while severance damages may be awarded in some cases where the property, though not physically contiguous is being devoted to an existing unity of use, mere fact that there is a possible or prospective use of separate properties as a unit, or that they are susceptible to a common use, will not justify allowance of severance damages. Code Civ.Proc. § 1248.

7. Eminent Domain ⟹136

Beach land devoted to no existing use and separated by state highway from farm land held in common ownership could not be considered part of farm land for purpose of determining value of portion of farm land taken by state for construction of freeway or as part of the land remaining after such taking for purpose of assessing severance damages. Code Civ.Proc. § 1248.

---

* Subsequent opinion 271 P.2d 507.

8. Highways ⚷153

State acquired a permanent, exclusive surface easement as well as the fee title to realty granted to state for highway purposes, and no structures or objects of any kind or nature could be placed in, under or over state highway without securing a permit from department of public works. Streets and Highways Code, §§ 660–670.

9. Dedication ⚷53

State could acquire fee title to realty conveyed to state in 1924 by grant deed for highway purposes, notwithstanding statute then in effect, providing that by taking or accepting land for highway, public acquired only right of way.

10. Eminent Domain ⚷90

Where grantors by deed conveying land to state for construction of state highway waived all claim for damages or compensation for or on account of establishment of state highway and subsequent conveyance of land divided by such highway contained similar waiver, when state thereafter took additional land from parcel on one side of highway for construction of a freeway, owners could not recover damages to parcel on other side of highway for establishment and construction of freeway. Code Civ.Proc. § 1248.

11. Highways ⚷87

Owners of fee title to land subject to right of way for state highway have no greater right to encroach upon highway right of way than strangers to the title. Streets and Highways Code, §§ 660–670.

12. Eminent Domain ⚷2(6)

Construction of a dividing strip in center of state highway constituted proper exercise of police power and resulting damage to abutting property was not compensable. Code Civ.Proc. § 1248.

Robert E. Reed, Sacramento, George C. Hadley, Herbert J. Williams and Albert J. Day, Los Angeles, for appellant.

Holbrook, Tarr & O'Neil and Leslie R. Tarr, Los Angeles, for respondent.

MUSSELL, Justice.

Appellant commenced this proceeding in eminent domain for the purpose of converting a portion of highway 101 north of Leucadia in San Diego county into a freeway.

Respondents own property on the east and west of the existing state highway, which bisects their property in a northerly and southerly direction. The westerly land of defendants is beach property, over which an easement for highway purposes 600 to 700 feet in width extends from the westerly edge of highway 101 to the Pacific Ocean for the purpose of providing for the drainage of San Marcos Creek under said highway. This easement physically divided the beach property into a northerly section of .99 acres and southerly section of 7.24 acres. The northerly 35 acres of respondents' property east of the highway, referred to as the landward property, was being dry farmed and the remaining south 35 acres was slough or sump land into which the San Marcos Creek drained. The beach property was not devoted to any existing use as of the date of the valuation in this proceeding.

The property sought to be condemned consists of approximately 12.73 acres (parcel 2–A) lying along the east side of the existing highway 101 and the extinguishment of all abutters' rights of access appurtenant to respondents' landward property, except that the northerly 361.33 feet thereof was to abut upon and have access to a newly created frontage road. In addition, this parcel included within its description the underlying fee to all existing state highway easements. All of the property sought to be taken except the underlying fee to the beach easement consisted of respondents' landward property and no abutters' rights of access were taken from the beach property.

As a part of the construction of the freeway a new two lane road was to be constructed easterly of the existing highway. This new construction would carry north bound traffic and the existing highway would then carry south bound traffic only, and the area between the two traveled ways was, in effect, a dividing strip. A crossover was to be provided near the southern boundary of respondents' property and an underpass was to be constructed near their north property line. A barbed wire fence, to prevent access to the freeway, was to be erected along the easterly boundary of the freeway right of way from the southerly boundary of respondents' property to a point 361.33 feet south of respondents' northerly boundary. The northerly 361.33 feet of respondents' property was to abut upon and have access to the newly created frontage road constructed by appellant, which, through a system of interchanges, gave respondents' property access to the freeway in both a northerly and southerly direction.

Throughout the jury trial, appellant contended that the beach property was not a part of the larger parcel, of which parcel 2–A was a part, since it had been severed for many years by state highway 101 and the same owner had theretofore received compensation for the severance of this property.

The trial court ruled that the beach property was a part of the larger parcel for the purpose of determining the value of parcel 2–A and constituted a part of the remainder for the purpose of assessing severance damages. Following this ruling, opinions were given by respondents' witnesses enhancing the value of the part taken based on the court's ruling that it was connected to and was a part of the beach property, although no beach property except the underlying fee to the beach easement was actually taken. These witnesses also attributed severance damages to the beach property upon the same basis.

The jury returned a verdict finding that the value of parcel 2–A is the sum of $12,000 and that the damage to defendants' remaining property not sought to be condemned by reason of the taking of parcel 2–A and the construction of the freeway in the manner proposed is $17,500.

The trial court found that for the purpose of determining the value of parcel 2–A, sought to be condemned by plaintiff, all of said defendants' property on both sides of the existing state highway was and now is one contiguous and entire tract of real property under the single ownership of the defendants, subject to an easement for highway purposes, and further found that after the taking of parcel 2–A by the plaintiff and the construction of the freeway improvement in the manner proposed, the defendants' remaining property (upon which severance and consequential damages were assessed and determined) was and is all of the defendants' property abutting the westerly side of the existing highway and all of the defendants' property abutting the easterly side of the proposed freeway improvement.

Judgment was entered pursuant to the verdict of the jury and this appeal was taken for the primary purpose of determining that the property separated from the part taken by an existing traveled state highway is not a part of a larger parcel for the purposes of valuation and severance damages.

Appellant first contends that the beach property, separated from the parcel taken by an existing state highway was erroneously held to be a part of the larger parcel for the purpose of determining the value of parcel 2–A and severance damages. We agree with this contention.

[1, 2] In a proceeding in eminent domain the court or jury must ascertain and assess damages to the property owner for the value of the property taken and if such parcel is a part of a larger parcel, for any severance damages sustained by the remaining land. Section 1248, Code Civ.Proc. The remaining property must be physically contiguous to the parcel condemned. East Bay Mun. Utility Dist. v. Kieffer, 99 Cal. App. 240, 260, 278 P. 476, 279 P. 178; Atchison, T. & S. F. Railway Co. v. Southern Pac. Co., 13 Cal.App.2d 505, 57 P.2d 575. In City of Stockton v. Ellingwood, 96 Cal.App. 708, 745, 275 P. 228, 244, it is held that "There must be contiguity; that is, the governmental subdivisions must in fact constitute one parcel, and not divided by either natural or artificial objects or ways so as to divide the land into two or more separate parcels." This principal of law is conceded by respondents but they argue that the appellant obtained only a

right of way and easement for highway purposes for existing highway 101; that the underlying fee thereof is owned by respondents and that, therefore, the beach and landward property are contiguous. However, an examination of the grant deed to the State of the real property upon which the existing highway was constructed leads us to the conclusion that the underlying fee was conveyed to the State thereby. The deed, dated November 19, 1924, executed by the then owners of the property, provides in the first paragraph (the granting clause) that the owners "do hereby grant to the State of California the real property * * * described as follows." The second paragraph contains a description of the property and the third paragraph provides "It is hereby agreed that as a further consideration for the granting of said right of way * * *" the State shall vacate and abandon certain portions of the old right of way. The deed also provides that it is understood that the grantors "grant only that portion of land which is included within land owned by said grantors or in which said grantors are interested and hereby waive any and all claim for damages or compensation for or on account of the establishment of said state highway."

[3, 4] Respondents contend that the use of the words "said right of way", in referring to the further consideration expressed in the deed, shows that the grantors did not intend to part with fee title to the property. However, the term "right of way" may reasonably be interpreted as describing not only the easement but also the land occupied by its use, Moakley v. Los Angeles Pac. Ry. Co., 139 Cal.App. 421–424, 34 P.2d 218, and the term is susceptible of a twofold interpretation. Anderson v. Willson, 48 Cal.App. 289, 295, 191 P. 1016. Moreover, a deed is to be interpreted as a whole for the purpose of ascertaining the true intention of the parties. Section 1066, Civ. Code; Smallpage v. Turlock Irrigation Dist., 26 CalApp.2d 538, 543, 79 P.2d 752; Parks v. Gates, 186 Cal. 151, 199 P. 40; Barnett v. Barnett, 104 Cal. 298, 300, 37 P. 1049. If possible, effect should be given to each and every part of the deed, Burnett v. Piercy, 149 Cal. 178, 86 P. 603, and it must be construed most strongly against the grantor. Section 1069, Civ.Code; Section 1864, Code Civ.Proc.; Ball v. Mann, 88 Cal.App.2d 695, 199 P.2d 706. The deed, considered as a whole, contemplates the granting of the fee and the quoted phrase was used for the purpose of describing the property rather than to divide or limit the estate or interest granted. No limitation is found in the granting clause and the benefits run to "said grantee, its successors and assigns". This is consistent with the granting of the fee and under the circumstances shown, the deed operated to convey fee title to the property involved. Las Posas Water Co. v. County of Ventura, 97 Cal.App. 296, 299, 275 P. 817.

[5, 6] Another factor to be considered in determining whether the beach property and the landward property of respondents constitute one or two parcels is the use to which the land was put. While unity of use is not the controlling factor, City of Oakland v. Pacific Coast Lumber Etc. Co., 171 Cal. 392, 398, 153 P. 705, it should be considered in determining whether the properties are contiguous, and as was said in People v. Ocean Shore Railroad, 32 Cal. 2d 406–423, 196 P.2d 570, 581:

> "There may be a right to an award of severance damages in some cases where the property, though not physically contiguous, is being devoted to an existing unity of use. See Southern Calif. Edison Co. v. Railroad Comm., 6 Cal.2d 737, 59 P.2d 808; Monongahela Navigation Co. v. United States, 148 U.S. 312, 13 S.Ct. 622, 37 L.Ed. 463. But such damages are ordinarily limited to contiguous property, and the mere fact that there is a possible or prospective use of separate properties as a unit, or that they are susceptible to a common use, will not justify the allowance of severance damages. See East Bay Mun. Utility Dist. v. Kieffer, 99 Cal.App. 240, 248, 278 P. 476, 279 P. 178; 2 Lewis on Eminent Domain, 3d Ed., (1909), § 697, p. 1207; 2 Nichols on Eminent Domain, 2d Ed., (1917), § 241, p. 740."

In the instant case the landward property was used for farming purposes and the beach property was not devoted to any existing use as of the date of the valuation thereof. The mere fact that the two properties are susceptible to a common use will not justify the allowance of severance damages.

[7] Aside from the question as to the ownership of the underlying fee of the property involved, it is our conclusion that the existing highway divided respondents' property so as to preclude them from recovering severance damages to the beach property.

In County of San Mateo v. Christen, 22 Cal.App.2d 375, 71 P.2d 88, an action in eminent domain, appellant Darbee was the owner of 23 acres of land within the corporate limits of the town of Lawndale. A portion of said land lying on either side of a public street called Robson Avenue was delineated on a subdivision map filed for record in 1872 but never actually opened or improved upon the ground. This tract contained 4.357 acres, for which the jury awarded $4,021.30. It also found that the remaining land of the appellant was neither damaged nor benefited by the severance. The case was tried after the highway was completed and was in use. The lower court limited proof of damage to the lands lying on the same side of Robson Avenue as the land taken for the highway and it was claimed that since Robson Avenue was not improved or open on the ground to travel and since the appellant was using the entire tract as a unit that this was error under City of Stockton v. Marengo, 137 Cal.App. 760, 31 P.2d 467. The appellate court held (hearing denied by Supreme Court) that the trial court's ruling was proper; that the two cases were not parallel; that in the Marengo case the defendant had platted the tract into blocks and streets but had not sold it and continued to occupy it as a whole; that in the case before it, the tract was platted in 1872, and in 1910 and 1913 appellant had purchased the lots forming her holding by reference to the recorded map; that under the circumstances the case was ruled by East Bay Municipal Utility Dist. v. Kieffer, 99 Cal.App. 240, 278 P. 476, 279 P. 178, and City of Oakland v. Pacific Coast Lumber & Mill Co., 171 Cal. 392, 153 P. 705, and that the evidence of damage was properly limited to the contiguous lands not separated from the portion condemned by a public street.

[8, 9] In the instant case division of respondents' property took place when the deed of November 19, 1924, was executed and delivered to the appellant and the highway was actually improved upon the ground and in use by the public. No structures or objects of any kind or nature may be placed in, under or over the highway without securing a permit from the department of public works. People v. Henderson, 85 Cal.App.2d 653, 194 P.2d 91; Sections 660–670 Sts. & Hy. Code. The State acquired a permanent, exclusive surface easement as well as the fee title to the property. In this connection respondents argue that under the provisions of Section 2631 of the Political Code (in effect when the 1924 deed was executed) the State could acquire only a right of way by taking and accepting land for a highway. However, this argument was answered contrary to respondents' contention in Las Posas Water Co. v. County of Ventura, supra, 97 Cal.App. at page 300, 275 P. 817.

[10] Further evidence of a division and separation of respondents' property is found in said deed of 1924 wherein respondents waived all claim for damage or compensation for and on account of the establishment of highway 101, and in their deed of January 24, 1935, which contains a similar waiver. Under these circumstances, they cannot here again recover damages to the beach property for the establishment and construction of the highway. Collopy v. United Railroads, 67 Cal.App. 716, 228 P. 59.

[11, 12] It is true, as argued by respondents, that their right to cross and recross the highway is limited by the establishment of the freeway. However, respondents, if owners of the underlying fee, would have no greater rights to encroach upon the highway right of way than strangers to the title, People v. Henderson, su-

pra, 85 Cal.App.2d at page 656, 194 P.2d 91, and the construction of a dividing strip in the center of the highway is in exercise of the police power and not compensable. People v. Sayig, 101 Cal.App.2d 890, 901, 226 P.2d 702; Holman v. State of California, 97 Cal.App.2d 237, 217 P.2d 448. Moreover, no abutters' rights of access were taken in the present proceedings as to the beach property and respondents' access to the highway from that property was not impaired.

We conclude that the trial court erred in ruling that the beach property was a part of the larger parcel for the purpose of determining the value of parcel 2–A and constituted a part of the remainder for the purpose of assessing severance damages; that it was prejudicial error to permit respondents' witnesses herein to enhance severance damages by considering the beach property as a part of the remainder and to refuse an instruction that the beach property could not be considered in arriving at the amount of severance damages. Since these errors require a reversal of the judgment, it is not necessary to pass upon other points raised on this appeal.

Judgment reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

120 Cal.App.2d 185

ROSS et al. v. SAN FRANCISCO UNIFIED SCHOOL DIST.

Civ. 15544.

District Court of Appeal, First District, Division 1, California.

Sept. 11, 1953.

Action against school district for injury to eye of student not quite sixteen years of age while polishing silver rings on reins belonging to a teacher on school buffing machine pursuant to teacher's order. The Superior Court, in and for the City and County of San Francisco, granted a motion for nonsuit and entered judgment for defendant, and plaintiffs appealed. The District Court of Appeal, Peters, P. J., held that under the evidence, the question of whether student was contributorily negligent in not wearing safety goggles while using buffing machine was a question of fact for jury.

Judgment reversed.

1. Appeal and Error 🔑927(3), 997(2)

Judgment of nonsuit can be supported only if, disregarding conflicting evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, indulging every legitimate inference which may be drawn from such evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict for plaintiff.

2. Schools and School Districts 🔑122

In action against school district for injury to eye of student while polishing silver rings on leather reins belonging to a teacher, evidence was sufficient to take case to jury on question of negligence of defendant in maintenance of and supervision over buffing machine in failing to provide adequate supply of unbroken safety goggles, failure of teacher to see that student had found and was using goggles, and failure to warn student of danger of long flexible reins becoming enmeshed in buffer.

3. Negligence 🔑136(25, 26)

Contributory negligence and proximate cause are normally questions of fact for jury.

4. Negligence 🔑122(1)

Defendant has the burden of proving contributory negligence and proximate cause, in absence of compelled inferences thereof arising out of plaintiff's own evidence.

5. Negligence 🔑136(26, 29)

Only in the clearest of cases will recovery be barred on ground that plaintiff was contributorily negligent as a matter of law, particularly where a minor is involved.

6. Negligence 🔑136(29)

In determining whether a minor has been guilty of contributory negligence as a matter of law, a much more lenient rule in favor of minor is applied than applies to adults.

7. Negligence ⚷85(4)

Mere knowledge of existence of danger, while it may bar recovery by an adult on ground of contributory negligence, will not necessarily bar recovery for injuries sustained by a child.

8. Negligence ⚷10

The doing of an act with appreciation of the degree of danger in addition to mere appreciation of the danger is necessary to establish "negligence" as a matter of law.

See publication Words and Phrases, for other judicial constructions and definitions of "Negligence".

9. Schools and School Districts ⚷122

In action against school district for injury to eye of ninth grade student, not quite sixteen years of age, while polishing silver rings on leather reins belonging to a teacher on school buffing machine pursuant to teacher's order, whether school district was negligent in maintenance of and supervision over buffer or in supervision of student's actions while operating machine, whether student was contributorily negligent in not wearing safety goggles and what was the proximate cause of accident were questions of fact for jury under the evidence.

◆

Jack Flinn and Jackson E. Nichols, San Francisco, for appellants.

Dion R. Holm, City Atty., and Edward F. Dullea, Deputy City Atty., San Francisco, for respondent.

PETERS, Presiding Justice.

Plaintiffs, Vernon Ross, a junior high school student, and his father, brought this action against defendant, the School District, for damages for the loss of an eye by Vernon alleged to have been proximately caused by the defendant's negligent maintenance of and supervision over a buffing machine. At the close of plaintiffs' case before a jury, defendant's motion for a nonsuit was granted, and judgment entered for defendant. The sole ground of the motion, and of the order granting it, was that the evidence demonstrated that Vernon was guilty of contributory negligence as a matter of law. Plaintiffs appeal.

[1] On such an appeal the judgment of nonsuit can be supported only if "'disregarding conflicting evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff.'" Andre v. Allynn, 84 Cal.App.2d 347, 348, 190 P.2d 949, 950, quoting from Card v. Boms, 210 Cal. 200 at page 202, 291 P. 190.

There is no dispute but that there was sufficient evidence, tested by these standards, to go to the jury on the issue of defendant's negligent maintenance of and supervision over the buffing machine. The judgment can be sustained, if at all, upon the sole ground that Vernon was, as a matter of law, guilty of contributory negligence.

On the date of the accident, January 5, 1951, Vernon lacked about three weeks of being sixteen years of age. He was then in the high 9th grade at the junior high school. This school has students in the 7th, 8th and 9th grades. It has several craft classes, in one of which—the sheet metal class—the students are taught the use of power tools, including the use of the buffing machine. This machine consists of a power-driven circular buffing wheel which revolves at a high speed. Vernon had taken sheet metal shop when he was in the high 7th and low 8th, and during this period had been taught the use of the buffer. He had taken other craft classes before and after taking the sheet metal class, but in these other courses used only hand tools. In the high 9th he was taking a craft course from teacher Ferrari, who had also been his teacher in the sheet metal course. In this course he worked only on wooden articles and used only hand tools.

On January 4, 1951, Ferrari ordered Vernon, during his craft class, to go to the sheet metal shop and buff a pair of reins belonging to Ferrari. These reins were made of circular leather about a yard long, with a buckle at one end and with silver rings at one-half inch intervals along the length of each rein. Ferrari wanted these silver rings and the buckles polished. Vernon was taken to the sheet metal shop by Ferrari, who turned on the power, and then left Vernon there alone to do the buffing. No warning was then or later given to Vernon by Ferrari or by any one else of the danger of buffing a long pliable strap on the revolving buffer. Vernon worked for half an hour, but did not finish the job.

On January 5, 1951, the next day, Vernon, at 2 o'clock in the afternoon, went to his math class. About ten minutes after two Ferrari sent a messenger to Vernon to request him to report to the crafts room where Ferrari was conducting a class. Vernon, with the permission of his math teacher, reported to Ferrari, who was then calling the roll of his class. Ferrari instructed Vernon to take the reins to the sheet metal shop and to finish the buffing job he had started the day before. Ferrari stated that he wanted to take the reins, which were his personal property, home that night. Pursuant to instructions, Vernon took the reins to the sheet metal shop. Mr. Friersen was then conducting a sheet metal class in that room. Vernon told Friersen what Ferrari wanted done, and asked permission to use the buffing machine. Such permission was granted. Friersen was then preparing to call the roll, and was standing in about the middle of the room, where the buffing machine could be easily seen by him. Vernon went over to the tool locker, where the safety goggles, used to protect the eyes while buffing, were customarily kept. He had secured goggles from that cupboard the preceding day, and on many previous occasions. On this occasion there were but two sets of goggles in the tin box where they were kept. Vernon stated that when he had taken the sheet metal course there were then more goggles available. Goggles are used while operating other machines in addition to the buffer. On this occasion one of the available goggles was obviously broken. Vernon took the other set, went over to the buffer, laid the goggles on the nearby bench, and waited for Friersen to turn on the power after he had finished taking the roll. There was a switch on the buffer operated by a key kept by the teacher which had to be turned on before the buffer would operate. After this key switch was turned on, the student could turn the machine off or on by the operation of a flip switch. When Friersen finished the roll call he came over to the buffer and turned on the key switch. He asked Vernon if he had goggles and Vernon told him that he did. Friersen then left, and returned to about the middle of the room.

Before starting the buffing operation Vernon tried to put on the goggles and found that one of the ear bands was broken. The evidence is somewhat ambiguous as to whether this ear band was broken when Vernon tried to tighten it, or was broken before he tried them on. Taking the evidence most favorable to plaintiff, as we must, it must be assumed that the ear band was broken when Vernon removed the goggles from the locker.

Vernon immediately reported to Friersen that the goggles were broken. Friersen told Vernon to go to the locker and get another set. Vernon went to the locker and searched it thoroughly but could find no goggles other than the broken set he had first observed. He also looked in another locker, and into several cupboards, but could find no other goggles. He thereupon returned to the buffing machine and started his buffing job without goggles.

It should be here mentioned that several students in the sheet metal class also testified as to the number and condition of the available goggles. All witnesses agreed that the goggles were customarily kept in a tin box in the tool cabinet. Three witnesses stated that there were usually only two or three sets of goggles available, and two of the witnesses testified that some of the goggles were always bent and broken.

Vernon, without goggles, started to buff the silver rings on the reins. He testified that he worked for about fifteen minutes before the accident occurred. Other testimony suggests that he may have worked at the buffer, before the accident, for about half an hour. No one came up to him while he was working. Friersen, when Vernon started work, was still in the middle of the room, and remained in the room at all times here involved. Vernon polished all of the silver rings on one of the reins, and was half through the other, when the accident happened. The rein upon which Vernon was then working became entangled in the buffing wheel, causing the long leather band to revolve rapidly. A sliver of the buckle flew off and pierced Vernon's left eye. He was hospitalized for a period of fifteen days, during which time the sliver was removed. The eye lens of his left eye has been permanently destroyed and a traumatic cataract has formed. The sight in this eye is permanently gone. An operation to remove the cataract, although possible, would only improve Vernon's appearance but would not improve his sight.

Vernon admitted that he knew that safety goggles should be worn while operating the buffer, and testified that, when he took the sheet metal course, he had been instructed upon safety precautions, and was given a test upon safety regulations. He admitted that he had then been instructed always to use safety goggles when he operated the buffer. He stated that, prior to the accident, he had used the buffer some seventy-five or eighty times, and on each occasion had worn goggles. The trial court was much impressed by this testimony and granted the nonsuit on the ground that such evidence demonstrated that Vernon was guilty of contributory negligence as a matter of law.

[2] The above evidence would obviously support findings that the school district was guilty of negligence in its maintenance of and supervision over the buffer. The failure of the defendant to have an adequate supply of unbroken goggles on hand, the failure of Friersen to keep a watch on Vernon to see that he had found and was using goggles, the failure of Ferrari or any one else to warn Vernon of the danger of the long flexible reins becoming enmeshed in the buffer would support findings that defendant was negligent and that such negligence was a proximate cause of the accident. It is also true that Vernon's evidence to the effect that he had been told to wear glasses and knew that they should be worn might support a finding of contributory negligence. The question is, does that evidence compel such a finding as a matter of law?

[3–6] In determining this question there are certain rules of law that must be kept in mind. Whether a plaintiff has been guilty of contributory negligence is normally a question of fact for the jury. Andre v. Allynn, 84 Cal.App.2d 347, 190 P.2d 949; Hernandez v. Murphy, 46 Cal.App.2d 201, 115 P.2d 565. Proximate cause is also normally a fact question. Uribe v. McCorkle, 63 Cal.App.2d 61, 146 P.2d 22; Jones v. City of South San Francisco, 96 Cal.App.2d 427, 216 P.2d 25; Hernandez v. Murphy, 46 Cal.App.2d 201, 115 P.2d 565; Taylor v. Oakland Scavenger Co., 17 Cal.2d 594, 110 P.2d 1044. In the absence of compelled inferences of contributory negligence and proximate cause arising out of plaintiff's own evidence, the burden of proof is upon the defendant on both of these issues. Gett v. Pacific G. & E. Co., 192 Cal. 621, 221 P. 376; Bauman v. Edgar, 72 Cal.App. 448, 236 P. 943; Anthony v. Hobbie, 25 Cal.2d 814, 155 P.2d 826. The barring of a plaintiff, particularly a minor, on the ground that he has been guilty of contributory negligence, as a matter of law, is a rare occurrence, and will only be done in the clearest of cases. Anthony v. Hobbie, 25 Cal.2d 814, 155 P.2d 826; Andre v. Allynn, 84 Cal.App.2d 347, 190 P.2d 949; Uribe v. McCorkle, 63 Cal.App.2d 61, 146 P.2d 22; Lloyd v. Southern Pacific Co., 111 Cal.App.2d 626, 245 P.2d 583; Jansen v. Southern Pacific Co., 112 Cal.App.2d 833, 247 P.2d 581; Green v. Key System Transit Lines, 116 Cal.App.2d 512, 253 P.2d 780; see exhaustive annotation and collection of cases in 107 A.L.R. 4, particularly at page 164, et seq. In the instant case we are dealing with a minor. In determining whether a minor has been guilty of contributory negligence as a matter of law, a much more lenient rule in favor of the minor is applied than applies to adults. Foley v. California Horseshoe Co., 115 Cal. 184, 47 P. 42; Jones v. Davies, 133 Cal.App. 389, 24 P.2d 364; Schroeder v. Baumgarteker, 202 Cal. 626, 262 P. 740; Shannon v. Central-Gaither U. School Dist., 133 Cal.App. 124, 23 P.2d 769. In Guyer v. Sterling Laundry Co., 171 Cal. 761, 154 P. 1057, this rule was applied to a girl of nineteen. The court stated 171 Cal. at page 763, 154 P. at page 1058: "A girl of 19 is still in her youth. Youth is ever the time of heedlessness, of impulsiveness, and of forgetfulness. Lacking power of continuous application and concentration, it will, upon the other hand, center its thought for a brief time and to its peril upon one matter to the exclusion of all else. Those who employ young girls and young women in and about machinery which may inflict injury are properly chargeable by the law with knowledge of these self-evident truths, and it becomes therefore their duty to guard youth against its own inevitable short-comings. * * * Whether contributory negligence upon the part of plaintiff was shown, that is to say, whether, as a young girl of 19 years of age, she did not comport herself with the care and prudence due from one of her years and experience, was strictly a question for the jury * * *."

In Foley v. California Horseshoe Co., 115 Cal. 184, 47 P. 42, the court held that a different standard applied to a boy of fourteen operating machinery than would apply to an adult, and held that even where such boy proceeded with a certain process in the face of a known danger, he was not barred, as a matter of law, because his knowledge of the danger and the precautions that should have been taken were not inconsistent with that lack of judgment that creates the need for the special protection of children. At page 192 of 115 Cal., at page 44 of 47 P. the court stated:

> "It would be barbarous to hold them to the same accountability as is held the adult employe, who is an independent, free agent. Their conduct is to be judged in accordance with the limited knowledge, experience, and judgment which they possess when called upon to act. * * *
>
> "So here the child might well be expected to comprehend the likelihood of accident, and to know how to provide against it, when engaged in his usual employment in front of the machine. But when he is sent to the rear of it, and in among the wheels and mechanism, to perform a novel duty, we cannot say as matter of law that he entered upon its performance with a full appreciation of the increased dangers and risks, and with sufficient judgment to know how to avoid them. These matters, and the further question whether the minor duly exercised such judgment as he possessed, must, therefore, as a rule, be left as considerations of fact for the jury's determination; and it would be an exceptional case which would present them as unmixed questions of law for the determination of the court."

[7, 8] Thus, mere knowledge of the existence of the danger will not necessarily bar a child while it might bar an adult. This was well illustrated in Andre v. Allynn, 84 Cal.App.2d 347, 190 P.2d 949, where the principles here set forth, and most of the cases here cited, are discussed at some length. In that case it was held that the temporary forgetfulness of a sixteen-year old boy as to the danger of falling upon a ramp where he and others had previously slipped, did not bar him, as a matter of law, because, it was held, although the evidence showed that he knew of the danger, it did not show, as a matter of law, that he knew the amount or degree of the danger. At page 352 of 84 Cal.App.2d, at page 552, of 190 P.2d it is stated, quoting from Ridge v. Boulder Creek etc. School Dist., 60 Cal.App.2d 453, 460, 140 P.2d 990: "'The doing of an act with appreciation of the *amount* of danger in addition to mere appreciation of the danger is necessary in order to say as a matter of law that a person is negligent.'" See, also, Henry v. Garden Grove Union H. S. Dist., 119 Cal.App. 638, 7 P.2d 192. In Mastrangelo v. West Side U. H. School Dist., 2 Cal.2d 540, 42 P.2d 634, a sixteen-year old high school student was nonsuited in an action brought for his injuries re-

ceived in a class chemical explosion. The boy had picked out the wrong chemical from the shelf, failed to follow the printed instructions in the textbook, and mixed the chemicals contrary to such instructions. Nevertheless, the judgment of nonsuit was reversed, it being held that, because the teacher knew that the boy was going to perform the experiment and did not supervise him while performing it, it could not be held that the boy was guilty of contributory negligence as a matter of law.

Not in point are the cases cited by the defendant such as Bolar v. Maxwell Hardware Co., 205 Cal. 396, 271 P. 97, 60 A.L.R. 429. In that case a boy of fifteen was held guilty of contributory negligence as a matter of law where he built a cannon, bought powder from defendant, secreted the device from his family, and was injured when he shot it off. See, also Mathews v. City of Albany, 36 Cal.App.2d 147, 97 P.2d 266, 98 P.2d 1025. In such cases the boy knew of the danger and knew of the degree of the danger. The project was conceived by the child and carried out, secretly, by him. That is not the factual situation here presented. In the instant case Vernon was doing work for school credit pursuant to instructions from his teacher. In the Mastrangelo case, supra, 2 Cal.2d at page 549, 42 P.2d at page 638, the Supreme Court distinguished such cases as follows:

> "It is at once obvious that these decisions are completely distinguishable from the instant case in an important particular, namely, that they all involve voluntary acts by the children concerned. In the instant case, the particular experiment was prescribed as part of the course and the plaintiff was instructed to perform it. It is not a case, therefore, of 'the whole plan originating in his own mind,' and 'carried out secretly' with knowledge that he would be forbidden to put it into execution if discovered, as held in the Bolar Case, supra. On the contrary, the experiment was required and was conducted openly in full view of the instructor."

[9] Under the reasoning of the above entitled cases it seems quite clear that whether Vernon's actions, under the circumstances, constituted contributory negligence or whether defendant was negligent in its maintenance of and supervision over the buffing machine or in its supervision of Vernon's actions while operating the machine and what was the proximate cause of the accident, were fact questions that should have been left to the jury.

The judgment appealed from is reversed.

BRAY and FRED B. WOOD, JJ., concur.

120 Cal.App.2d 1

BANKS et al. v. HOUSING AUTHORITY OF CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 15693.

District Court of Appeal, First District, Division 1, California.

Aug. 26, 1953.

Rehearing Denied Sept. 25, 1953.

Hearing Denied Oct. 22, 1953.

Action for writ of mandamus requiring Public Housing Authority of City and County of San Francisco to certify petitioners as eligible for admission to any units in permanent public low rent housing development under authority's ownership and control, subject only to same rules and regulations and preferences applicable to other applicants, and without regard to race or color, and to require housing authority to determine eligibility of all applicants for such housing without regard to race or color. The Superior Court, City and County of San Francisco, Melvyn I. Cronin, J., entered judgment for petitioners and defendants appealed. The District Court of Appeal, Fred B. Wood, J., held that administrative regulation promulgated by public housing authority by which the authority in selecting tenants for low income housing localized occupancy of Negroes and other racial groups in certain projects, and refused their admittance to other projects, regardless of qualifications and priorities, violated equal protection clause of

fourteenth amendment of United States Constitution.

Affirmed.

1. Constitutional Law ⚷213

Action by municipal housing authority is state action by one of its official branches within purview of Fourteenth Amendment to the United States Constitution. U.S.C.A.Const. Amend. 14; Health and Safety Code, §§ 34200–34368; Housing Act of 1949, § 302(a), 42 U.S.C.A. § 1410(g).

2. Constitutional Law ⚷215

Administrative regulation promulgated by public housing authority by which authority in selecting tenants for low income housing projects localized occupancy of Negroes and racial groups in certain projects and refused their admittance to other projects, regardless of qualifications and priorities, denied equal protection. U.S.C.A.Const. Amend. 14; Housing Act of 1949, § 302(a), 42 U.S.C.A. § 1410(g); Health and Safety Code, §§ 34200–34368.

3. Constitutional Law ⚷215

The state through the public housing authority of City and County of San Francisco creates property interests whenever it executes a lease with an applicant for a dwelling, and its right to do so must be exercised within the boundaries of the Fourteenth Amendment. U.S.C.A.Const. Amend. 14; Health and Safety Code, §§ 34200–34368.

4. Constitutional Law ⚷215

Executive branch of government may not foster neighborhood racial pattern where such a course of conduct results in unequal treatment of persons otherwise eligible to receive and obtain housing accommodations furnished on behalf of state. U.S.C.A.Const. Amend. 14.

5. Administrative Law and Procedure ⚷665
Municipal Corporations ⚷63(1)

Petition alleging petitioners' eligibility for admission to low income housing unit under control of housing authority, and housing authority's refusal to admit petitioners solely on basis of petitioners' race, and housing authority's answer admitting petitioners' application for admittance and denying eligibility, and alleging that petitioners' application had been investigated and that determination of ineligibility had been made, did not present for judicial review an administrative decision concerning eligibility of petitioners, where the investigation and determination of eligibility had been made after the filing of the petition. Health and Safety Code, §§ 34200–34368; Housing Act of 1949, § 302(a), 42 U.S.C.A. § 1410(g).

6. Mandamus ⚷168(4)

In action to require housing authority to certify petitioners for admission to units in low income housing development without regard to race and color, and to require the housing authority to institute policy disregarding race or color in determining eligibility of any applicants for low cost housing, evidence sustained finding that petitioners were eligible for admission to units in such low income housing development. U.S.C.A.Const. Amend. 14; Health and Safety Code, §§ 34200–34386; Housing Act of 1949, § 302(a), 42 U.S.C.A. § 1410(g).

7. Mandamus ⚷151(2)

Federal public housing administration was not necessary party to action to compel city public housing administration to process application for admission to units in low income dwelling developments without regard to race or color, where document regulating relations between federal and city housing administration made selection of tenants and assignments of dwelling unit matters primarily for local determination. Housing Act of 1949, § 302(a), 42 U.S.C.A. § 1410(g); U.S.C.A.Const. Amend. 14; Health and Safety Code, §§ 34200–34386; Code Civ.Proc. § 389.

8. Mandamus ⚷151(2)

City and County of San Francisco were not necessary parties to action to compel housing authority of City and County of San Francisco to disregard color and creed in selection of tenants for units in low income housing projects within the authority's control where cooperation agreement between city and county and housing authority disallowed consideration of race or creed in determining eligibility of applicants in units concerned in suit. U.S.C.A.Const. Amend. 14; Code Civ.Proc. § 389; Housing Act of 1949, § 302(a), 42 U.S.C.A. § 1410(g); Health and Safety Code, §§ 34200–34386.

9. Mandamus ⚿148

An action to require public housing authority to certify petitioners for admission to units in permanent public low rent housing development under housing authority's ownership and control without regard to race or color, and to require housing authority to institute policy of determining eligibility of all applicants for such housing without regard to race or color, could be maintained as a representative or class suit, for benefit of petitioners, and for benefit of other persons similarly interested, particularly members of petitioners' race, eligible or potentially eligible for admission to such housing projects. Health and Safety Code, §§ 34200–34386; Housing Act of 1949, § 302(a), 42 U.S.C.A. § 1410(g); U.S.C.A.Const. Amend. 14.

10. Mandamus ⚿1

A court is not bound by precedent in determining facts and circumstances compelling issuance of writ of mandamus and writ will issue against city or other public body or officer wherever law and justice require.

* * *

Roth & Bahrs, San Francisco, for appellants.

Francois & Metoyer, San Francisco, Nathaniel S. Colley, Sacramento, Loren Miller, Los Angeles, for respondents.

FRED B. WOOD, Justice.

The Housing Authority of the City and County of San Francisco, its members, and its executive director, have appealed from a judgment which ordered the issuance of a peremptory writ of mandate requiring them "1. To certify forthwith petitioners, Mattie Banks and James Charley, Jr., for admission to any units in any permanent public low rent housing development under respondents' ownership and control, subject only to the same rules, regulations, and preferences applicable to other applicants, and without regard to race or color; 2. To institute forthwith a policy and practice of applying the same set of standards in determining eligibility to all applicants for permanent public low rent housing developments and without regard to race or color; 3. To institute forthwith a policy and practice of processing the applications of petitioners and other Negro applicants as expeditiously as all other applications for permanent low rent housing accommodations are processed; 4. To institute forthwith a policy and practice of recognizing the preferences as set forth in Section 302 of the Housing Act of 1949;[1] 5. To institute forthwith a practice, program, and policy of admitting all qualified applicants to any and all available units in any and all permanent public low rent housing developments under respondents' management and control subject only to the rules and regulations applicable to all applicants alike and without regard to race or color."

The judgment also decreed that "the policy, custom, practice, and usage of respondents in refusing to lease or rent to petitioners, to other persons of Negro descent, or to any other applicant because of the race or color of such applicant, units in certain permanent low rent housing developments under the ownership and control of said respondents, whether it be pursuant to the so-called 'neighborhood pattern' policy or for any reason whatsoever, is hereby declared to be illegal and void and in violation of the equal protection clause of the 14th Amendment to the Constitution of the United States and contrary to the public policy of the State of California, and the City and County of San Francisco."

The "neighborhood pattern policy" mentioned was declared in a resolution adopted by the housing authority May 28, 1942, expressed in these words: "1. In the development of its program and the selection of its tenants this Authority shall provide housing accommodations for all races in the proportion which the number of low income families otherwise unable to obtain decent, safe and sanitary dwellings in each racial group, bears to one another. 2. In the selection of tenants for the projects of this Authority, this Authority shall act with reference to the established usages, customs and traditions of the community and with a view to the preservation of public peace and good order and shall not insofar as possible enforce the commingling of races, but shall insofar as possible maintain and preserve the same racial composition which exists in the neighborhood where a project is located."

---

[1] 63 U.S.Stats. at Large (1949), Part 1, ch. 338, p. 413 at 423; 42 U.S.C.A. § 1410(g).

February 24, 1950, appellants entered into an agreement with the city and county of San Francisco whereby these proportionate needs and neighborhood pattern policies were abrogated to the extent of making them inapplicable to projects initiated subsequent to July 15, 1949. As to such projects the agreement provides that the housing authority "shall avoid or refrain from any policy or practice which results, directly or indirectly, in discrimination or any form of segregation by reason of race, color, religion, national origin or ancestry." But the agreement also provides in effect that the proportionate needs and neighborhood pattern policies shall continue in full force and effect as to projects initiated prior to July 15, 1949. Thus, it appears that these policies continue to apply to the projects known as Holly Courts, Potrero Terrace, Sunnydale, Valencia Gardens, Westside Courts, North Beach Place, and Ping Yuen.

E. N. Ayer, chairman of the housing authority, testified that the neighborhood pattern policy was intended to localize occupancy of Negroes and other racial groups in certain projects; that in accordance with this policy Westside Courts was for the occupancy of Negroes and that no Negro whether a veteran or non-veteran, regardless of his qualifications and priorities, would be admitted to the North Beach project, nor to any of the above named projects except Westside Courts.

John W. Beard, executive officer of the housing authority, testified that each of the projects named is a permanent low rent housing project available only to low income families, under federal and state laws. Among such families there are certain preferences. Families displaced by a project have the first preference. Among them, families of disabled veterans come first, those of veterans and servicemen come next, and finally the remaining displaced families. Next come low income families not displaced by the project. Among them the same priorities obtain; i. e., families of disabled veterans come first and those of veterans and servicemen second. When other factors are equal, families of the lowest income and in greatest need of better housing are preferred. Residence in San Francisco is a pre-requisite in all cases. The time of filing an application is not a factor in determining the indicated preferences.

Beard further testified that on September 19, 1952, there were no Negro occupants of any of the projects above named except Westside Courts which had 136 Negro tenants and no white tenants. He said that "the racial contents in these projects is the result of the program passed by the Housing Commission [Corporation]". The housing authority instructed Beard that they were to be occupied by white families. As to projects thus indicated for occupancy by white families, if a Negro who had a preference (such as a disabled veteran who had been displaced by the construction of the project) were to apply, he would not be admitted because of his not being a white person. The instruction given Beard by the housing authority concerning Westside Courts was for dominantly Negro occupancy, permitting up to 20 white occupancies. Ping Yuen was wholly occupied by Chinese. A white person otherwise qualified would be deemed acceptable for admission to any of the named projects except Westside Courts and Ping Yuen. If a Negro, he would be considered only for Westside Courts.

These seven projects, already constructed and occupied or ready for occupancy, provide 2016 family units, of which Westside Courts has 136 and Ping Yuen 174 units. Additional projects under construction would provide 713 additional units, and there were projects in the preconstruction stage which would provide 1,892 additional units. There were in contemplation projects which would provide a total of 5,826 dwelling units.[2]

Beard further stated that a survey had been made upon the basis of which it was estimated that of the families potentially eligible for admission to low rent housing projects, 70% are white and 30% are non-white. The latter group includes Chinese and other races but consists substantially of Negroes. He said it is contemplated that when the projects yet to be built are completed the dwelling units will be so distributed among white and non-white families that 70% of them will be occupied by white and 30% by non-white families.

Appellants put in evidence an exhibit dated March 20, 1952, entitled "Overall Program for Local Authority," which indicates that at the time of its preparation the appellant housing authority had active projects totalling 1741 dwelling units occupied by 1,600 white and 141 non-white families; deferred projects totalling 1,142 units, to be occupied by 711 white and 431 non-white families; and projects "under Program Reservation" totalling 2,973 units, to be occupied by 1,784 white and 1,189 non-white families. This exhibit contains an estimate that when the entire program is completed there will be 5,856 dwelling units occupied by 4,095 white and 1,761 non-white families, respectively, or 70% white and 30% non-white.

Thus, appellants' claim, the proportionate needs and neighborhood pattern policies will ultimately provide low rent housing accommodations for potentially eligible white and non-white families in the very proportion (70% and 30%) which a survey made in 1950 indicates in fact obtains in the city and county of San Francisco. That survey, according to this same exhibit, shows that 23,202 families occupy substandard dwelling units, of whom 16,303 (70%) are white and 6,899 (30%) are non-white.

In support of their appeal, appellants claim: (1) There is no constitutional inhibition against segregation by races "if the facilities offered or the protection afforded are separate but equal," and that their proportionate needs and neighborhood pattern policies satisfy this requirement; (2) the public policy of this state does not make segregation per se unlawful; (3) the public policy of the city and county of San Francisco does not forbid the segregation here involved; (4) the evidence does not support the finding that petitioners Mattie Banks and James Charley, Jr., are eligible for housing accommodations, and the trial court had no right to substitute its judgment for that of appellant housing authority on that issue; (5) there was a lack of indispensable parties to this action; (6) this is not a representative suit; (7) mandamus is not the proper remedy.

(1) *The principal issue thus presented turns upon the applicability to the facts of this case of those provisions of the 14th Amendment of the Constitution of the United States which declare* that no *state* shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[1] Appellants appropriately and commendably concede that action "by a housing authority[3] establishing a policy of segregation in accordance with a so-called 'neighborhood pattern'" is *state* action "by one of its official branches or agencies just as the state was acting through its judicial branch in Shelley v. Kraemer, [334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161]".

---

[2] Appellants have not directed our attention to anything in the record, nor have we found anything in the record indicating whether it is certain that the prospective projects will be built, or when. The San Francisco Chronicle of August 25, 1953, carries a news item to the effect that on August 24th a federal order was made eliminating two low rent public housing projects planned for San Francisco.

[3] Appellant housing authority was created and its functions are defined by state statute. Deering Act 3483; now Health and Safety Code, Chapter 1 of Part 2 of Division 24, §§ 34200–34368, added by Stats.1951, ch. 710, p. 1922, at pp. 1947–1960.

The question presented is primarily one of equality of treatment of the "persons" affected. The Constitution speaks of the individual, not of the racial or other group to which he may belong. It prohibits a state from arbitrarily discriminating against "any person."

Does the distribution of public housing on the basis of the proportionate needs of racial groups (white and non-white, 70% and 30%) satisfy the requirement that individuals are entitled to equal protection of the law?

Public housing is intended to provide low cost housing for qualified families of low income. No attempt has been made to provide accommodations for all qualified families. The supply of units is limited. The overall plan, when consummated, will provide but 5,856 dwelling units for 23,202 potentially eligible families. Only one out of each four eligible families can be served. In selecting the one and rejecting the three, appellants must of course consider the relative needs of each and the statutory preferences for displaced families, families of disabled veterans and families of veterans and of servicemen.

To these factors, as an additional guide to them in making this selection, appellants have added a policy (not expressed in any statute, state or federal) of limiting these dwelling units to racial *groups* on the basis of the proportionate needs of the *groups*, 70% white and 30% non-white.

In carrying out this policy appellants have devised a neighborhood pattern policy which underscores and emphasizes the inequalities of the proportionate needs policy. Ultimately the housing authority will have about 1,756 units for the 6,899 eligible non-white families. By the time the housing authority had 2,016 units ready for occupancy, but 310 were available for non-white families. White and non-white families were then being served in the proportion of 85% and 15%, respectively, not 70% and 30%. Moreover, within the non-white group, the dwelling units were unequally allotted: 174 to Chinese and 136 to Negroes; i. e., 56% Chinese and 44% Negro, whereas there is evidence that the 6,899 eligible non-white families are "substantially" Negro.

[2] The arbitrary character of such a method of selection is too obvious to require elaboration. It bears no relation to eligibility of the individual. It cuts across and disregards every element which conceivably has any bearing upon eligibility of the individual. It is really an arbitrary method of exclusion, a guaranty of inequality of treatment of eligible "persons."

In justification of these "policies" and of appellants' refusal to admit petitioners and others similarly situated, and of their refusal to admit Negro veterans and their families while admitting non-Negro non-veterans, appellants invoke the "separate but equal" treatment doctrine. That doctrine was enunciated by the Supreme Court of the United States in Plessy v. Ferguson, 1896, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256, in relation to a Louisiana statute, LSA–R.S. 45:528 et seq., which required railway companies to "provide equal but separate accommodations for the white, and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations". 163 U.S. at page 540, 16 S.Ct. at page 1139. The petitioner took a seat in a coach not assigned to his race. He was ordered by the conductor, under penalty of ejection from the train, to vacate that coach and take a seat in a coach assigned to persons of his race. Upon his refusal to comply, he was forcibly ejected, with the aid of a police officer.

Those were the facts. Obviously, they did not present the question whether there would have been compliance with the Louisiana statute and the 14th Amendment if the railway company had refused admission and passage to petitioner because (1) that particular train had no coach or compartment set aside for his race, or (2) the coach or compartment so set aside was already fully occupied by members of his race. It is an essentially similar lack of accommodations which the appellants furnish under their proportionate needs and neighborhood pattern policies. We do not regard the Plessy case as authority for the legal position which appellants take.

A railway passenger case which shows the legal significance of *un*equal treatment is Mitchell v. United States, 1940, 313 U.S. 80, 61 S.Ct. 873, 85 L.Ed. 1201. Mitchell, a Negro, having "paid a first-class fare for the entire journey from Chicago to Hot Springs [Ark.], and having offered to pay the proper charge for a seat which was available in the Pullman car for the trip from Memphis to Hot Springs," was "compelled, in accordance with custom, to leave that car and to ride in a second-class car and was thus denied the standard conveniences and privileges afforded to first-class passengers. This was manifestly a discrimination against him in the course of his interstate journey and admittedly that discrimination was based solely upon the fact that he was a Negro. The question whether this was a discrimination forbidden by the Interstate Commerce Act is not a question of segregation but one of equality of treatment. *The denial to appellant of equality of accommodations because of his race would be an invasion of a fundamental individual right which is guaranteed against state action by the Fourteenth Amendment* (McCabe v. Atchison, T. & S. F. Ry. Co., 235 U.S. 151, 160–162, 35 S.Ct. 69, 70, 71, 59 L.Ed. 169; [State of] Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 344, 345, 59 S.Ct. 232, 234, 83 L.Ed. 208) * * *." (313 U.S. at page 94, 61 S.Ct. at page 876, 85 L.Ed. 1201, emphasis added.)

The slight demand for first-class railway accommodations, on the part of colored people, was no justification for such unequal treatment. "We thought a similar argument with respect to volume of traffic to be untenable in the application of the Fourteenth Amendment. We said that it made the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of that right is that it is a personal one. McCabe v. Atchison, T. & S. F. Ry. Co., supra. While the supply of particular facilities may be conditioned upon there being a reasonable demand therefor, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused. It is the individual, we said, who is entitled to the equal protection of the laws,—not merely a group of individuals, or a body of persons according to their numbers. Id. See, also [State of] Missouri ex rel. Gaines v. Canada, 305 U.S. [at] pages 350, 351, 59 S.Ct. [232] 236, 237, 83 L.Ed. 208." 313 U.S. at page 97, 61 S.Ct. at page 878, 85 L.Ed. 1201.

In the McCabe case the court held invalid that portion of an Oklahoma statute that permitted railway companies to provide sleeping cars, dining cars and chair cars exclusively for white persons with no similar accommodations for Negroes. In support of the statute it was argued that it did not appear that enough Negroes seek these accommodations to warrant the outlay of providing them. This argument the Supreme Court found was without merit: "It makes the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one. Whether or not particular facilities shall be provided may doubtless be conditioned upon there being a reasonable demand therefor; but, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused. It is the individual who is entitled to the equal protection of the laws, and if he is denied by a common carrier, acting in the matter under the authority of a state law, a facility or convenience in the course of his journey which, under substantially the same circumstances, is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded." 235 U.S. 151, 161–162, 35 S.Ct. 71, 59 L.Ed. 169.

In the Missouri case, the petitioner, a Negro, was refused admission to the law school at the state university, because he was a Negro. The state offered to pay his tuition at some nearby school of good standing. The "* * * fact remains that instruction in law for negroes is not now afforded by the State, either at Lincoln University or elsewhere within the State, and that the State excludes negroes from the advantages of the law school it has established at the University of Missouri." at page 345 of 305 U.S., at page 234 of 59 S.Ct., 83 L.Ed. 208. Of the argument that Missouri's offer of scholarships at law schools in the neighboring states afforded substantially equal treatment, the court said: "The basic consideration is not as to what sort of opportunities, other States provide, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies to negroes solely upon the ground of color. The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups within the State. The question here is not of a duty of the State to supply legal training, or of the quality of the training which it does supply, but of its duty when it provides such training to furnish it to the residents of the State upon the basis of an equality of right. By the operation of the laws of Missouri a privilege has been created for white law students which is denied to negroes by reason of their race. The white resident is afforded legal education within the State; the negro resident having the same qualifications is refused it there and must go outside the State to obtain it. That is a denial of the equality of legal right to the enjoyment of the privilege which the State has set up, and the provision for the payment of tuition fees in another State does not remove the discrimination.

"The equal protection of the laws is 'a pledge of the protection of equal laws.' Yick Wo v. Hopkins, 118 U.S. 356, 369, 6 S.Ct. 1064, 1070, 30 L.Ed. 220." 305 U.S. 337, 349–350, 59 S.Ct. 236, 83 L.Ed. 208. As to the limited demand by Negroes for law school training, the court said: "Here, petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws, and the State was bound to furnish him within its borders facilities for legal education substantially equal to those which the State there afforded for persons of the white race, whether or not other negroes sought the same opportunity." 305 U.S. at page 351, 59 S.Ct. 237.

In Sweatt v. Painter, 1949, 339 U.S. 629, 70 S.Ct. 848, 94 L.Ed. 1114, it was found that the legal education offered petitioner at the state law school for Negroes was not substantially equal to that offered white students at the University of Texas Law School. The 14th Amendment guaranteed petitioner "legal education equivalent to that offered by the State to students of other races." 339 U.S. at page 635, 70 S.Ct. at page 851.

In McLaurin v. Oklahoma State Regents, 1949, 339 U.S. 637, 70 S.Ct. 851, 94 L.Ed. 1149, it appeared that appellant was admitted as a graduate student at the University of Oklahoma, but in the classroom was required to sit in a row specified for colored students; in the library, he was assigned a special table; and in the cafeteria he was required to sit at a table apart from other students. "The result is that appellant is handicapped in his pursuit of effective graduate instruction. Such restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession." 339 U.S. at page 641, 70 S.Ct. at page 853. "We conclude that the conditions under which this appellant is required to receive his education deprive him of his personal and present right to the equal protection of the laws." 339 U.S. at page 642, 70 S.Ct. at page 854.

In Henderson v. United States, 1949, 339 U.S. 816, 70 S.Ct. 843, 94 L.Ed. 1302, the question was "whether the rules and practices of the Southern Railway Company, which divide each dining car so as to allot ten tables exclusively to white passengers and one table exclusively to Negro passengers, and which call for a curtain or partition between that table and the others," violated a federal statute which made it unlawful "'to subject any particular person, * * * to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; * * *.'" 339 U.S. at page 818, 70 S.Ct. at page 844.

Appellant was traveling first-class and went to the diner. "In accordance with the practice then in effect, the two end tables nearest the kitchen were conditionally reserved for Negroes. At each meal those tables were to be reserved initially for Negroes and, when occupied by Negroes, curtains were to be drawn between them and the rest of the car. If the other tables were occupied before any Negro passengers presented themselves at the diner then those two tables also were to be available for white passengers, and Negroes were not to be seated at them while in use by white passengers. When the appellant reached the diner, the end tables in question were partly occupied by white passengers but at least one seat at them was unoccupied. The dining-car steward declined to seat the appellant in the dining car but offered to serve him, without additional charge, at his Pullman seat. The appellant declined that offer and the steward agreed to send him word when space was available. No word was sent and the appellant was not served although he twice returned to the diner before it was detached at 9 p. m." 339 U.S. at pages 818–820, 70 S.Ct. at page 844. In holding the statute had been violated, the court said: "The right to be free from unreasonable discriminations belongs under § 3(1), to each particular person. Where a dining car is available tc passengers holding tickets entitling them to use it, each such passenger is equally entitled to its facilities in accordance with reasonable regulations. The denial of dining service to any such passenger by the rules before us subjects him to a prohibited disadvantage. Under the rules, only four Negro passengers may be served at one time and then only at the table reserved for Negroes. Other Negroes who present themselves are compelled to await a vacancy at that table, although there may be many vacancies elsewhere in the diner. The railroad thus refuses to extend to those passengers the use of its existing and unoccupied facilities. The rules impose a like deprivation upon white passengers whenever more than 40 of them seek to be served at the same time and the table reserved for Negroes is vacant.

"We need not multiply instances in which these rules sanction unreasonable discriminations. The curtains, partitions and signs emphasize the artificiality of a difference in treatment which serves only to call attention to a racial classification of passengers holding identical tickets and using the same public dining facility. Cf. McLaurin v. Oklahoma State Regents, [ante], 339 U.S. [at page] 637, 70 S.Ct. 851, [94 L.Ed. 1149, decided today]." 339 U.S. at pages 824–825, 70 S.Ct. at page 847, 94 L.Ed. 1302.

Although in the Henderson and the Mitchell cases, the court was applying a statute, not the 14th Amendment, the impact of the statute was similar to that of the Amendment and the court in formulating its decision used the same process of reasoning as that followed in the McCabe, the Missouri, the McLaurin, and the Sweatt cases, each a 14th Amendment case.

We find in these decisions full support for the judgment appealed from, none for the position taken by appellants.

There is another line of decisions which tends toward the same end. Buchanan v. Warley, 1917, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149, involved a city ordinance which (operating prospectively, not retroactively) forbade any Negro occupancy of a house in any block where the greater number of houses were occupied by white persons. Conversely, it forbade white occupancy of a house in a block where the greater number of houses were occupied by Negroes. Plaintiff, a white person, was suing defendant, a Negro, for specific performance of a contract of sale of a lot in a block in which the majority of houses were occupied by white persons. The sale was contingent upon the buyer having the right to occupy the property as a residence. Plaintiff successfully claimed that the ordinance exceeded the limitations of the 14th Amendment. Property is more than a mere thing owned, "it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property." 245 U.S. at page 74, 38 S.Ct. at page 18. The prohibition expressed in this ordinance was "based wholly upon color; simply that and nothing more." 245 U.S. at page 73, 38 S.Ct. at page 18.

The Buchanan ruling was followed in Harmon v. Tyler, 1926, 273 U.S. 668, 47 S. Ct. 471, 71 L.Ed. 831, reversing Tyler v. Harmon, 160 La. 943, 107 So. 704, relative to an ordinance which forbade the issuance of a building permit for construction of a residence for a Negro in a "white community" or for a white person in a "negro community" without the written consent of a majority of the persons of the opposite race inhabiting the "community or portion of the city to be affected." The ordinance also imposed penalities upon any person who established his home in a community inhabited principally by members of the opposite race, in the absence of written consent of a majority of the latter.

City of Richmond v. Deans, 4 Cir., 1930, 37 F.2d 712, 713, affirmed a judgment which enjoined enforcement of an ordinance prohibiting any person from using as a residence any building on any street between intersecting streets where a majority of the residences are occupied by "those with whom said person is forbidden to intermarry". The legal prohibition of intermarriage was itself based on race. The trial court held the ordinance void as a violation of the 14th Amendment. The Circuit Court of Appeals agreed, deeming the question identical with that which was decided in the Buchanan and the Harmon cases. The Supreme Court affirmed upon the authority of those two cases. 281 U.S. 704, 50 S.Ct. 407, 74 L.Ed. 1128.

Shelley v. Kraemer, supra, 1948, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161, involved restrictive covenants against non-white use, occupancy or ownership of certain properties. It was held that although the 14th Amendment did not proscribe private action in the making of these covenants, it did prohibit the state from participating therein by enforcing the restrictions expressed in the covenants. The court expressly reaffirmed the position it had taken in the Buchanan, Harmon, and Richmond cases. These observations in the Shelley case are quite significant: "We have noted that previous decisions of this Court have established the proposition that judicial action is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common-law policy. Nor is the Amendment ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement. State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands.

"We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand. We have noted that freedom from discrimination by the States in the enjoyment of property rights was among the basic objectives sought to be effectuated by the framers of the Fourteenth Amendment. That such discrimination has occurred in these cases is clear. Because of the race or color of these petitioners they have been denied rights of ownership or occupancy enjoyed as a matter of course by other citizens of different race or color." 334 U.S. at pages 20–21, 68 S.Ct. at page 845. These statements have added significance, in our case, when read with the further observation that "it would appear beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment." 334 U.S. at page 22, 68 S.Ct. at page 846.

[3] In our case it appears, in a very real sense of the term, that the state through the appellant housing authority "creates" property interests whenever it executes a lease with an applicant for one of its dwelling units. The right so to do must be "exercised within the boundaries of the Fourteenth Amendment." But it is not necessary to rest our decision on that ground. Whether or not it be a property right which the housing authority "creates and enforces," the state is engaged in furnishing suitable housing accommodations to low income families. This, of course, it must do within the boundaries of the 14th Amendment. As said in the Missouri case, "The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the

equality of the privileges which the laws give to the separated groups within the State. The question here is not of a duty of the State to supply legal training, or of the quality of the training which it does supply, but of its duty when it provides such training to furnish it to the residents of the State upon the basis of an equality of right." 305 U.S. 337, 349, 59 S.Ct. at page 236, 83 L.Ed. 208. We need only substitute "administrative regulations" for "laws" and "housing accommodations" for "legal training" to make the pronouncement last quoted fit our case perfectly. Appellants by reason of their proportionate racial needs and neighborhood racial pattern policies are not furnishing and have prevented themselves from furnishing housing accommodations to persons of low income "upon the basis of equality of right."

Perhaps a few words should be added concerning appellants' "neighborhood pattern policy." They are exercising state power to preserve, perpetuate, and enforce a neighborhood racial pattern wherever they decide to locate and build a housing project. In some instances that pattern may have been created and maintained, until now, by the very type of restrictive covenants which the state, through its judicial branch, is prohibited from enforcing. See Shelley v. Kraemer, supra, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161. What sort of a 14th Amendment might it be that would, at the same time, countenance active sponsorship and fostering of such restrictions by the executive branch of the state or local government?

However, a "pattern" may have developed and become established (whether by way of restrictive covenants, the development of ghetto conditions through economic pressures, or otherwise) the legislative branch may not enforce the pattern, as we have seen in the Buchanan, Harmon, and Richmond cases. Particularly apt in this connection is the recent case of City of Birmingham v. Monk, 5 Cir., 1951, 185 F.2d 859, certiorari denied by Supreme Court, 341 U.S. 940, 71 S.Ct. 1001, 95 L.Ed. 1367. It involved a city ordinance which made it unlawful for Negroes to reside in areas zoned as white residential or for whites to reside in Negro residential zones. Such provisions exceeded the limitations imposed on state action by the 14th Amendment and were, therefore, void. Of especial interest to us is the fact that the zoning was based upon neighborhood patterns of a sort. For example, the ordinance made it a misdemeanor for a member of the colored race to move into and reside in "'an area in the City of Birmingham generally and historically recognized at the time as an area for occupancy by members of the white race.'" 185 F.2d at page 860.

[4] Nor may the executive branch of government observe, encourage, and foster a neighborhood racial pattern when, as here, such a course of conduct results in unequal treatment of persons otherwise eligible to receive and obtain the housing accommodations which the housing authority was created to furnish on behalf of the state.

Appellants place considerable reliance upon Favors v. Randall, D.C.E.D.Pa. 1941, 40 F.Supp. 743. The court in that case did find that a local housing authority's selection of tenants, between the white and colored races, in conformity with a neighborhood pattern, did not exceed constitutional limitations. The complainants were asking for a preliminary injunction restraining the housing authority from certifying certain tenants to a certain project on the basis of color or race and from certifying any further tenants to that project during the pendency of the action. Although the opinion indicates the court recognized the basic requirement of equality of treatment it does not clearly indicate that the court's attention was pointedly directed to the fact that the rights of "persons," not groups, were involved under the 14th Amendment. The rationale of the decision seems to be that upon the basis of the facts before it the court felt that the questioned method of selection would work out equitably between the two groups, white and colored; indeed, that the colored group would obtain more housing units than its proportionate needs called for. That, as we have seen, is not the kind of "equal" treatment which the 14th Amendment requires. Moreover, the reported decision indicates that the only action taken by the court was to deny a motion for a preliminary injunction. Any court might well deny a preliminary injunction of the kind there involved and yet come to a quite different conclusion after a trial on the merits. The Favors case does not persuade us to a different view than that which we have expressed concerning appellants' proportionate racial needs and neighborhood racial pattern policies.

Those policies may also run counter to certain provisions of our State Constitution. (See art. I, § 1; the due process clause of § 13 of art. I; and the second or concluding clause of § 21 of art. I.) However, the parties have not discussed this question in their briefs. For that reason and in view of our conclusion in respect to the 14th Amendment, we need not consider it.

(2) *The bearing, if any, of a state public policy upon the type of segregation under inquiry,* need not be considered, in view of our conclusion concerning the applicability and impact of the 14th Amendment.

(3) *Likewise, the applicable public policy, if any, of the city and county of San Francisco need not be considered.*

No inference is to be drawn that we consider that the segregation policies under inquiry are sanctioned either by a state or by a local public policy.

[5] (4) *As to the eligibility of petitioners, Banks and Charley,* appellants take the position (as parties defendant) of tendering that issue to the trial court for decision in this action and yet of claiming that because the executive director of the housing authority (after suit filed and to enable appellants to answer the petition) made a secret investigation as a result of which he made an ex parte determination that these petitioners are ineligible for any dwelling units, and that under the circumstances of this case, the trial court was without power to overrule that determination and itself decide the issue of eligibility. It necessarily follows, appellants contend, that Banks and Charley were not entitled to bring this action in their own behalf or in behalf of others; hence, judgment should be in favor of appellants and against petitioners including all persons whom petitioners claimed to represent.

Strange would it be if the law committed to a defendant the determination of a plaintiff's capacity to sue, without power in the trial court to make its own determination under the circumstances disclosed in this case.

How did such an inconsistent set of issues arise?

Petitioners alleged that "each of them is in every respect and manner eligible for admission to said * * * housing development; that they have applied for admission thereto and have complied with all known rules and regulations governing admission of tenants * * * that they are willing to comply with all reasonable rules and regulations respecting admission of tenants * * * That respondents [appellants upon this appeal] have arbitrarily refused and do now refuse to admit petitioners or certify petitioners for admission to occupancy of any of said housing developments, except Westside Court, solely because of their race and color and for no other reason." (Paragraph VI of the petition.)

Answering the allegations of said paragraph VI, appellants admitted that Banks and Charley had applied for rental of accommodations in the North Beach project but denied "generally and specifically, each and every, all and singular, the other allegations set forth in Paragraph VI of such petition; and in this respect respondents [appellants] allege that respondents [appellants] investigated the claims of each petitioner, a party hereto, for the purpose of verifying each such claim and, upon such investigation, respondents [appellants] found and concluded that no petitioner named herein is eligible for admission to any permanent low rent housing development." (Paragraph V of the answer to the petition.)

Did the appellants thereby present for "judicial review" an administrative decision concerning the eligibility of the petitioners, an administrative decision calculated to determine the capacity of the petitioners to sue unless annulled in due course as the result of judicial review.

Their pleading does not read that way. The alleged investigation and determination were made after the filing of the petition, not before. Appellants say in their opening brief "it was necessary to investigate * * * to enable the Housing Authority to prepare an answer." Their pleading comports with that statement, for they allege that *all* of the appellants "investigated" and "found and concluded." That speaks of them as parties-defendant, not as an administrative agency or tribunal making a determination in the due exercise of its functions as such, for it embraces all of them, the several members and the executive officer of the housing authority as well as the housing authority itself. It reasonably may be interpreted as but a supplemental statement in explanation of their denial of the allegation of eligibility, tendered by the petitioners and the appellants as an issue for the court to decide.

The alleged investigation was conducted by the appellant executive director who concluded, upon the basis of information he obtained from various sources, that Banks and Charley were not eligible. In that process he neither consulted the petitioners nor confronted either of them with any of the information he had obtained nor notified them that the investigation was under way. In view of those circumstances, and the pleadings, we do not have here a case of judicial review of an administrative proceeding.

[6] At the trial the court heard the evidence offered by both sides and came to a different conclusion concerning eligibility. His findings thereon are supported by substantial evidence and we see no basis for a reviewing court to undertake to substitute its judgment for that of the trial judge on that issue.

Significant, too, is the form of the judgment rendered on that issue. The court did not undertake to declare the petitioners eligible for all time, under all circumstances, for any and all dwelling units under any and all conditions.

Instead, the court ordered that the writ of mandate direct the appellants to certify petitioners, Banks and Charley, "for admission to any units in any public low rent housing development under respondents' [appellants'] ownership and control *subject only to the same rules, regulations and preferences applicable to other applicants, and without regard to race or color.*" (Emphasis added.) This, we think, is wise and proper provision. It declares and preserves the petitioners' basic rights and privileges without hampering the appellant housing authority in the due exercise of its functions under the laws and regulations governing the administration of the housing projects entrusted to its care.

The trial judge indicated that such was his intent. During a discussion at the close of the trial he said in part, "I could not grant a writ of mandate ordering the Housing Authority to admit, at this time, these two petitioners [there were, for example, a sufficient number of applicants who were veterans to fill the existing vacant units], but I do believe the writ of mandate should be directed * * * directing the Housing Authority to certify them for admission in accordance with the rules and regulations of the Housing Authority and the law as governing the operation of the Housing Authority, without regard to restrictions because of color"; also, that appellants "have the right to exercise a reasonable discretion as to who are fit and proper reasonable risks; otherwise there would be hardly anything for them to do except to take them as they come. And I don't believe that it is the purpose and intent of the statute, to take any one, regardless of who or what they are. I think it is the intent of our laws in the country today to take them, however, without regard to color."

[7, 8] (5) *Appellants claim that the failure to join the city and county of San Francisco and the federal Public Housing Administration as parties defendant renders the judgment void for nonjoinder of indispensable parties.*

As to the city and county of San Francisco, this claim is predicated upon the cooperation agreement between the city and county and the appellant housing authority whereby the proportionate needs and neighborhood pattern policies are in effect approved as to the seven projects already in operation but disallowed as to projects initiated after July 15, 1949. The trial court, in this action, did not pass upon the validity of that contract as such. Moreover, it appears in evidence that the board of supervisors approved the continuation of these policies as to those projects only after the board was advised that the housing authority had the right to insist upon such continuance, coupled with the fact that the housing authority did so insist.

As to the federal Public Housing Administration, this claim is predicated upon the fact that in the documents upon the basis of which the Public Housing Administration makes federal moneys available to the appellant housing authority the racial policies of the latter were in effect approved by the Public Housing Administration. The trial court in this action did not pass upon those documents nor adjudicate the rights of the Public Housing Administration based thereon. We have examined the Annual Contributions Contract between the appellant housing authority and the Public Housing Administration. In that document, the housing administration states that the selection of tenants and the assignment of dwelling units are primarily matters for local determination, emphasizes the need for equitable provision for eligible families of all races determined on the approximate volume and urgency of their respective needs for such housing, and declares that urgency of need and the preferences prescribed in the Federal Housing Act of 1949 are the basic statutory standards for the selection of tenants. We do not perceive that that document sets up a relationship which makes the Housing Administration an indispensable party to this action.

In addition, the appellant housing authority is the responsible administrator of the properties involved, clothed with authority to deal with tenants and prospective tenants, in and out of court, without any apparent need for the city and county or the Public Housing Administration actively to participate in those dealings or in litigation which may grow out of them.

We do not find in the record anything which demonstrates that a "complete determination of the controversy cannot be had without the presence of other parties". (See Code of Civ.Proc., § 389.) We conclude that the principles enumerated in Bank of California v. Superior Court, 16 Cal.2d 516, 523–524, 106 P.2d 879, apply.

[9] (6) *This is a representative or class suit which petitioners, Banks and Charley, properly brought* for their own benefit and for the benefit of the many other persons who are similarly interested, particularly including members of the Negro race eligible or potentially eligible for admission to permanent low rent housing in San Francisco who have been denied admission solely on the basis of race.

A detailed discussion of the applicable legal principles is unnecessary in view of the decisions in Williams v. International etc. of Boilermakers, 27 Cal.2d 586, 165 P.2d 903; Thompson v. Moore Drydock Co., 27 Cal.2d 595, 165 P.2d 901; James v. Marinship Corp., 25 Cal.2d 721, 155 P.2d 329, 160 A.L.R. 900; Heffernan v. Bennett & Armour, 110 Cal.App.2d 564, 589–595, 243 P.2d 846.

[10] (7) *We find no merit in appellants' contention that mandamus being an extraordinary remedy, is not available in this case.* Mandamus has issued in many cases involving actions against a city or other public body. It was said in Housing Authority v. City of Los Angeles, 38 Cal.2d 853, 870, 243 P.2d 515, 524, that "the court is not bound by precedent in determining what facts and circumstances compel the issuance of the writ but that the writ will issue as against a city or other public body or officer wherever law and justice require such action." See also Walker v. City of San Gabriel, 20 Cal.2d 879, 881, 129 P.2d 349, 142 A.L.R. 1383; Eby v. Trustees of Red Bank School Dist., 87 Cal. 166, 177, 25 P. 240; Roussey v. City of Burlingame, 100 Cal.App.2d 321, 326, 223 P.2d 517; Stone v. Board of Directors of City of Pasadena, 47 Cal.App.2d 749, 754, 118 P.2d 866.

The judgment appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.

41 Cal.2d 344

ALVES v. PUBLIC UTILITIES COMMISSION OF CALIFORNIA et al.

S. F. 18496.

Supreme Court of California, in Bank.
Aug. 14, 1953.

Rehearing Denied Sept. 10, 1953.

Proceeding on writ of review to determine sufficiency of evidence to support order of Public Utilities Commission ordering carrier to cease and desist operating without certificate as highway common carrier between fixed termini and suspending permits to operate as radial highway common carrier and as a highway contract carrier. The Supreme Court, Edmonds, J., held that where carrier could transport goods as a contract carrier between fixed termini or over a regular route he could not carry same commodities between same points as contract carrier and as common carrier.

Order annulled.

Traynor, J., Gibson, C. J., and Spence, J., dissented.

1. Carriers 🔑4

That a carrier served all profitable business generally without contractual arrangements, and without limiting type or weight of product carried, and did not limit the number of shippers served, showed intent of carrier to dedicate his property to public use. Public Utilities Code, §§ 201 et seq., 3501 et seq.

2. Carriers 🔑3

A carrier that made almost daily shipments between two cities operated between fixed termini.

3. Automobiles 🔑106, 107(2)

Where Public Utilities Commission found that carrier which held radial highway common carrier permit and highway contract carrier permit operated as highway common carrier between fixed termini, but did not find that he conducted specified common carrier operations between fixed termini, findings did not justify order directing carrier to cease operating as highway common carrier between fixed termini and suspending permits to operate as radial highway common carrier and as highway contract carrier. Public Utilities Code, §§ 213, 215, 3501 et seq., 3513, 3516, 3517, 3542.

4. Automobiles 🔑104

Where carrier held radial highway common carrier permit and highway contract carrier permit, he could engage in both common and contract carriage, so long as same commodities were not carried between same points in both capacities. Public Utilities Code, § 3542.

◆

Marquam C. George, Oakland, for petitioner.

Everett C. McKeage and J. Thomason Phelps, San Francisco, for respondents.

EDMONDS, Justice.

The Public Utilities Commission instituted an investigation on it own motion into the operations and practices of Walter Alves, doing business as Alves Service Transportation. Following a hearing, the commission entered its order directing Alves to cease and desist from operating as a highway common carrier between certain designated cities unless and until he obtained a certificate of public convenience and necessity. The order also suspended his permits to operate as a radial highway common carrier and as a highway contract carrier until further order of the commission upon a showing of good cause.

In its opinion, the commission said: "Having carefully examined respondent's testimony in its entirety, we conclude that his operations are those of a common carrier. It is clear that the only restrictiveness placed upon such operations is controlled by the limitations of respondent's equipment and his desire to hold in reserve equipment adequate to meet the requirements of so-called regular customers. This, in our opinion, is not sufficient to remove the operations from a common carrier status."

At the time of the opinion and order, this court had not decided Souza v. Public Utilities Comm., 37 Cal.2d 539, 233 P.2d 537, and Samuelson v. Public Utilities Comm., 36 Cal.2d 722, 227 P.2d 256. Following the decision in the Samuelson case, the commission granted Alves a rehearing for the purpose of considering its applicability, if any, to the issues determined by the order against him. Pending rehearing, the Souza case also was decided. On rehearing, the commission entered a new order requiring Alves to cease and desist from operating without a certificate as a highway common carrier between designated fixed termini. The listing of prohibited termini was altered from that in the original order. The order on rehearing also suspended Alves' permits to operate as a radial highway common carrier and as a highway contract carrier, but the term of suspension was set at three days.

The opinion on rehearing took cognizance of the Samuelson and Souza cases. Abandoning the ground of "restrictiveness" upon which it had relied in its original opinion, the commission stated: "We are aware that the court in the Samuelson and Souza cases (supra) rejected the test of 'substantial restrictiveness' for determining whether a trucker is a common carrier, and of course we respect and accept its judgment. However, the evidence in this proceeding amply demonstrates that the respondent has held out his services to the public or a portion thereof as is indicated by the wide variety of commodities he transported, shipments of which ranged in weight from one pound to 198,180 pounds, and the large number of persons he served in addition to the one shipper with whom he had a written contract and four others with whom he had oral arrangements. This record cogently establishes that the respondent has evinced the unequivocal intention to dedicate his property to a public use required by the court's ruling in the Samuelson and Souza cases (supra), and we therefore find that the respondent is engaged in common carriage."

In the present proceeding, Alves, by writ of review, is challenging the jurisdiction of the commission to curtail his operations. The controversy centers upon the sufficiency of the evidence to support its order.

There is no serious dispute as to the facts. Briefly stated, they are as follows:

Alves commenced business in 1946 with two trucks. At present, his fleet consists of 14 tractors, 14 semitrailers, and two "bob-tail" trucks. At all times since 1946 he has held radial highway common carrier and highway contract carrier permits. He has never held, nor applied for, a certificate of public convenience and necessity to operate as a highway common carrier.

He maintains offices, with facilities for parking equipment, in San Leandro and Los Angeles. Although he operates on no fixed schedule, his trucks carry almost daily shipments between the San Francisco Bay area and the Los Angeles area in both directions. The shortest route between the point of departure and the destination is used. Besides his frequent service between the San Francisco and Los Angeles areas, he transports goods to a large number of other points throughout the state.

According to Alves, he does not solicit any business or advertise, although his name appears in the classified section of the telephone directory. During the first six months after he commenced business, about ten persons tendered property to him for transportation. In 1948, his customers consisted of at least 27 different persons or corporations. He added ten more shippers in 1949 and another six in 1950. He has a written contract with only one of these customers. With four others he has oral contracts, although in at least two instances there is some dispute as to whether the oral agreement constitutes a binding contract. His list of customers is variable, some being dropped and some being added from time to time. Shipping orders are accepted by telephone. The evidence reasonably would support a finding that he accepts new customers within the limits of his equipment, and that any refusals to carry goods have been based upon economic considerations.

He apparently is willing to carry any type of freight. His shipments range in weight from one pound to 198,180 pounds and in type from fresh flowers to heavy machinery. The equipment which he uses is similar to that of other carriers, rather than being of any specialized type to meet the needs of particular customers.

Alves contends that he does not operate as a highway common carrier, nor does he operate between fixed termini or over a regular route. The evidence, he says, is insufficient to sustain the finding that he has dedicated his property to a public use. In addition, he argues that the suspension of his permits was arbitrary, unreasonable, and an abuse of discretion. By its answer to his petition, the commission disputes each of these contentions.

The situation here presented is entirely different from that in the Samuelson and Souza cases, supra, upon which Alves relies. Samuelson was operating under only a highway contract carrier permit. His operations were restricted to an arbitrary limit of 30 shippers at any one time. He had served only 47 shippers during his entire period of operations. He did not solicit business and he limited the type of freight which he would carry. With all shippers he had written or oral contracts. The commission issued a cease and desist order upon the ground that Samuelson was not conducting his business with "substantial restrictiveness". This court annulled the order because there was no showing that Samuelson unequivocally intended to dedicate his property to a public use. We said: "The 'substantial restrictiveness' doctrine excludes this intention, or at least reduces it to only incidental importance." 36 Cal.2d at page 733, 227 P.2d at page 262.

In the Souza case a substantially similar situation was presented, although Souza was operating under both radial highway common carrier and highway contract carrier permits. From the record, however, it appeared that he had not operated as a common carrier, despite the fact that he had a permit to do so. This court for the same reasons as those stated in the Samuelson case, annulled the commission's order suspending his permits. We held it unnecessary to consider the question whether the commission could properly refuse to separate a permittee's common carrier operations from his contract carrier business.

[1, 2] In the instant case, however, there is evidence of a large scale and growing enterprise serving all profitable business offered within the limitations of its equipment. The vast majority of shippers are served without contractual arrangements. No limit is placed on the type, or weight, of product carried. It does not appear that any profitable business was refused, or that any limit was placed upon the number of shippers served. From such evidence, the commission reasonably could conclude that Alves unequivocally intended to dedicate his property to a public use. The evidence of frequent service between certain cities is also sufficient to support a finding that, at least as to some of his business, he operated between fixed termini.

But even if Alves was operating as a common carrier, he held a valid permit entitling him to do so. There is also evidence tending to prove that, in addition to common carriage, he was operating as a highway contract carrier, for which he likewise held a permit. It becomes important, therefore, to distinguish carefully between the various types of operation which Alves might have conducted.

The Highway Carriers' Act, Stats.1935, ch. 223, p. 878, as amended; 2 Deering's Gen.Laws, 1949 Supp., Act 5129a; repealed by Stats.1951, ch. 764, pp. 2025, 2257–2258; now Pub.U.C. § 3501 et seq., at the time of the commencement of this proceeding contained the following definitions:

"The term '*highway common carrier*' when used in this act means every highway carrier operating as a common carrier subject to regulation as such by the Railroad Commission under the Public Utilities Act of the State of California as amended." § 1(g); now Pub.U.C. § 3513.

"The term '*radial highway common carrier*' when used in this act means every highway carrier operating as a common carrier not heretofore subject to regulation as such by the Railroad Commission under the Public Utilities Act of the State of California, as amended." § 1(h); now Pub.U.C. § 3516.

"The term '*highway contract carrier*' when used in this act means every highway carrier other than a highway common carrier as defined in subsection (g) and every radial highway common carrier as defined in subsection (h)." § 1(i); now Pub.U.C. § 3517.

Section 2¾ of the Public Utilities Act, Stats.1915, ch. 91, p. 115, as added by Stats. 1935, ch. 664, p. 1831, as amended; 2 Deering's Gen.Laws, 1949 Supp., Act 6386; repealed by Stats.1951, ch. 764, pp. 2025, 2257; now Pub.U.C. § 201 et seq., provided these further definitions:

"The term 'highway common carrier' when used in this act means every corporation or person, * * * operating * * * any auto truck * * * used in the business of transportation of property as a common carrier for compensation over any public highway in this State between fixed termini or over a regular route, * * *." § 2¾(a); now Pub.U.C. § 213.

"The words 'between fixed termini or over a regular route' when used in this act mean the termini or route between or over which any highway common carrier usually or ordinarily operates any auto truck * * * even though there may be departures from said termini or route, whether such departures be periodic or irregular. Whether or not any auto truck * * * is operated by a highway common carrier 'between fixed termini or over a regular route' within the meaning of this act shall be a question of fact and the findings of the commission thereon shall be subject to review." § 2¾(b); now Pub.U.C. § 215.

Reading these various definitions as a whole, the following pattern of possible types of transportation appears. A "highway common carrier * * * subject to regulation as such" by the Public Utilities Commission is a highway carrier transporting "property as a common carrier for compensation * * * between fixed termini or over a regular route". A common carrier by auto truck which does not operate between fixed termini or over a regular route is a "radial highway common carrier". Thus, the difference between two possible types of common carriage is dependent upon whether it is performed "between fixed termini or over a regular route". The third possible type of highway carriage with which we are concerned is the "highway contract carrier", defined by exclusion as every highway carrier which is not a common carrier operating between fixed termini or over a regular route. In other words, if it does not operate as a common carrier, the highway contract carrier may operate between fixed termini or over a regular route.

[3] Alves held permits to operate both as a radial highway common carrier and as a highway contract carrier. Thus, under the quoted statutory definitions, he legally could operate as a common carrier; he could also transport goods as a contract carrier between fixed termini or over a regular route. But he could not operate as a common carrier between fixed termini or over a regular route. The commission has entirely ignored this essential distinction. Although it found that Alves operated as a highway common carrier between fixed termini and over regular routes, it did not find that he conducted specified common carrier operations between certain fixed termini. The specific findings are simply that he operated as a common carrier and that he operated between certain fixed termini.

In a supplemental brief, filed at the request of this court, the commission states that it treated the problem "as having two parts", each of which it resolved separately. It first determined whether Alves was operating as a common carrier, without regard to the termini served. Then, assuming "that the carrier's operations are those of a common carrier", it determined whether he operated between particular pairs of termini, or over particular routes.

According to the commission, it "does not claim that the evidence in the present record warrants a finding that operations between any particular pair of termini, * * * considered apart from the rest, were those of a common carrier". It states: "Having found that * * * [Alves'] business, considered as an undifferentiated whole, was that of a common carrier, and having then found that some of his operations were between fixed termini and over regular routes, the Commission considered that * * * [his] operations between those termini and over those routes were those of a common carrier." In effect, the commission concedes that there is no evidence which would support a finding that Alves transported property as a common carrier between fixed termini or over a regular route.

The commission apparently is relying upon the rule which it laid down in Pacific Southwest Railroad Association v. Stapel, 49 Cal.P.U.C. 407. It there said that it will not consider a carrier's operations in segments. If a carrier operates a portion of an integrated business as a common carrier, and another portion of its business as a contract carrier between fixed termini, applying the rule of the Stapel case, the commission will combine the entire business to find that the carrier is operating as a common carrier between fixed termini. Such a rule is arbitrary and unreasonable, at least as applied to a carrier holding both radial highway common carrier and highway contract carrier permits. By the Stapel rule, as to such a carrier, legal operation under each permit would constitute illegal operation as a highway common carrier.

[4] In this case, there being no evidence of operations between fixed termini as a common carrier, application of the Stapel rule contravenes section 4 of the Highway Carriers' Act. Stats.1935, ch. 223, p. 878, as amended; 2 Deering's Gen. Laws [1943], Act 5129a; repealed by Stats. 1951, ch. 764, pp. 2025, 2257–2258; now Pub.U.C. § 3542. It provided: "No person or corporation shall be permitted by the Railroad Commission to engage, nor shall any person or corporation engage in the transportation of property on the public highway, both as a common carrier and as a highway contract carrier of the same commodities between the same points." The clear implication of the statute is that a carrier may engage in both common and contract carriage, so long as the same commodities are not carried between the same points in both capacities. Whether Alves has violated the stated restriction has not been decided by the commission, and the evidence does not tend to show any such violation.

The order is annulled.

SHENK, CARTER and SCHAUER, JJ., concur.

TRAYNOR, Justice (dissenting).

Alves has permits under which he may legally operate both as a radial common carrier and as a highway contract carrier. Under these permits he may operate as a contract carrier between fixed termini or over regular routes; he may not do so, however, as a common carrier. Since part of his operations are between fixed termini, the question presented is whether there is substantial evidence to support the commission's finding that he conducts these operations as a common carrier rather than as a contract carrier. Since the commission concedes that the evidence would not support a finding "that operations between any particular pair of termini, * * * *considered apart from the rest,* were those of a common carrier," the majority opinion concludes that there is no evidence to support the commission's finding. (Italics added.) In this case, however, the determination of the character of the carriage between any particular pair of termini cannot be made by considering such carriage by itself.

In Samuelson v. Public Utilities Commission, 36 Cal.2d 722, 733, 227 P.2d 256, 262, the court stated that "the common law test of common carriage * * * requires an unequivocal intention to dedicate property to a public use." See also, Souza v. Public Utilities Comm., 37 Cal.2d 539, 543, 233 P.2d 537. As the majority opinion points out, this intent may be manifested by the manner in which the business is conducted: "In the instant case, however, there is evidence of a large scale and growing enterprise serving all profitable business offered within the limitations of its equipment. The vast majority of shippers are served without contractual arrangements. No limit is placed on the type, or weight, of product carried. It does not appear that any profitable business was refused, or that any limit was placed upon the number of shippers served. From such evidence, the commission reasonably could conclude that Alves unequivocally intended to dedicate his property to a public use." If consideration is restricted, however, to a particular segment of the business, it may be impossible to determine what the carrier's intent is. Thus as between a given pair of termini, the carriage, although regular, may be for so few shippers that it cannot be determined whether the carrier is selecting his clientele, or in reality holding himself out to serve the public generally. In such cases only by looking to the overall plan of the carrier's operations can it be determined on what basis he is operating the limited segments thereof. Thus if it appears from the overall operations that the business is being conducted on a common carrier basis, it is reasonable to infer that the regular carriage between each pair of termini is being conducted in the same manner.

To permit this inference to be drawn does not result in denying a carrier having both radial common carrier and highway contract carrier permits the right to conduct both types of business. By implying that it does, the majority opinion confuses the question of what types of operations are legally permissible with the question of how the existence of any given type may be proved. If in fact the operations between fixed termini or over regular routes are conducted on a contract rather than on a common carrier basis, the carrier should have no difficulty in so showing. In the present case, however, the evidence of the character of the operations between each pair of termini, when considered alone, is equivocal. Alves has not demonstrated that his method of operation between fixed termini differs from his method of operation in general. Accordingly, the commission was justified in concluding that the general pattern of common carrier operation that appeared from Alves's business when considered as a whole, established that his operations between fixed termini were of the same sort.

I would affirm the order.

GIBSON, C. J., and SPENCE, J., concur.

Rehearing denied; GIBSON, C. J., and TRAYNOR and SPENCE, JJ., dissenting.

---

41 Cal.2d 392

NOLAN v. PUBLIC UTILITIES COMMISSION et al.

S. F. 18639.

Supreme Court of California, in Bank.

Aug. 18, 1953.

Rehearing Denied Sept. 10, 1953.

Proceeding in certiorari to review order of Public Utilities Commission requiring carrier to cease and desist from operating without highway common carrier certificate from San Francisco to Oakland, Newark and San Jose. The Supreme Court, Edmonds, J., held that where carrier secured contracts with regular customers as a device to hide fact that his expanding radial highway common carriage had become highway common carriage, the contracts did not remove his operations from common carrier status.

Order affirmed.

1. Automobiles ⟹107(2)

Where motor carrier operated for two years with only a radial highway common carrier permit, and then secured a highway contract carrier permit, but continued for another 18 months to operate exclusively as a common carrier, evidence was sufficient to sustain finding of Public Utilities Commission that he operated as a common carrier. Public Utilities Code, § 3516.

2. Carriers ⟹4

By posing as a contract carrier a common carrier cannot evade the statutes designed to regulate its operations.

3. Carriers ⟹18(1)

The status of carrier is primarily a question of fact in each case and in certiorari proceeding to review order the Supreme Court will not disturb conclusion of Public Utilities Commission upon this question when it is based upon sufficient evidence.

4. Carriers ⟹4

The element of intent is a primary factor in determining character of carriage.

5. Automobiles ⟹76

Where carrier served his customers under radial highway common carrier permit until their shipments between any points became so frequent as to be considered highway common carriage between fixed termini, and then he entered into mutually binding contracts with customers and hauled their freight under his highway contract carrier permit, his operations, whether by contract or radial highway common carrier permit, were common carriage. Public Utilities Code §§ 213, 215, 3516.

6. Automobiles ⚷76

Where carrier daily transported freight between designated cities which were the ends of transportation lines which he operated, the cities were termini of daily shipments and "fixed termini" between which a highway common carrier operates. Public Utilities Code, § 215.

See publication Words and Phrases, for other judicial constructions and definitions of "Fixed Termini".

7. Automobiles ⚷76

Where carrier accepted all shipments pre-paid or collect as a common carrier, Public Utilities Commission's conclusion that he held out his services to consignees of shipments who paid collect freight charges, did not adversely affect Commission's determination that his status was that of highway common carrier. Public Utilities Code, §§ 213, 215, 3516.

◆

Marquam C. George, Oakland, for petitioner.

Everett C. McKeage, Boris H. Lakusta and John K. Power, San Francisco, for respondents.

EDMONDS, Justice.

The Public Utilities Commission instituted an investigation on its own motion into the operations and practices of Glen D. Nolan, doing business as Colma Drayage. Following a hearing, the commission entered its order directing Nolan to cease and desist from operating as a highway common carrier between a large number of designated cities unless and until he obtained a certificate of public convenience and necessity. The order also suspended his permits to operate as a radial highway common carrier and as a highway contract carrier. Thereafter, the commission granted Nolan's petition for a rehearing. Upon further consideration of the evidence, the commission entered a new order requiring Nolan to cease and desist from operating without a certificate as a highway common carrier from San Francisco to Oakland, Newark and San Jose, respectively. The new order did not suspend his existing permits. By the present proceeding in certiorari Nolan is challenging the commission's action.

The facts are not in dispute and may be summarized as follows:

When Nolan commenced operations in the early part of 1946, he applied for and received a radial highway common carrier permit. At that time, he was unfamiliar with the highway contract carrier permit provisions of the statute.

Beginning with one truck and one principal customer, Nolan gradually expanded his business. At present, he operates five pieces of equipment, driving one of the trucks himself. Service between certain cities became increasingly frequent, and, at the time of the hearing, was being rendered daily from San Francisco to Oakland, Newark and San Jose.

The only evidence that Nolan ever refused a new account is based upon transactions subsequent to the beginning of this investigation. The record shows that he now has about 20 to 25 regular customers and regularly accepts shipments from others who offer them. When asked why he refused certain accounts after the commencement of this investigation, he explained: "Well, I have been in the trucking business to go ahead, but they don't seem to want to let us, seem to run into trouble if you take too much freight, that is what they tell me."

Until 1948, Nolan operated exclusively under his permit as a radial highway common carrier. In January of that year when, as he put it, "I started hearing all this dope about a guy being out of line", he obtained a permit as a highway contract carrier. However, not until June, 1949, did he enter into any transportation contracts. Each of the 19 contracts which he secured about that time was with a shipper whom he had served previously in his capacity as a common carrier. Some of the contracts were in writing and some oral.

At the time of the hearing, by cancellations and replacements, the total number of contracts had been reduced to nine. Cancellations were accomplished informally under both types of contracts, and no attention was paid to the cancellation clause of the written contracts. Nolan testified that his operations had remained unchanged from the period before he secured his first contract to the time of the hearing.

From this and other evidence the commission found that Nolan's method of operating his business after securing the contracts was identical with his previous service. The contracts, it said, were merely a device "to avoid the obvious pitfall of broaching into highway common carriage when the radial operation became too frequent and could no longer be described as between *un*fixed termini or over *ir*regular routes." The commission concluded that "the whole of respondent's operation manifests an unequivocal dedication to serve the public or a portion thereof between fixed termini or over regular routes." However, it limited its decision upon rehearing to a determination of Nolan's status as to those pairs of termini served daily. See Souza v. Public Utilities Comm., 37 Cal.2d 539, 543, 233 P.2d 537.

Nolan contends that the evidence is insufficient to sustain the finding that he is operating as a highway common carrier from San Francisco to Oakland, Newark and San Jose. He also challenges the sufficiency of the evidence to sustain the findings that the contracts were a mere subterfuge and that he held his services out to all persons receiving collect shipments. There is no basis in law, he says, for the conclusion that when the business of a radial highway common carrier becomes so extensive that the termini are fixed it becomes a highway common carrier. By its answer to his petition, the commission disputes each of these contentions.

[1] Nolan's argument that there is no evidence to indicate he operated as a common carrier at any time is not well founded. For two years he operated with only a radial highway common carrier permit. By statutory definition, operations under this permit could be only as a common carrier. Pub.U.C. § 3516. Even after he secured a highway contract carrier permit, he continued for another eighteen months to operate exclusively as a common carrier.

The determinative question, therefore, is whether he removed some, or all, of his operations from common carrier status by securing contracts with certain regular customers. The finding of the commission that he did not do so is amply sustained by the evidence. Describing the expansion of his business, Nolan said: "What I have tried to do in business—I heard about being out of line. I try to operate as a radial carrier. I have spread out. I don't know where I can spread next." In response to a question concerning the difference between radial and contract carriage, he testified: "By a radial and contract carrier—well, I don't understand all these rules of the Commission, but I believe that you don't operate over the same areas too frequently. That you can operate as a radial carrier, that if you continue operating between the same points too frequently, then you better get a contract or you will be up where I am at." From the evidence, it is clear that Nolan had no intention of withdrawing his dedication to serve the public or a portion thereof as to any part of his operations. As he said: "I go wherever there is freight. If it is Saturday or Sunday and I can make some dough on the load, I take it."

The most concise summary of Nolan's reason for entering into contracts with certain shippers appears in his reply to the commission's answer to his petition. He there states: "Whenever it appeared that a shipper would ship with any considerable degree of frequency between any points, petitioner attempted to solve his dilemma by entering into mutually binding contracts, and refusing to accept shipments as a radial highway common carrier." This concession is in complete accord with the commission's finding that the contracts were a mere device to hide the fact that constantly expanding radial highway common carriage had become highway common carriage.

[2, 3] By posing as a contract carrier, a common carrier cannot evade the statutes designed to regulate its operations. Haynes v. MacFarlane, 207 Cal. 529, 534, 279 P. 436. The status of the carrier is primarily a question of fact in each case, and the court will not disturb the conclusion of the commission upon this question when it is based upon sufficient evidence. George v. Railroad Commission, 219 Cal. 451, 456, 27 P.2d 375; see Frost v. Railroad Comm., 271 U.S. 583, 600, 46 S.Ct. 605, 70 L.Ed. 1101.

[4, 5] The element of intent is a primary factor in determining the character of carriage. Samuelson v. Public Utilities Comm., 36 Cal.2d 722, 733, 227 P.2d 256. Here the evidence is abundant that Nolan intended to continue operating as a common carrier but to avoid the consequences of expanding operation by entering into contracts with those shippers whose business carried his trucks with regularity to certain termini. This is sufficient to sustain the findng that all of his operations, whether by contract or otherwise, were common carriage.

Nolan's contention that a radial highway common carrier does not become a highway common carrier when business expansion results in regular trips to certain communities is without merit. By statutory definition, the distinction between the two types of carriers is that the highway common carrier operates between fixed termini or over a regular route whereas the radial carrier has no fixed termini or regular route. Pub.U.C. §§ 213, 215, 3516; Alves v. Public Utilities Commission, Cal.Sup., 260 P.2d 785.

[6] Nolan's argument that he has no terminus because he has never established a terminal is based upon a confusion of the meaning of "terminal" and "terminus". The very definition which he quotes refutes his claim. Webster's New International Dictionary, Second Edition, defines "terminus" as: "Either end of a railroad or other transportation line; also the station or the town or city, at that place." Here, the evidence is undisputed that Nolan daily transported freight from San Francisco to Oakland, Newark and San Jose, the respective ends of particular transportation lines which he operated. These three cities, therefore, were the termini of daily shipments. Unquestionably, daily transportation to these cities places them within the classification of "fixed termini", those between which the carrier "usually or ordinarily operates". Pub.U.C. § 215. In considering his operations between these cities the commission properly found that he was a highway common carrier.

As a corollary to his contention that the evidence is insufficient to sustain the finding that he is operating as a highway common carrier between designated termini, Nolan argues that the commission lumped his common carrier and his contract carrier operations. By this procedure, he says, two permissible types of business become illegal. However, the commission found, upon sufficient evidence, that all of Nolan's operations were common carriage and that the contracts were simply a device to avoid the effect of regular transportation between fixed termini. Therefore, Nolan is not engaged in any contract carrier operations and his claim that separate types of business were improperly combined cannot be sustained.

[7] It is unnecessary to consider Nolan's challenge to the accuracy of the commission's conclusion that he held out his services to consignees of shipments who paid collect freight charges. In view of the fact that he accepted all shipments, prepaid or collect, as a common carrier, the determination of his status was not adversely affected by this holding.

The order is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

120 Cal.App.2d 92

In re BUCKHANTZ' ESTATE.

BUCKHANTZ et al. v. DAVIDSON et al.

Civ. 19528.

District Court of Appeal, Second District, Division 3, California.

Sept. 4, 1953.

Rehearing Denied Sept. 28, 1953.

Hearing Denied Oct. 29, 1953.

Proceeding in the matter of the estate of a decedent. The Superior Court of Los Angeles County, John Gee Clark, J., entered an order apportioning the federal estate tax and an appeal was taken. The District Court of Appeal, Vallée, J., held that a widow who elected to take under her deceased husband's will in lieu of claiming her community property rights was entitled in computation of taxable value of property or estate received by her for purposes of determining her apportionate share of federal estate tax to claim as deduction or exemption value of property she would have received had she elected to claim her community property rights.

Affirmed.

1. Internal Revenue ⚷982

Federal estate tax is an excise tax rather than a property tax, and is a tax upon surrender of old incidents of property by decedent and acquisition of new ones by survivor, and is measured by value of property to which such incidents attach, and is not a tax upon what beneficiaries receive.

2. Internal Revenue ⚷1732

Object sought to be accomplished by state statutes relating to proration of federal estate taxes is equitable allocation of burden of tax among those actually affected by such burden. Probate Code, §§ 970 to 973.

3. Internal Revenue ⚷1732

When incidence of federal estate tax is to be borne by several parties, general rule under proration statutes is that tax is to be prorated in proportion which each share bears to total taxable property, and only value of property actually taxed may be considered, and proration must be predicated solely on property of decedent included in gross estate for federal estate tax purposes and on parts thereof which devolved to several legatees and devisees on death of testator, excluding from consideration benefits received from decedent which are not included in taxable estate. 26 U.S.C.A. § 811.

4. Internal Revenue ⚷1738

A "person interested in the estate," within state statute requiring federal estate tax to be prorated among persons interested in estate to whom property is or may be transferred or to whom benefit accrues, is any person who receives or is beneficiary of any property transferred pursuant to a transfer which is subject to tax. Probate Code, § 970; 26 U.S.C.A. § 811.

See publication Words and Phrases, for other judicial constructions and definitions of "Person Interested In the Estate".

5. Internal Revenue ⚷1008

A widow who elected to take under her deceased husband's will in lieu of claiming her community property rights was entitled in computation of taxable value of property or estate received by her for purposes of determining federal estate tax to claim as deduction or exemption value of property she would have received had she elected to claim her community property rights. Probate Code, §§ 970 to 973; 26 U.S.C.A. § 811.

6. Internal Revenue ⚷1008

Purpose of provision of federal estate tax law permitting deduction from value of gross estate, in determining value of net estate, of amount equal to value of any interest in property which passes or has passed from decedent to his surviving spouse, but only to extent such interest is included in determining value of gross estate, was to equalize estate tax in noncommunity property states with that in community property states, to prepare way for elimination from tax burden of all those whose bequests and devises do not create or add to tax, and to insure that marital deduction should not be burdened with any part of federal estate tax. 26 U.S.C.A. §§ 811, 812(e) (1) (A).

7. Internal Revenue ⚷1009

In determining value of net estate for purpose of federal estate tax, bequests, devises, and transfers for public, charitable, and religious uses are deductible. 26 U.S.C.A. §§ 811, 812(d).

Zagon, Aaron & Sandler, Raymond C. Sandler, Los Angeles, and Nelson Rosen, Hollywood, for appellants.

W. R. Hervey, Jr., Edward Hervey, Maxwell J. Fenmore, Morris J. Pollack, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal from an order of the probate court apportioning the federal estate tax.

Morris Buckhantz died testate on March 18, 1950, and his will was admitted to probate. All property in which Buckhantz had an interest was community property of himself and his wife, Jeannette. The will disposed of all the community property and required Jeannette to elect whether she would accept the provisions of the will or "the rights which might be given her by law." It bequeathed and devised the property to Jeannette, a sister, various relatives, employees, and charitable institutions. The residue was given to a trust company in trust with directions to apportion it into three equal parts without physical segregation; Jeannette was given the income from two parts for life with power of appointment of those parts, and the sister was given the income from one part with the remainder of that part to her sons. The will made no provision or direction as to the federal estate tax.[1]

On June 1, 1951, during administration of the estate, Jeannette entered into an agreement with the other legatees and devisees by which she agreed that she "will elect and does hereby elect to accept the provisions of the will of Morris Buckhantz, deceased, as said will is now admitted to probate, and will make no claim as against its provisions on account of any community property rights which she may have." The agreement was approved by the probate court.

On June 15, 1951, the executor filed its federal estate tax return with the collector of internal revenue, reporting a gross estate of $162,659.31, a net taxable estate of $129,972.88, and a tax of $12,052.63. In computing the tax the executor included in the gross estate only half of the community property, aggregating $162,659.31. The tax was paid.

The executor petitioned for instructions as to proration of the tax, stating: "That according to the provisions of the Last Will and Testament * * * and the law of the State of California * * * the federal estate tax should be prorated among those who participated in and shared the estate upon which the tax was based and which determined and fixed the amount of said tax." The court concluded: "That the Federal Estate Tax shall be prorated among and paid by the beneficiaries under the decedent's Will, as follows: Each beneficiary shall pay such portion of the Federal Estate Tax as the amount received by, or for the use and benefit of such beneficiary, bears to the total property subject to the Federal Estate Tax. Jeannette Buckhantz, the decedent's widow, is liable for that prorata share of the federal estate tax which the value of the assets received by her, or for her use and benefit, is in excess of the value of her community property interest; that portion of the estate received by her, or for her use and benefit, representing her community interests created no federal estate tax, and therefore, should not be considered in prorating the federal estate tax." The order reads: "That the executor is hereby ordered and directed to exclude the community interest of Jeannette Buckhantz in said estate from its computation when prorating the amount of the federal estate tax apportioned to each beneficiary." The sister and her sons appealed.

---

[1] The will contained the following provision directing the trustee in the administration of the trust estate: Fifth: '(o) If the whole or any part of the Trust Estate, or the proceeds or avails thereof, shall become liable for the payment of any tax, charge or assessment which said Trustee shall be required to pay, said Trustee shall have the full power and authority, without previous notice to or demand upon any person, to pay such tax, charge or assessment. I direct that all gifts and bequests to each of the beneficiaries as herein set out, shall be taxable to the donee or beneficiary, and all taxes, whether Federal, State or Municipality, shall be first paid by such donee or beneficiary before distribution to them of the said gift or bequest. Any sums so paid which are a charge against any beneficiary hereunder shall be deducted from the interest of the beneficiary so liable. Any estate and inheritance taxes so paid by the Trustee shall be charged to the donee or beneficiary and deducted by the Trustee from the gift, device [sic] or bequest distributable to such donee or beneficiary. Other taxes shall be charged to income, provided, however, that any tax levied upon profit or gain which inures to the benefit of principal shall be paid out of principal, notwithstanding paid tax may be denominated a tax upon income by the taxing authority. Improvement assessments shall be charged to principal and maintenance assessments shall be charged to income."

Appellants urge these propositions as grounds for reversal: 1. "A widow who elects to take under her husband's will in lieu of claiming her community property rights is not entitled in the computation of the taxable value of the property or estate received by her for purposes of determining her proportionate share of the Federal estate tax, to claim as a deduction or exemption the value of the property which she would have received had she elected to claim her community property rights. By electing to take under the will, she assumed precisely the same relation to the husband's estate as any other legatee or devisee." 2. Insofar as the residue of the estate is concerned, the will in effect directs that there shall be no apportionment between the shares of the trust estate of the federal estate tax attributable thereto.

Section 970 of the Probate Code provides that when an executor has paid a federal estate tax "upon or with respect to any property required to be included in the gross estate of a decedent" under the provisions of any federal estate tax law, the amount of the tax so paid, except in a case where the testator otherwise directs in his will and except in specified cases not material here, "shall be equitably prorated among the persons interested in the estate to whom such property is or may be transferred or to whom any benefit accrues."[2] Section 971 authorizes the probate court to make the proration "of any property in the estate in the proportion, as near as may be, that the value of the property, interest or benefit of each such person bears to the total value of the property, interest and benefits receved by all such persons interested in the estate." Section 972 reads: "In making a proration allowances shall be made for any exemptions granted by the act imposing the tax and for any deductions allowed by such act for the purpose of arriving at the value of the net estate." Section 973 provides that in cases where a temporary interest is created in a trust, "the tax on both such temporary interest and on the remainder thereafter shall be charged against and be paid out of the corpus of such property or fund without apportionment between remainders and temporary estates." Section 977 reads: "Except where the context otherwise requires, as used in this article:

---

[2] A number of states have enacted proration statutes: Arkansas—Acts 1943, No. 99, § 1, p. 142, Ark.Stat.Anno. Tit. 63, § 150; Connecticut—P.A.1945, No. 228, P.A.1949, No. 331, Rev.Gen.Stat.1949, §§ 2075–81; Delaware—L.1947, c. 119, Rev. Code, c. 79, §§ 3355–3359; Florida—L. 1949, c. 25435, §§ 1–4, Stat.Ann. § 734.-041; Maine—L.1945, c. 269, repealed H.B. 1353, Laws of 1947 c. 220; Maryland—L.1947, c. 156, Annotated Code, art. 81, § 126; Massachusetts—G.L.(Ter. Ed.) c. 65A, §§ 5–5A and Acts 1948, c. 605, §§ 1, 2; Nebraska—Laws of 1949, c. 222, § 1, eff. March 26, 1949, Rev. Stat. § 77–2108; New Hampshire—Rev. Laws, 1942, c. 88–A, § 1, as added by L.1943, c. 175 and L.1947, c. 102; New Jersey—Laws of 1950, c. 327, p. 1096, N.J.S.A. 3A:25–30; New York—Decedent's Estate Law, § 124, McK.Consol. Laws, c. 13; Pennsylvania—Act 565, P.L. 2762, Laws of 1937, 20 P.S. § 844; Rhode Island—Gen.Laws, c. 43, § 33, (apportionment of state inheritance tax); Tennessee—L.1943, c. 109, § 1, Williams Tennessee Code, § 8350.7; Texas—R.C.1943, § 844, L.1947, c. 401, § 3683a Vernons Texas Civil Stat.; Virginia—L.1946, c. 128, p. 188, Code 1942, § 5440(b), Code Ann. § 64–150 et seq.

"(a) 'Person interested in the estate' means any person who receives or is the beneficiary of any property transferred pursuant to a transfer which is subject to a tax imposed by any Federal estate tax law, now existing or hereafter enacted.

"(b) 'Gross estate' or 'estate' means all property included for Federal estate tax purposes in determining the Federal estate tax pursuant to the Federal estate tax law."

The estate tax in the present case was levied and paid under the Internal Revenue Act of 1948. The tax was a charge upon, and was a lien against, the "gross estate" as defined by section 811 of the Internal Revenue Code, 26 U.S.C.A. United States v. Woodward, 256 U.S. 632, 635, 41 S.Ct. 615, 65 L.Ed. 1131; Estate of Cushing, 113 Cal.App.2d 319, 328, 248 P.2d 482. The gross estate is all property required to be included in computing the estate tax. Under the Act of 1948, only half of the community property is includible in the gross estate of the spouse first to die, and no marital deduction is allowable with respect to community property. The other half is considered to be owned outright by the surviving spouse and may be included in her gross estate.[3] A marital deduction is allowable in the case of separate property owned by residents of community property states.[4] The taxable estate is the difference between the gross estate and the exemptions and allowable deductions. Only half of the community property of the testator and Jeannette was required to be included in the gross estate.

[1] The federal estate tax is an excise, not a property, tax; it is a tax upon the surrender of old incidents of the property by the decedent and the acquisition of new ones by the survivor, and is measured by the value of the property to which these incidents attach. It is not, as appellants inferentially argue, a tax on what the beneficiaries receive. Estate of Atwell, 85 Cal. App.2d 454, 460, 193 P.2d 519.

The ultimate thrust of the federal estate tax is governed entirely by state law, subject to section 826(c) and (d) of the Internal Revenue Code which gives the executor limited rights to demand contribution for a share of the estate tax only in the case of life insurance proceeds and of property subject to a taxable power of appointment and not exonerated from the tax trust by the testator. 26 U.S.C.A. § 826; Estate of Atwell, 85 Cal.App.2d 454, 460, 193 P.2d 519.

[2, 3] The object sought to be accomplished by the proration statutes is the equitable allocation of the burden of the tax among those actually affected by that burden. Security First Nat. Bank v. Wellslager, 88 Cal.App.2d 210, 213, 198 P.2d 700; In re Chambers' Estate, Sur., 54 N.Y.S.2d 88, 92; In re Wahr's Estate, 370 Pa. 382, 88 A.2d 417; 47 C.J.S., Internal Revenue, § 776, p. 1016. When the incidence of the tax is to be borne by several parties, the general rule under such statutes is that the tax is to be prorated in the proportion which each share bears to the total taxable property; only the value of property actually taxed may be considered; and the proration must be predicated solely on the property of the decedent included in the gross estate for federal estate tax purposes and on the parts thereof which devolved to the several legatees and devisees on the death of the testator, excluding from consideration benefits received from the decedent which are not included in the taxable estate. Security First Nat. Bank v. Wellslager, 88 Cal.App.2d 210, 213, 198 P.2d 700; 47 C.J.S., Internal Revenue, § 776, p. 1017 and cases there cited. The court is bound by the actual fact of inclusion or exclusion of property by the federal taxing authorities. The task of prora-

---

[3] Regulations 105, section 81.47a (f) say that when the surviving spouse elects to take under her husband's will, the community property interest owned by her is not considered as having "passed from the decedent to his surviving spouse." No part of the estate tax is attributable to the widow's half of the community property.

[4] Community property acquired prior to July 29, 1927, is treated as separate in computing the marital deduction under the 1948 Act.

tion begins at the point where the taxing authorities end their duty of fixing the estate tax; it takes the accomplished fact of taxation and then prorates the burden on the actuality of the tax.

Referring to proration statutes in general, the court in Security First Nat. Bank v. Wellslager, supra, said 88 Cal.App.2d at page 213, 198 P.2d at page 702: "Their purpose is to apportion equitably the burden of the tax so that it is borne commensurately by those whose gifts contribute to the tax burden and there is eliminated from such burden all whose legacies do not in any way create or add to the tax. In re Harvey's Estate, 350 Pa. 53, 38 A.2d 262."

[4, 5] Analysis of Probate Code sections 970, 971, and 977, without more, negatives appellants' first contention. The tax to be prorated is that paid upon or with respect to property required to be included in the gross estate under the federal estate tax law. The gross estate is all property included in determining the tax. The tax is to be prorated among the persons interested in the estate. A person interested in the estate is any person who receives or is the beneficiary of any property transferred pursuant to a transfer which is subject to the tax. The court makes the proration in the proportion, as near as may be, that the value of the property of each such interested person bears to the total value of the property received by all such persons interested in the estate. Manifestly, the statute means the tax is to be prorated among those, and only those, who receive property which has been included in the taxable estate; and property which has not been included in determining the tax shall not bear any part of it. This conclusion is supported by all the authorities.

In Estate of Cushing, 113 Cal.App.2d 319, at page 333, 248 P.2d 482, at page 490, the court declared: "There can be no doubt that the proration statute definitely expresses a policy that the federal estate tax is intended, in the absence of an expression to the contrary, to be levied, for state inheritance tax purposes, in accordance with the benefit that a person interested receives from the estate—and such benefit is, as already pointed out, limited to the taxable gross estate, and does not extend to the entire probate estate. In other words, the proration statute, in the absence of direction in the will to the contrary, expresses a general state policy directing the executor to pay the federal estate tax and to fix the impact of the tax upon each beneficiary's share of the property that has contributed to the tax. The wife's share of the community property, as already pointed out, under federal law, has not contributed to the tax * * *. It follows from what has been said that the California statutes indicate that the widow's one-half of the post-1927 community property, since it is not part of the 'gross estate' of the husband and is not liable for the federal estate tax, should not be charged, directly or indirectly, with any portion of the federal estate tax." While the foregoing was said with respect to the question whether in computing the widow's share of the community property that is free from the state inheritance tax the federal estate tax should be treated as an expense of administration, we think it applies with equal force to the question at bar.

We find no dissent in the authorities from the proposition that under proration statutes only that property in the probate estate which has contributed to the estate tax shall bear the impact of that tax. Our statute is based on the New York statute. N.Y. Decedent's Estate Law, § 124, McK.Consol.Laws, c. 13; Estate of Hotaling, 74 Cal.App.2d 898, 900, 170 P.2d 111. The New York cases all hold that no part of the tax may be allocated to property which was not included in the taxable estate.[5]

---

[5] The statutory rule "requires the actually taxed property to pay the tax in fair proportions." In re Starr's Estate, 157 Misc. 103, 282 N.Y.S. 957, 960; The proration is to be "against all transfers of property included in the gross estate." In re Rappaport's Estate, 167 Misc. 164, 3 N.Y.S.2d 616, 618; The object of the statute "is the equitable allocation of the burden of the taxes among all the parties actually affected by that burden." In re Kaufman's Estate, 170 Misc. 436, 10 N.Y.S.2d 616, 625; No part of the tax may be allocated to prop-

[6] The Revenue Act of 1948 provides for deduction of "An amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate." 26 U.S.C.A. § 812(e) (1) (A). This is commonly called the marital deduction. The apparent purpose of the enactment of the marital deduction was to equalize the estate tax in noncommunity property states with that in community property states, to prepare the way for the elimination from the tax burden of all those whose bequests and devises do not create or add to the tax, and to insure that the marital deduction should not be burdened with any part of the federal estate tax. In re Peters' Will, Sur., 88 N.Y.S.2d 142, affirmed 275 App.Div. 950, 89 N.Y.S.2d 651; Lincoln Bank & Trust Co. v. Huber, Ky., 240 S.W.2d 89; In re Fuch's Estate, Fla., 60 So.2d 536; Miller v. Hammond, 156 Ohio St. 475, 104 N.E.2d 9. Appellants concede: "If the circumstances in this case had been such as to make a marital deduction proper and applicable in favor of Mrs. Buckhantz, then it would be proper to make an allowance to Mrs. Buckhantz on account of such marital deduction in prorating the tax, under the provisions of Section 972 of the Probate Code."

[7] In computing the federal estate tax, bequests, devises, and transfers for public, charitable, and religious uses are deductible. 26 U.S.C.A. § 812(d). It is uniformly held that since such gifts do not contribute to the federal estate tax they do not bear any of its burden. In re Harvey's Estate, 350 Pa. 53, 38 A.2d 262; In re Wahr's Estate, 370 Pa. 382, 88 A.2d 417; 19 Conn.Bar J. 6; 54 Dickinson L. Rev. 432, 441; 73 N.J.L.J. 319.

It would be a strange legal paradox to hold that a widow who receives property which is not taxed should, merely because she elects to and receives such property under the will rather than as her share of the community property, pay part of the tax levied on property bequeathed and devised to others when the marital deduction and bequests, devises, and transfers for public, charitable, and religious uses bear no part of its burden.

There is much discussion in the briefs as to whether the half of the community property which is excluded in determining the estate tax is a deduction or an exemption or nontaxable property. Appellants argue that it is nontaxable property; respondent, that it is an exemption. Obviously, it is nontaxable property. But the question is of no moment, since, whether it be one or the other, it is not part of the taxable estate and bears no part of the burden of the tax.

Under the statute the tax is to be "equitably prorated among the persons interested in the estate to whom such property is or may be transferred or to whom any benefit accrues." Prob.Code, § 970. It is argued that since the benefit received by the widow is the property she takes under the will, the value of that property should be used in measuring her tax liability. The vice in the argument lies in the fact that appellants are speaking about benefits received from the deceased while the statute speaks about benefits which are included in the taxable estate. Section 970 of the Probate Code refers to an allocation of the

---

perty not included in the taxable estate. In re Mayer's Estate, 174 Misc. 917, 22 N.Y.S.2d 468, 470; Gifts and trusts excluded in determining the tax must be excluded in the proration. In re Blumenthal's Estate, 182 Misc. 137, 46 N.Y.S.2d 688, affirmed Application of Schmidlapp, 267 App.Div. 949, 47 N.Y.S.2d 652, affirmed In re Blumenthal's Will, 293 N.Y. 707, 56 N.E.2d 588, 589; The statute provides for an equitable proration "of estate taxes among the persons sharing in the taxable estate, in those cases where the testator does not otherwise direct in his will." In re Hegeman's Will, 270 App.Div. 707, 62 N.Y.S.2d 337, 339, affirmed 296 N.Y. 915, 73 N.E.2d 37. See the Maryland proration statute, 1937, Laws of Maryland, c. 546, Annotated Code, art. 81, § 160, and Application of Chase Nat. Bank, Sup., 59 N.Y.S.2d 848 construing the Maryland statute. See also 2 Ark.L.Rev. 221; 31 Boston Univ. L.Rev. 233; 20 Conn.Bar J. 198; 43 Ill. L.Rev. 153.

burdens imposed on property actually taxed. The proration must be in the proportion that the value of the property included in the taxable estate and received by each person bears to the total value of the property so included and received by all interested persons. If property is not swept into the taxable estate for estate tax purposes, it bears no part of the tax. The value of the actually taxed property received by the widow was that remaining after deducting the value of half of the community property. It is that value only which may be used by the court in performing its function of allocation. Equality of contribution to the burden of the tax requires that the widow pay her proportionate share of the federal estate tax, computed only on that part of the transfers to her which were included in computing the tax. There is nothing in the proration statutes which furnishes any reason why a part of the tax imposed on property of one recipient of bounty should be impressed on another, against whose benefit the Congress did not elect to assess it. The effect of tailoring the rule to what appellants seek would be not only to reduce the amount of the estate tax chargeable to them and others, but to charge the widow with part of the tax levied on property received by them.

Jeannette does not, by asserting her right to take the property not included in the taxable estate free of any part of the estate tax, violate her agreement not to make any claim against the provisions of the will on account of any community property rights she may have, as appellants argue. She is not making any claim against the provisions of the will, or any claim inconsistent with the acceptance of the benefits she receives under the will. What her agreement means is that she will not claim that any of the property disposed of by the will is community property and belongs to her independent of the will. She has made no such claim.

In re Bernay's Estate, 344 Mo. 135, 126 S.W.2d 209, 122 A.L.R. 169, and In re Osgood's Estate, 52 Utah 185, 173 P. 152, L.R.A.1918E, 697, cited by appellants, are not analogous. Those cases merely hold that where the widow took under the will rather than under the statute the inheritance tax statutes of those states imposed a tax on everything she took under the will. The situation in each of those cases was similar to what it might have been in this state with respect to the imposition of the state inheritance tax had the Legislature not enacted Revenue and Taxation Code section 13552, which exempts from that tax property to a value not exceeding half of the community if the widow elects to take under her husband's will rather than under the statute.

We find nothing in the will which directs that there be no proration of the federal estate tax attributable to the trust estate between the shares thereof. Appellants are not consistent in this regard. In their opening brief they urge that the will so directs. In their closing brief they say the will contains no apportionment provisions. The argument appears to be that the corpus of the trust estate should bear that part of the estate tax for which it is responsible, without allocating to the widow's share any part of the half of the community property which was not included in determining the estate tax. The argument is without merit. The effect of following this contention would be that the widow would pay two-thirds of the tax prorated to the corpus of the trust estate when a part, if not all thereof, was excluded in determining the tax.

The two parts of the residue bequeathed and devised in trust for the benefit of Jeannette do not bear two-thirds of the proportion of the tax attributable to the residue. See Security First Nat. Bank v. Wellslager, 88 Cal.App.2d 210, 214, 198 P.2d 700; In re Starr's Estate, 157 Misc. 103, 282 N.Y.S. 957, 960. The conclusion of the probate court that the portion of the estate received by Jeannette, or for her use and benefit, representing half of the community property created no estate tax and, therefore, should not be considered in prorating the tax, applies to the two-thirds of the residue to be segregated for the use and benefit of Jeannette. The order of the court, when construed with the conclusions of law which precede it and which are a part of the document including the order, is clear and unambiguous in this respect.

We hold that the probate court correctly adjudged that Jeannette is liable only for that prorata share of the federal estate tax which the value of the assets received by her, or for her use and benefit, is in excess of the value of half of the community property; and that the part of the estate received by her, or for her use and benefit, representing half of the community property, is not to be considered in prorating the tax.

Affirmed. Respondents to recover their costs on appeal.

SHINN, P. J., and PARKER WOOD, J., concur.

COCKERELL et al. v. TITLE INSURANCE & TRUST CO. et al. (two cases).*

DENNY et al. v. TITLE INSURANCE & TRUST CO. et al.

Civ. 19677.

District Court of Appeal, Second District, Division 1, California.

Sept. 10, 1953.

Hearing Granted Nov. 5, 1953.

Proceedings involving dispute as to who was entitled to surplus yield consisting of amount realized at trustees' sale under second trust deed in excess of sum required to satisfy second trust deed. The Superior Court of Los Angeles County rendered judgment, and plaintiffs who were also cross-defendants appealed. The Court of Appeals, Scott, J. pro tem, held that evidence warranted finding that plaintiffs on date of sale were not owners of note secured by third trust deed, but that pleadings and proof were insufficient to warrant judgment awarding surplus yield to grantees under unrecorded deed from owners.

Reversed with direction.

1. Mortgages 🔑376

Where trustee's sale of property under second trust deed resulted in surplus yield consisting of an amount in excess of sum required to satisfy second trust deed, plaintiffs asserting that on date of such sale they were owners of note secured by third trust deed by virtue of assignment by payee of note and beneficiary under third trust deed and that therefore plaintiffs were entitled to receive the surplus yield as payment on unpaid balance of note secured by third trust deed had burden to establish their case by preponderance of evidence.

2. Mortgages 🔑376

Evidence warranted finding that plaintiffs on date of trustee's sale of property under second trust deed were not such owners of note secured by third trust deed as to be entitled to surplus yield consisting of amount realized at sale in excess of sum required to satisfy second trust deed.

3. Mortgages 🔑376

Liens inferior to lien of mortgage foreclosed attach to surplus proceeds of sale in same order and relative priority which they hold with reference to premises before foreclosure, and must be paid in that order, unless some equitable right demands different order of payment, or unless one entitled to surplus has either expressly or impliedly waived his rights.

4. Mortgages 🔑376

Pleadings and proof were insufficient to warrant judgment awarding grantees under unrecorded deed from owners the surplus yield consisting of amount realized at trustee's sale under second trust deed in excess of sum required to satisfy second trust deed.

N. S. Crowley, Bellflower, for appellants.

Morris Lavine, Los Angeles, for respondents Denny.

SCOTT, Justice pro tem.

Plaintiffs and cross-defendants Cockerell and Hinds appeal from a judgment rendered against them and in favor of defendants and cross-complainants Denny. The dispute relates to certain money in the amount of $6,926.02, deposited in court by the Title Insurance and Trust Co., a corporation, pursuant to order of court based on the cross-complaint in intervention filed by said corporation. Following the deposit, the case was dismissed as to the corporation. The judgment awarded the amount thus deposited to cross-complainants Denny.

---

* Subsequent opinion 267 P.2d 16.

The trial court found that on August 28, 1951, the Dennys owned a certain parcel of real estate described in the pleadings; that the Title Insurance and Trust Co., as trustee, sold the property under a second trust deed, the sale being subject to a first trust deed. The sale price of the property thus sold under the second trust deed was $25,950, which was a "surplus yield" of $6,926.02, in excess of the sum required to satisfy the second trust deed.

The record owners of the property on the date of the sale were Ernest A. Coe and Helen Jean Coe, but they had given an unrecorded deed to the property to the Dennys some time prior thereto. A fourth trust deed from the Dennys to the Coes seems to have been executed August 1, 1950.

A note for $10,983.80, dated September 23, 1948, and secured by a third deed of trust on the same property had been executed by Russ Green and Ethyl Green, husband and wife, who apparently were the owners at that time. The payee of the note and beneficiary under the third trust deed was named as "Crestmore Co., a Limited Partnership, P. O. Box 365, Fontana". This third trust deed, of course, was subordinate to the second trust deed under which the property was sold.

The complaint alleged that plaintiffs Cockerell and Hinds, on the date of the sale, were owners of the note secured by the third trust deed by virtue of an assignment by the Crestmore Company, and were therefore entitled to receive the "surplus yield" as a payment on the unpaid balance of the note which was an amount greater than the amount of the "surplus yield".

The trial court found that: "It is not true that on August 28th, 1951, that the plaintiffs (Cockerell and Hinds) were the owners of the note and deed of trust securing note, executed by Russ Green and Ethyl Green, husband and wife, to Security-First National Bank of Los Angeles, Trustee, in favor of Crestmore Company."

[1, 2] The burden was upon plaintiffs to establish their case by a preponderance of the evidence. Plaintiff Hinds and defendant and cross-complainant T. E. Denny were the only witnesses at the trial. There was no competent evidence as to the persons constituting the Crestmore Company, a limited partnership, or as to whether there had been compliance with any requirements of law relative to their doing business as such under a fictitious name. Plaintiff testified that "a party in San Bernardino" had furnished her with information about the Crestmore Company, and stated, "I know there are three: Paul and Bob Wierman, brothers, and one other woman. I don't know her name just at this minute, but they were checked on as to the company and being in their name". There was no evidence upon which the trial court could base a finding as to who were partners in the Crestmore Company and what were their respective powers. The note was endorsed on the reverse side: "The undersigned does hereby assign this note to the account of Rowena F. Cockerell and Jeannie A. Hinds, as of the 27th day of August, 1951. (signed) The Crestmore Co. P. H. Wierman."

By her testimony plaintiff sought to show that there was a meeting in the office of Paul Wierman in Temple City, in the late evening of August 27, and running over into the morning of August 28—the day of the sale under the second trust deed; that Mr. and Mrs. P. H. Wierman and Robert Wierman, and plaintiff Hinds were present; that the assignment was written upon the note and that she gave some consideration therefor through an escrow. Oral testimony and documentary evidence were presented which were ambiguous and conflicting. Plaintiff's testimony was vague and evasive. The trial court was justified in considering that much of the evidence offered had no probative value.

There was evidence, for example, that if any consideration was paid for the note and third trust deed it was not paid direct by plaintiffs to any representative of the Crestmore Company but was paid into an escrow which was actually opened on August 29, 1951, the day after the sale had been completed under the second trust deed. The escrow instructions said that the delivery of some trust deed (presumably the third trust deed) was "not the concern of this escrow". But a letter signed by P. H. Wierman at about the same time states: "This will certify that Rowena F. Cockerell and Jeannie A. Hinds are the beneficiaries of an escrow in which the assignment of a third trust deed (identifying it) to their account in progress and they have full right and title to said third trust deed and all benefits from such from this day on. (signed) P. H. Wierman, Crestmore Company."

If the third trust deed had been delivered out of escrow, as claimed, it could not have been placed in escrow for plaintiffs as beneficiaries, and yet, aside from the escrow instructions, the only document relating to the said trust deed signed by anyone purporting to be connected with the Crestmore Company and identifying it with particularity indicates that the third trust deed was part of the escrow transaction.

Plaintiff Hinds had known for a month and a half before the sale under the second trust deed that it was to take place at ten o'clock the morning of August 28, 1951. She waited until late the evening before and the early morning hours of the very day of the sale. The trial court's conclusion that the acts of the parties and the documents they signed did not result in transferring to plaintiffs any title to the note and third trust deed on or before August 28, 1951, is warranted by the record before us.

This still leaves the problem of the unpaid note signed by the Greens, secured by the third trust deed, and the lien thereby created which remained unsatisfied.

[3] "Liens inferior to the lien of the mortgage foreclosed attach to the surplus proceeds of sale in the same order and relative priority which they held with reference to the premises before the foreclosure, and must be paid in that order, unless some equitable right demands a different order of payment, as in the case where one creditor can found a claim to preference on his superior vigilance and activity, or unless one entitled to the surplus has either expressly or impliedly waived his rights." 59 C.J.S., Mortgages, § 800, page 1531; see also Porter v. Muller, 112 Cal. 355, 44 P. 729; Windt v. Gilleran, 135 Cal. 94, 66 P. 970; Union Water Co. v. Murphy's Flat Fluming Co., 22 Cal. 620; Withington v. Shay, 47 Cal.App.2d 68, 73, 117 P.2d 415, 119 P.2d 1; 18 Cal.Jur. 638, Sec. 843; 37 Am.Jur. 250, Sec. 874.

[4] The cross-complaint of the Dennys does not name the Crestmore Company as a cross-defendant. It makes no claim that the note secured by the third trust deed has been paid or the lien extinguished. There was a "finding" by the trial court as follows: "It is true that the lien, if any, of said third and fourth trust deeds, above described, were extinguished by the foreclosure of the said second deed of trust aforesaid."

The failure of the Dennys to seek any relief as against Crestmore Company suggests that they agree that the note and third trust deed securing it have passed into the hands of plaintiffs and cross-defendants Cockerell and Hinds. On appeal it is intimated that some legal disability of the partnership or of the partners would have invalidated any attempt of Crestmore Company to enforce its claim and that this disability would adversely affect any persons to whom they might assign it. This issue was not raised by the cross-complaint.

Cross-complainants Denny's pleading and proof were not sufficient to support a judgment awarding them the "surplus yield".

Amended pleadings by all parties should be permitted raising issues requiring determination and joining as defendants or cross-defendants any additional parties asserting any claim to the money on deposit. When the case is at issue it can be retried with all witnesses and evidence produced which are required to satisfy the trial court.

Pursuant to Rule 26a, Rules on Appeal, the respective parties will bear their own costs on appeal.

Judgment reversed with direction to the trial court to permit all parties to file amended pleadings and to bring in any additional necessary parties. Appellants and respondents to bear their own respective costs on appeal.

WHITE, P. J., and DORAN, J., concur.

120 Cal.App.2d 154

In re BRESCHINI'S ESTATE.

Civ. 15634.

District Court of Appeal, First District,
Division 2, California.
Sept. 10, 1953.

Action by daughters of ranch owner to determine heirship, claiming that one-half interest in ranch conveyed by father to daughters' stepmother was gift, and that daughters were entitled to that one-half interest rather than collateral heirs of stepmother. The Superior Court, County of Monterey, Anthony Brazil, J., entered judgment for defendants and plaintiffs appealed. The District Court of Appeal, Dooling, J., held that evidence sustained finding that conveyance by father to stepmother was for good and valuable consideration and was not gift.

Affirmed.

1. Frauds, Statute of 🔑139(2)

Fact that agreement between parties prior to marriage, that wife would have half interest in husband's ranch for investing her money therein, was oral, was immaterial in view of fact that it was later fully executed. Probate Code, § 229.

2. Gifts 🔑1

Transfer of real property is not gift if it is based on valuable consideration, and extent of consideration is immaterial. Probate Code, § 229.

3. Gifts 🔑49(4)

In action to determine heirship by daughters of ranch owner who conveyed to daughters' stepmother one-half interest in ranch, evidence sustained finding that conveyance had been made for a good and valuable consideration and was not gift. Probate Code, § 229.

◆

Sisti Segretti, Jr., and J. T. Harrington, Salinas, for appellants.

Hudson, Martin, Ferrante & Street, Monterey, Otto A. Hoecker, San Francisco, for respondents.

DOOLING, Justice.

Basilio Breschini and Mary Breschini intermarried in 1927. At that time Basilio owned a ranch and in 1933 Basilio conveyed a one-half interest in this ranch to his wife Mary by grant deed which expressed a consideration of $10. Basilio predeceased Mary. Mary died intestate in 1950.

The appellants, daughters of Basilio by an earlier marriage, filed a petition to determine heirship claiming that the one-half interest in the ranch conveyed by Basilio to Mary was a gift to her and hence under Probate Code, § 229, appellants were entitled to inherit it rather than respondents, who are collateral heirs of Mary. The court found against appellants and in favor of respondents, that Basilio had conveyed such one-half interest to Mary "for a good and valuable consideration, and not as a gift." The sole claim on this appeal is that this finding is not supported.

There was evidence produced that prior to Mary's marriage to Basilio she had been working as cook and housekeeper on various ranches and had acquired a bank account. For a few months before the marriage she had been working for Basilio. Before the marriage Basilio and Mary had a conversation with one of Mary's brothers to which he testified as follows: "Well, he say they have planned to get married and they were going to settle down and it would be better for the two and she didn't have to work for some one else and it was more easy for her and she said the prospect was very good, she would have a chance to invest her money in the ranch. * * * He said he was going to get married * * * and something like it would be a better life to be on the ranch than going out working for somebody else. I remember that, and then she had a chance to invest her money in the ranch."

It is also in evidence that Mary with her separate funds bought furniture for their home on the ranch and an automobile which was used by both spouses on the ranch, in going to town and for business. After the conveyance by Basilio to Mary he told his brother: "Well, she gave money to buy the car, I don't know how much. * * He gave the mortgage (sic) you know, half the ranch * * * half to Mary. * * * He gave him (sic) half the place and that is all, he didn't say anything else."

The trial court was entitled to infer from this testimony that prior to the marriage Basilio and Mary agreed orally that she should have an interest in the ranch for "investing" her money in the ranch, that pursuant to such agreement Mary bought the automobile for use in the operation of te ranch, that Basilio recognized this as a performance of that agreement and conveyed to her a one-half interest in the ranch in consideration thereof.

[1, 2] The fact that the agreement was oral is immaterial in view of the fact that it was later fully executed. In re Estate of Piatt, 81 Cal.App.2d 348, 351–353, 183 P.2d 919; Hussey v. Castle, 41 Cal. 239, 242. The extent of the consideration is not important. The transfer is not a gift if it is based on any valuable consideration. Civ.Code, sec. 1146; Allied Architects' Ass'n v. Payne, 192 Cal. 431, 438–439, 221 P. 209, 30 A.L.R. 1029; Yosemite Stage etc. Co. v. Dunn, 83 Cal. 264, 23 P. 369; Jameson v. Shepardson, 83 Cal.App. 596, 602, 257 P. 157; 9 Cal.Jur., Deeds, sec. 41, p. 140.

[3] Since all questions of fact are for the trial court all we need find is substantial evidence from which the trial court could reasonably draw the inferences necessary to support its findings. In view of the evidence it is not necessary to consider the effect of alleged conflicting disputable presumptions discussed by counsel.

Decree affirmed.

NOURSE, P. J., and McCOMB, Justice assigned, concur.

---

120 Cal.App.2d 237

E. A. DAVIS & CO., Inc. v. RICHARDS et al.

Civ. 15619.

District Court of Appeal, First District,
Division 2, California.

Sept. 15, 1953.

Hearing Denied Nov. 12, 1953.

Suit for unpaid balance due on sale of installation of patented kitchen unit. The Superior Court, Santa Clara County, W. T. Belieu, J., rendered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Nourse, P. J., held that evidence sustained finding that kitchen unit, consisting of cabinets, dishwasher and sink assembly with garbage disposal unit, did not become a permanent fixture and that installer thereof was thus within exemption to statute requiring contractors to be licensed, notwithstanding fact that licensed mechanics hired and paid by installer did plumbing and electrical work and some papering and laying of linoleum in connection with installation of unit.

Affirmed.

Licenses ⚷39.44

Evidence sustained finding that kitchen unit, consisting of cabinets, dishwasher and sink assembly with garbage disposal unit, did not become a permanent fixture and that installer thereof was thus within exemption to statute requiring contractors to be licensed, notwithstanding fact that licensed mechanic hired and paid by installer did plumbing and electrical work and some papering and laying of linoleum in connection with installation of unit. Business and Professions Code, §§ 7025, 7026, 7028, 7048, 7058, 7059.

◆

Crist, Stafford & Peters, Elton F. Martin, Palo Alto, for appellants.

Clark L. Bradley, San Jose, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued for the unpaid balance due on a sale and installation of a patented kitchen unit consisting of sink, dishwasher and cabinets, with incidentals consisting of changes in electrical outlets, laying of linoleum, painting, etc. In a trial to the court a balance of $1,536.72 was found due and judgment for plaintiff followed.

In their answer the defendants charged that some of the work was improperly and unskillfully performed. The trial court, on substantial evidence, found adversely to this defense and no point is made on that issue in the appeal.

The appellants' appeal rests wholly on the claim that respondent should not recover because the corporation was not a licensed contractor. In reply the respondent asserts that it was not a contractor within the meaning of section 7026 of the Business and Professions Code, that, if subject to any provisions of that code, it was as a "specialty" contractor controlled by sections 7055 and 7058.

There is no dispute in the facts. They show that the kitchen unit consisted of seven steel wall cabinets, six steel base cabinets, one dishwasher and one sink assembly with garbage disposal. All these were prefabricated and were attached to the floor and the walls. The trial court found that the cabinets "were prefabricated and a finished product;" and that it "was not actually fabricated into nor did it become a permanent, fixed part of the defendants' kitchen." It also found that "the minor plumbing and electrical wiring * * * was a part of the installation of the finished kitchen cabinets, and was necessary to their proper operation. * * *"

All those findings are supported by competent and substantial evidence. The finding that the cabinets did not become permanent fixtures really disposes of the case as was held in Costello v. Campbell, 81 Cal.App.2d 452, 184 P.2d 315.

In support of its judgment the learned trial judge filed an opinion, which we adopt as our reasons for an affirmance of the judgment, and which reads as follows:

"Plaintiff's first cause of action alleges a book account for unpaid balance due from defendants of the sum of $1,536.72; the second cause of action alleges a sale to defendants of kitchen fixtures and appliances of the reasonable value of $3,036.72, upon which defendants have paid the sum of $1,500.00, leaving a balance due plaintiff from the defendants of the sum of $1,536.72.

"By the answer the defendants deny the allegations of plaintiff's complaint except they admit the payment to plaintiff of the sum of $1,500.00 on account; they allege that the complaint does not state a cause of action; further, that plaintiff agreed to furnish defendants the materials and labor necessary to install certain kitchen units and other labor for installation, etc., for the overall sum of $2,215.70; and in addition seek to recover the sum of $688.00 damages for faulty workmanship in the installation; and by cross-complaint seek to recover the sum of $53.00 for plaintiff's negligence in scratching of defendants' kitchen floor and table and other minor items.

"It appears from the evidence in this case that plaintiff has established his cause of action against the defendants as prayed for by a preponderance of the credible evidence.

"Except for the special defenses herein referred to, there is no doubt but that the defendants are indebted to the plaintiff in the sum of $1,536.72.

"In substance the defense to plaintiff's action herein is based on their contention that the plaintiff was obliged to have a contractor's license before it could contract to perform, or sue to collect for the sale and installation of certain prefabricated kitchen cabinets, and in addition some wallpaper and linoleum sold and installed by the plaintiff in the home of the defendants at the instance and request of the latter, for which they now refuse to pay after installation thereof.

"Defendants' contentions are based on Section 7025, 7026, 7028, and 7031, Division 3, Chapter 9, Article 2, of the Business and Professions Code of the State of California; which sections generally indicate the persons and entities which are required to have licenses in order to contract, and specify the penalties for those who contract without such licenses.

"On the other hand, the plaintiff contends the above cited sections of the Business and Professions Code relied on by the defendants are not applicable to the facts or issues herein involved, nor do they govern or control the established facts as disclosed by the evidence in this action.

"It is the plaintiff's contention herein that the evidence shows it was clearly within the exceptions and freed from the observance of the general provisions of the law pertaining to contractors generally.

"While as a general practice the Business and Professions Code requires a contractor to obtain a license to engage in building enterprises or suffer penalties provided in said laws, there are certain exemptions provided in said statutes.

"The sections of the Business and Professions Code above referred to and which it is believed govern this case are as follows:

" 'This chapter does not apply to the sale or installation of any finished products, materials, or articles of merchandise, which are not actually fabricated into and do not become a permanent fixed part of the structure.'

"Chapter 9, Article 3, Section 7045 B. & P. Code.

"This section last cited was construed in Costello v. Campbell, 81 C[al.]A[pp.]2d., 452 [184 P.2d 315]. It involved facts substantially the same as are disclosed in the present action, and the court held that under the exemptions provided for in Section 7045 of the Business and Professions Code the law permits an unlicensed contractor to recover for the sale and installation of finished products which do not become permanent fixtures to the realty.

"The evidence in this case established the fact that the kitchen cabinets were prefabricated and a finished product; that such product was not actually fabricated into nor did it become a permanent, fixed part of the structure.

"It would appear that whatever minor plumbing and electric wiring was needful to be used in installing the electric dishwasher and garbage disposal units was a part of the installation of the finished kitchen cabinet setup, it was necessary to its proper operation and not independent thereof, and would come within the exemption provisions of Section 7045 of the Business and Professions Code.

"The evidence discloses that in connection with the installation of the prefabricated kitchen cabinet in the home of the defendants, in order to make a complete job, plaintiff did some electrical work and papering and laying of linoleum. This work was merely incidental to the installation of the St. Charles kitchen cabinet, a prefabricated article, and was done in the kitchen or immediately adjacent thereto. Plaintiff was not a general contractor to do such work, but specialized in the selling and installation of the St. Charles kitchen cabinet, which he buys as a finished product and installs the same as he did in this case. All such incidental work was performed by licensed mechanics hired and paid for by the plaintiff, and in these instances such mechanics were paid less than a hundred dollars for each piece of work.

"Section 7048, Business and Professions Code.

"Since the plaintiff was a specialty contractor who, under the facts of this case, was not obliged to have a license but had the same status as a licensed contractor, he was authorized to contract with two or more crafts to do and perform incidental and supplemental work which it had undertaken to do as was done in this case.

"Section 7059, Business and Professions Code.

"It further appears from the evidence that the plaintiff did and performed all said work in installing said prefabricated kitchen cabinet in defendants' home in a good and workmanlike manner, and as agreed, as well as all incidental or supplemental work in connection therewith. It further appears from the evidence that defendants have failed to establish any defense, counter-claim, or cause of cross-complaint against the plaintiff herein.

"It is the opinion of the court that plaintiff take judgment against the defendants as prayed for in this complaint, and for costs, and interest from September 27, 1950."

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.

---

120 Cal.App.2d 129

RUTHERFORD, Inc. v. ROUSE et al.

No. 15512.

District Court of Appeal, First District,
Division 1, California.

Sept. 10, 1953.

Hearing Denied Nov. 5, 1953.

Action on policy of insurance. The Superior Court, County of Alameda, entered judgment for plaintiff, and certain defendants appealed. The District Court of Appeal, Bray, J., held that where policy indemnified subcontractor for liability to prime contractor, but subcontractor had completed contract, and entered into contract with new prime contractor before policy expired, and insurer had, at subcontractor's request, furnished new prime contractor "certificate of insurance" which did not change existing policy, insurer was not liable to subcontractor for loss by fire occurring after date policy expired, and before same policy was extended, and before new policy was issued indemnifying subcontractor for liability to new prime contractor.

Reversed.

1. Insurance 🔑665(1)

Jury could disregard testimony of interested witnesses in action to recover upon policy of insurance.

2. Appeal and Error 🔑1008(3)

In absence of conflicting evidence, District Court of Appeal was not bound by trial court's interpretation of insurance contracts.

3. Insurance 🔑177

Where policy indemnified subcontractor for liability to prime contractor but subcontractor had completed contract, and entered into contract with new prime contractor before policy expired, and insurer had at subcontractor's request furnished new prime contractor "certificate of insurance" which did not change existing policy, insurer was not liable to subcontractor for loss by fire occurring after date policy expired, and before same policy was extended, and before new policy was issued indemnifying subcontractor for liability to new prime contractor.

Wallace, Garrison, Norton & Ray, San Francisco, for appellants.

Willard E. Bohn, Robert H. Kroninger, Oakland, for respondent.

BRAY, Justice.

From a judgment against them for $6,741.43 entered upon a jury verdict, defendants Rouse and Underwriters at Lloyd's appeal.

Questions Presented.

1. Did the evidence of insurance issued by defendants to plaintiff cover the Atkinson contract?

2. Was the cost of fighting fire an element of damage under the policy?

Facts.

In May, 1949, plaintiff had a contract with the Utah Construction Co. to do clearing over segments of a roadway which the latter had contracted with the

U. S. Government to build through a national forest in Oregon. Under this contract, plaintiff was required to obtain a contract of indemnity insurance. An underlying contract of insurance limited to a $5,000 loss was obtained from the Hartford Fire Insurance Co. The excess over this amount was obtained from defendants Rouse and Underwriters for plaintiff by its insurance brokers, Johnson & Wright, dealing through defendant Philip Antrobus, Inc., who represented Rouse and the Underwriters. The policy in question indemnified plaintiff "for any and all sums which the Assured shall by law become liable to pay, and shall pay, or by final judgment be adjudged to pay * * * as damages for:— Damage to Property * * * by reason of operations" described in the Hartford policy, and for loss "in respect of Property Damage Liability only" on certain numbered contracts between plaintiff and the Utah Construction Co. "and extensions of, or additions to, contracts at the same location between the same parties." The term of the policy was from May 27, 1949, to May 27, 1950. Early in 1950 plaintiff completed its work for the Utah Construction Co. Plaintiff thereupon took a subcontract from Guy F. Atkinson Co., which held a master contract for the construction of a further segment of the highway. March 30, 1950, plaintiff's broker wrote Antrobus: "Will you kindly furnish us with certificate of insurance under captioned policy for: Guy F. Atkinson, Cascade Building, Portland, Oregon. This is in connection with some work which Rutherford, Inc., is sub-contracting from Guy F. Atkinson near Lowell, Oregon. The amount of the contract is approximately $200,000.00. We will furnish you with additional information when we get a copy of the contract." March 31st, Antrobus replied: "We enclose Certificate of Insurance for Guy F. Atkinson per your letter dated March 30th. We wish to remind you that the above captioned Certificate expires on May 27th, and we will appreciate renewal advices at your convenience." Enclosed was the following document:

"Certificate of Insurance.

"To: Guy F. Atkinson Company
"Address: Cascade Building,
"Portland, Oregon.

"This is to certify that we have placed with Lloyd's Underwriters through our London correspondents the following described policy of insurance:

Name of Assured: Rutherford, Inc.
Certificate No.: AL 4421
Policy No.:
Effective: 5/27/49 Expiring: 5/27/50
Coverage: Excess Property Damage Liability Insurance.
Limits: $245/225,000.00 excess of $5/25,000.00.
Subject to ten (10) days' Cancellation Clause."

No additional premium was charged for the issuance of this certificate.

All of the negotiations concerning insurance had between plaintiff's brokers, Johnson & Wright, and Philip Antrobus, Inc., defendants' agent, were handled by Goodenough for the former and McDowell for the latter. Goodenough died prior to trial and hence the sole version of those negotiations obtainable was that of McDowell and Philip Antrobus. McDowell testified that based on his 18 years experience in the insurance world he did not consider plaintiff's March 30th letter as a request for an amendment of plaintiff's insurance policy, nor by issuing the "Certificate of Insurance" addressed to Atkinson did he intend in any way to modify that policy. Both he and Philip Antrobus testified that the purpose of such a certificate was merely a routine method of informing Atkinson that plaintiff carried liability insurance. It merely certifies that the insured carries a certain numbered insurance policy and the recipient of a certificate such as Atkinson receives is supposed to go to the insured and obtain from the policy its full terms.

On April 12th plaintiff's brokers wrote Antrobus: "In accordance with our letter of March 30th we are enclosing herewith copy of portions of the contract agreement between Guy F. Atkinson Company and

Rutherford, Inc. We have taken the liberty of adding 'Company' after the name of 'Guy F. Atkinson' on the certificates which you furnished us. We should also appreciate your sending us two more copies of the certificate." Included in the excerpts from the contract was one requiring plaintiff to hold Atkinson and the government harmless from all damage from any fire caused by plaintiff. Another excerpt required plaintiff to furnish, at its own expense, contractor's comprehensive public liability insurance and furnish Atkinson evidence that it carried such insurance. Plaintiff assumed that the "Certificate of Insurance" of March 31st covered the Atkinson contract and commenced work under that contract. The problem would be comparatively simple had a loss occurred prior to the expiration date shown on this certificate, May 27, 1950. However, the fire upon which plaintiff's action is based did not occur until June 2d.

Subsequent to the Antrobus letter of March 31st, telephone conversations were held between Goodenough on the one hand and Philip Antrobus and McDowell on the other. Due to Goodenough's death the only version of these conversations is that of the latter two. They claimed that Goodenough was informed that while they would issue evidence of the existing policy they could not extend it. They requested further information so that they could place new coverage for the Atkinson contract. While this was going on the fire occurred but they did not learn of it until June 27th. Goodenough then told them that the Atkinson contract had about three months to go, and had to have coverage, that plaintiff had a fire. "It was not any claim under your policy * * *." However, it made them conscious of the danger of another fire and Goodenough wanted Antrobus to place this coverage even if it cost $200. (The premium for the original policy was 40 cents per $100 of plaintiff's payroll. A deposit of $250 was made on account.) H. O. Rutherford testified he told Goodenough about the fire immediately after it occurred and that about June 12th Rutherford phoned Antrobus and was told that liability was denied. Antrobus testified that Goodenough made no claim for the fire loss and "definitely indicated that there was no loss under our policy." Antrobus made no investigation of the fire loss. Goodenough was told that the original policy could not be extended to cover Atkinson; that Antrobus would have to cable Lloyd's for a separate placing because they had established that there was burning going on and under Antrobus' agreement with Lloyd's Antrobus could not cover that sort of work. When they issued the first policy they were advised there would be no burning.

On July 20, 1950, an endorsement was added to the original policy reading:

> "Issued to Rutherford, Inc.
> "Endorsement effective May 27, 1950
>
> * * * * * *
>
> "In consideration of an additional Minimum and Deposit Premium of $21.23, it is hereby understood and agreed that the period of the above numbered Policy/Certificate is extended to expire—
> June 27, 1950
> instead of as originally specified."

The same day a policy of insurance was issued specifically covering the Atkinson contract. For this policy a premium of $200 was charged later, based on the Utah Construction Co. payroll. At no time was the Atkinson payroll used for premium purposes. Another "Certificate of Insurance" relating to the new policy similar in form to that of March 31st was addressed and sent to Atkinson. Antrobus testified that Goodenough did not advise or intimate that by giving the extension to June 27th Antrobus would be covering the fire which had already occurred.

One Bedell, an insurance expert, testified that the March 31st "Certificate of Insurance" was the same as a cover note but not a modification of the original policy.

Was the Atkinson Contract Covered?

No issue is raised by the pleadings nor urged by plaintiff upon the theory that the actions of defendants or any of them misled plaintiff into believing it was covered. The cause of action pleaded and tried is based on the claim that insurance was actually given.

[1, 2] Plaintiff's theory as set forth in its complaint was that the original policy was extended to cover the Atkinson contract by both the "Certificate of Insurance" of March 31, 1950, and by the later endorsement extending the policy to June 27th. The testimony of Philip Antrobus and McDowell does not support this theory. However, in view of the obvious interest of these witnesses, the jury had the right to and no doubt did disregard their version of the situation. This leaves the case to be determined by the writings themselves, and and the reasonable inferences to be drawn therefrom. As there is no conflict in the evidence we are not bound by the trial court's interpretation of these writings and can make our own. Estate of Platt, 21 Cal. 2d 343, 131 P.2d 825.

[3] These writings do not show an amendment of the original policy nor an extension of it to cover the Atkinson contract. Assuming that the March 31st "Certificate of Insurance" acted as a cover note for the Atkinson contract as interpreted by Bedell, still it did not constitute an amendment of the policy, and it expired May 27th. In the letter sending it Antrobus pointed out that the *certificate* expired on that date and they wanted renewal advices. This certificate never was renewed or extended. When, after the fire had occurred and on July 20th, new documents were issued, they were, first, an extension of the original policy to June 27th, and secondly, an independent policy covering the Atkinson contract and commencing June 27 and ending September 27. As the first policy had not been amended to cover the Atkinson contract, its extension would only apply to the contract which it did cover, namely, the Utah Construction Co. contract. Even though the March 31st certificate constituted a cover note, applying to the Atkinson contract, the extension was only of the policy which applied solely to the Utah Construction Co. contract, and which policy even plaintiff's own expert admitted had not been modified. Moreover, the minimum and deposit premium obtained for the extension was based solely on the Utah Construction Co. payroll. Obviously, coverage would not have been given for the Atkinson contract at a time when all parties knew that there had been a heavy loss by fire under the latter contract without some consideration of the Atkinson payroll. Moreover, if the extension covered the Atkinson contract what was the necessity of issuing a new policy? The writings themselves refute the allegations of plaintiff's complaint that on March 31, 1950, the policy was amended to cover the Atkinson contract and that as amended the policy was extended by endorsement.

2. Elements of Damage.

In view of our determination that there was no coverage, it is unnecessary to determine whether the cost to plaintiff of fighting the fire was included in the terms of the policy.

The judgment is reversed.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

LIVINGSTON ROCK & GRAVEL CO. v. LOS ANGELES COUNTY.*

Civ. 19688.

District Court of Appeal, Second District, Division 2, California.

Sept. 8, 1953.

Rehearing Denied Sept. 25, 1953.

Hearing Granted Nov. 5, 1953.

Action to enjoin a county from enforcing an ordinance rezoning an unlimited industrial district as a light manufacturing district so as to prohibit operation of plaintiffs' cement mixing plant therein. From a judgment of the Superior Court of Los Angeles County, J. T. B. Warne, J., for plaintiffs, defendant appealed. The District Court of Appeal, McComb, J., held that provisions of the ordinance, authorizing revocation of exceptions automatically granted thereby to permit continuation of particular existing uses of buildings or premises in the respective zones immediately before the ordinance became effective and revocation or modification of permits, exceptions or other approvals granted for uses so exercised as to be detrimental to public health or safety, were unconstitutional with respect to plaintiffs' plant as depriving them of vested property rights without due process of law and fair and reasonable compensation.

---

* Subsequent opinion 272 P.2d 4.

Judgment affirmed.

1. Appeal and Error 🔑544(3)

The character of appeal on judgment roll alone was not changed by fact that appellant, in notice to superior court clerk to prepare record, requested inclusion of return and supplemental return to writ of review and affidavit in addition to judgment roll.

2. Appeal and Error 🔑907(3)

On clerk's transcript appeal on judgment roll alone, appellate court must conclusively presume that evidence is ample to sustain trial court's findings.

3. Appeal and Error 🔑544(3)

Parties appealing on judgment roll alone cannot enlarge scope of appellate court's review by designating for inclusion in lower court clerk's transcript documents not properly part of judgment roll or requesting that exhibits received in evidence be transmitted to appellate court.

4. Appeal and Error 🔑544(3)

On defendant's appeal on judgment roll alone, review by District Court of Appeal is confined to determination of whether complaint states cause of action, whether trial court's findings are within issues and support judgment appealed from, and whether reversible error appears on face of record.

5. Constitutional Law 🔑296(2)

The provisions of federal and state Constitutions that no person shall be deprived of property without due process of law protect persons engaged in lawful business of operating cement mixing plant on land in area designated by county zoning ordinance as unlimited industrial district before rezoning thereof as light manufacturing district in their vested property rights to conduct such business. Const. art. 1, § 13; U.S.C.A.Const. Amends. 5, 14.

6. Municipal Corporations 🔑601(11)

The broad view of police power which justifies taking away of right to engage in certain businesses in certain territory by zoning ordinance does not justify destruction of existing businesses therein.

7. Eminent Domain 🔑2(1)

Any governmental regulation depriving any person of profitable use of his property constitutes a taking thereof and entitles him to compensation under Constitution, unless invasion of his rights is so slight as to permit justification of regulation under police power.

8. Municipal Corporations 🔑601(23)

The rights of users of property at time of adoption of zoning ordinance affecting property are recognized and protected.

9. Municipal Corporations
🔑601(7, 9, 11), 625, 626

A zoning ordinance is invalid and unreasonable as applied to particular property, where ordinance attempts to exclude and prohibit existing and established uses or businesses which are not nuisances, imposes restrictions creating a monopoly, permits use of property only for purpose for which it is entirely unsuited or unusable because of use of adjacent property, or gives owner of restricted property less rights than owners of surrounding property.

10. Eminent Domain 🔑2(1)

A county regional planning commission's order revoking right to operate cement mixing plant on land in area changed from unlimited industrial district to light manufacturing district by county rezoning ordinance after establishment of plant was void as depriving plant owners of their property without just compensation, notwithstanding contention that order merely revoked exception automatically granted by ordinance to permit continuation of existing uses of buildings or premises in respective zones immediately before ordinance became effective, as county could not do indirectly what it could not do directly.

11. Eminent Domain ⚷2(1)

A strong public desire to improve public condition is insufficient to warrant achievement thereof by shorter cut than constitutional way of paying for change by just compensation of owners deprived of their property thereby.

12. Constitutional Law ⚷296(2)
Eminent Domain ⚷2(1)

Provisions of county zoning ordinance, authorizing regional planning commission to revoke exceptions, automatically granted by ordinance for continuation of existing uses of buildings or premises in respective zones immediately before ordinance became effective, and to revoke or modify permits, exceptions or other approvals granted automatically or by county board or commission pursuant to ordinance, if approved use is so exercised as to be detrimental to public health or safety, were unconstitutional with respect to cement mixing plant, erected, equipped and legally operated before adoption of ordinance on land in unlimited industrial district changed by ordinance to light industrial district, as depriving plant owners of vested property rights without due process of law and payment of fair and reasonable compensation. Const. art. 1, § 13; U.S.C.A.Const. Amends. 5, 14.

Harold W. Kennedy, County Counsel, and Edward H. Gaylord, Deputy County Counsel, Los Angeles, for appellant.

Denio, Hart, Taubman & Simpson, Long Beach, for respondents.

McCOMB, Justice.

From a judgment in favor of plaintiffs Livingston, in an action for an injunction to restrain the County of Los Angeles, hereinafter referred to as defendant, from enforcing certain provisions of the Los Angeles County zoning ordinance which would prohibit plaintiffs from conducting their cement mixing plant in an area of Los Angeles County known as the "Artesia Industrial District", defendant appeals.

Facts: On January 31, 1950, the Pacific Electric Corporation owned a parcel of land in Los Angeles County in a district designated as the Artesia Industrial District. Over it passed a main double track railway line with two separate spur tracks to serve the commercial and industrial plants on the adjoining land. The latter was held and used for industrial and manufacturing purposes exclusively, and was surrounded by lands being devoted to commercial, industrial and manufacturing uses. The Pacific Electric leased 20,000 square feet of their land to plaintiffs.

At such time and at all times prior to March 21, 1950, all of this land was by ordinance No. 1494 (new series), of the County of Los Angeles, zoned as being in zone M–3 (unlimited) with the provision that (except as otherwise provided in Article 4 of said ordinance, which is not here involved) any building, structure, improvement or premises might be erected, constructed, established, altered, enlarged, used, occupied or maintained thereon without restriction under the provisions of the ordinance as to use and occupancy.

Plaintiffs leased such property and erected thereon a batching plant for the loading of readymix concrete mixer trucks with concrete aggregates which use was then permissible in any M–3 zone in the County of Los Angeles. This plant was erected pursuant to building permit issued by the duly authorized building department of defendant and was completed prior to March 21, 1950. The plant cost $18,000 to erect and plaintiffs purchased $80,000 worth of mixer trucks to use with their plant. Since such date the plant and mixer trucks have been in continuous operation.

In the construction and operation of their plant, plaintiffs conformed to, complied with, and at all times now are complying with all requirements of the smog control and air pollution ordinances of Los Angeles County. In addition plaintiffs secured from the proper authority having control of smog and air pollution a permit authorizing the operation of their plant and certifying that after inspection it was found to be complying with all smog control and air pollution ordinances and requirements.

Defendant, by Urgency Ordinance adopted March 21, 1950, purported to rezone the Artesia Industrial District, theretofore in zone M–3 (unlimited), putting it in zone M–1 (light manufacturing).

On November 25, 1950, plaintiffs received a notice through the mail that a hearing would be held December 1, 1950, before the regional planning commission with reference to revocation of exception (Case No. 61).

The owner of the property, Pacific Electric Company, was never given any notice of this hearing.

On December 6, 1950, the regional planning commission sent plaintiffs a notice that it had revoked plaintiffs' right to operate their plant. Plaintiffs exhausted their administrative remedies before instituting the present action.

In addition to the foregoing facts the trial court found that plaintiffs by erecting and operating their plant had "acquired property rights which are entitled to protection against unconstitutional encroachments which will have the effect of depriving them of property without due process of law," and that defendant claims that by reason of the purported action of its regional planning commission, plaintiffs will lose all right to operate their plant and will be guilty of a criminal act if they continue operation.

[1–4] This appeal is upon the judgment roll alone.* Therefore our review is confined to a determination of whether (a) the complaint states a cause of action; (b) the findings are within the issue; (c) the judgment is supported by the findings and (d) whether reversible error appears upon the face of the record. (Hunt v. Plavsa, (hearing denied by the Supreme Court), 103 Cal.App.2d 222, 224 [2], 229 P.2d 482.)

In view of this rule, we are further limited under the circumstances of this case to be a determination of whether reversible error appears upon the face of the record.

The determination of the problem depends upon this question:

Were sections 533 and 649 of the county zoning ordinance, so far as applicable to plaintiffs, unconstitutional and was the order of the regional planning commission thus void?

This question must be answered in the affirmative. The following are provisions of the urgency ordinance adopted March 21, 1950 by defendant purporting to change the Artesia Industrial District from zone M–3 to zone M–1:

"Section 531. Existing Uses.

"An exception is granted automatically, hereby, so as to permit the continuation of the particular existing uses of any building, structure, improvement or premises existing in the respective zones immediately prior to the time this ordinance or any amendment thereof becomes effective if such existing use was not in violation of this or any other ordinance or law. * * *

---

* The fact that in the notice to the clerk to prepare a record, defendant requested in addition to the judgment roll, that there be included "that certain document entitled 'Return and Supplemental Return to Writ of Review and Affidavit' filed on August 4, 1952," does not change the character of the appeal. It still remains an appeal upon the judgment roll alone.

Mr. Presiding Justice White in Hunt v. Plavsa (hearing denied by the Supreme Court), 103 Cal.App.2d 222, 224 (1), 229 P.2d 482, 483, thus accurately states the rule:

"The present appeal is here upon the judgment roll. And as is said in Kompf v. Morrison, 73 Cal.App.2d 284, 286, 166 P.2d 350, 352, 'It is elementary and fundamental that on a clerk's transcript appeal the appellate court must conclusively presume that the evidence is ample to sustain the findings, and that the only questions presented are as to the sufficiency of the pleadings and whether the findings support the judgment.' In this type of appeal, since 'the evidence is not before this court, we are confined to a determination of the questions as to whether the complaint states a cause of action; whether the findings are within the issues; whether the judgment is supported by the findings and whether reversible error appears upon the face of the record.' (Montaldo v. Hires Bottling Co., 59 Cal.App.2d 642, 646, 139 P.2d 666, 668.) Appellants cannot, by designating for inclusion in the clerk's transcript documents not properly a part of the judgment roll, or by requesting that the exhibits received in evidence be transmitted to the appellate court, enlarge the scope of the appellate court's review. (In re Estate of Larson, 92 Cal.App.2d 267, 268, 269, 206 P.2d 852.)"

"Such exception shall remain in force and effect for the following length of time, except that it may be extended or revoked as provided in this article;

"(a) Where the property is unimproved, one year.

"(b) Where the property is unimproved except for structures to replace which said Ordinance No. 2225 does not require a building permit, three years.

"(c) In other cases twenty years, and for such longer time so that the total life of the improvement from date of construction will be:

* * * * * *

"Section 533. Revocation of Automatic Exception.

"In addition to other grounds stated in Article 2 of Chapter 6, an exception which has been automatically granted may be revoked if the Commission finds:

"(a) That the condition of the improvements, if any, on the property are such that to require the property to be used only for those uses permitted in the zone where it is located would not impair the constitutional rights of any person.

"(b) That the nature of the improvements are such that they can be altered so as to be used in conformity with the uses permitted in the zone in which such property is located without impairing the constitutional rights of any person.

"Section 649. Revocation.

"After a public hearing as provided for in this Article, the Commission may revoke or modify any permit, exception or other approval which has been granted either automatically or by special action of either the Board of Supervisors or the Commission, pursuant to either the provisions of this ordinance or of any ordinance superseded by this ordinance on any one or more of the following grounds:

* * * * * *

"(e) Except in the case of a dedicated cemetery, that the use for which the approval was granted is so exercised as to be detrimental to the public health or safety, or so as to be a nuisance."

[5] The 5th amendment to the Constitution of the United States reads in part: "No person shall be * * * deprived of * * * property, without due process of law".

The 14th amendment to the Constitution of the United States is to the same effect, and a similar provision appears in the Constitution of the State of California as Article 1, § 13.

The foregoing constitutional provisions protect plaintiffs in their vested property rights to conduct their lawful business in which they had engaged prior to the time the property on which their plant is located was placed in an M–1 zone. This rule has been established by our Supreme Court under similar circumstances in various cases. In County of San Diego v. McClurken, 37 Cal.2d 683, 691 [9], 234 P.2d 972, our Supreme Court held that an owner of real property who had legally undertaken construction of a building thereon before the effective date of a zoning ordinance might complete the building and use it for the purposes designated, which were legal at the date of the commencement of the building, after the effective date of the zoning ordinance restricting its uses to purposes other than that for which it had been originally intended.

[6, 7] A similar rule was stated in Jones v. City of Los Angeles, 211 Cal. 304, 309 [7], 295 P. 14, 17, in the following language: "In other words, does the broad view of the police power which justifies the taking away of the *right to engage in such businesses* in certain territory, also justify the *destruction of existing businesses?* We do not think that it does." And again 211 Cal. at page 321, 295 P. at page 22, "'It has also been held that any regulation which deprives any person of the profitable use of his property constitutes a taking of property and entitles him under the Constitution to compensation, unless the inva-

sion of rights is so slight as to permit the regulation to be justified under the police power. * * *'"

[8] In Edmonds v. County of Los Angeles, 40 Cal.2d 642, 255 P.2d 772, 777, our Supreme Court said: "The rights of users of property as those rights existed at the time of the adoption of a zoning ordinance are well recognized and have always been protected. (Yokley, Zoning Law and Practice, § 132, p. 255.) Accordingly, a provision which exempts existing nonconforming uses is ordinarily included in zoning ordinances because of the hardship and doubtful constitutionality of compelling the immediate discontinuance of non-conforming uses. (County of San Diego v. McClurken, 37 Cal.2d 683, 686, 234 P.2d 972.)"

[9] Similarly, in Wilkins v. City of San Bernardino, 29 Cal.2d 332, 340, 175 P.2d 542, 548, Chief Justice Gibson, speaking for the court, says "An examination of the California decisions discloses that the cases in which zoning ordinances have been held invalid and unreasonable as applied to particular property fall roughly into four categories: 1. Where the zoning ordinance attempts to exclude and prohibit existing and established uses or businesses that are not nuisances (citing cases). 2. Where the restrictions create a monopoly (citing cases). 3. Where the use of adjacent property renders the land entirely unsuited to or unusable for the only purpose permitted by the ordinance (citing cases). 4. where a small parcel is restricted and given less rights than the surrounding property, as where a lot in the center of a business or commercial district is limited to use for residential purposes, thereby creating an 'island' in the middle of a larger area devoted to other uses (citing cases)."

In the present case it was expressly admitted by defendant in its answer that it did not claim it had instituted any proceedings to abate a public nuisance as provided by section 3491 of the Civil Code.

[10] There is, of course, no merit in defendant's contention that plaintiffs were not being deprived of their property without just compensation, but that an automatic exception to the ordinance was merely being revoked. Such argument overlooks the basic facts in this case and says in effect that a rose by another name is not in fact a rose. In other words defendant may not do indirectly that which it could not do directly. Constitutional guaranties and rights may not be thus frittered away through specious reasoning.

[11] Mr. Justice Holmes, of the Supreme Court of the United States, in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, at page 416, 43 S.Ct. 158, at page 160 (67 L.Ed. 322) very aptly states, "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

[12] Applying the foregoing constitutional provisions in the light of the rules anounced by the Supreme Court of California in the cases set forth above, it is evidence that the provisions of the ordinances as applied to the facts in this case were unconstitutional so far as plaintiffs' plant was concerned, and of course, that the order of the regional planning commission was void. It is apparent that at the time plaintiffs erected their plant, made their investment in equipping it, and commenced to use it, its operation was perfectly legal, which fact was recognized in the urgency ordinance of defendant. It is likewise obvious that plaintiffs had a vested property right in the operation of their plant of which they could not be constitutionally deprived without due process of law, which presupposes plaintiffs' being awarded a fair and reasonable compensation for the property rights of which defendant was attempting to deprive them.

In view of such conclusions it is unnecessary to discuss other points presented by counsel in their respective briefs for the reason that irrespective of the solutions the judgment, for the reasons set forth above, must be affirmed.

Affirmed.

MOORE, P. J., and FOX, J., concur.

120 Cal.App.2d 145

ARGONAUT INS. EXCHANGE v. INDUSTRIAL ACCIDENT COMMISSION et al.

No. 15742.

District Court of Appeal, First District, Division 1, California.

Sept. 10, 1953.

Proceeding to recover compensation for injuries sustained while working as a gardener. The Industrial Accident Commission awarded compensation and insurance carrier petitioned for review of award. The Industrial Accident Commission filed an answer admitting lack of due process in hearing, and requested that order be vacated and cause remanded for further proceedings. The insured employer contested the petition of insurer and the commission. The District Court of Appeal, Bray, J., held that although the referee had broad discretion in hearing such cases he was arbitrary in refusing to allow insurer to amend answer to include question of coverage.

Award annulled and cause remanded to commission for further hearing.

1. Constitutional Law 🔑318

Refusal of referee of Industrial Accident Commission to allow an insurer to cross-examine witnesses upon material issues denies insurer the constitutional right of due process.

2. Constitutional Law 🔑318

In workmen's compensation proceeding, refusal of referee to allow insurer a recess to discuss with insured employer his testimony and that of members of insured's family, who had assumed position adverse to insurer, and to allow insurer continuance of hearing to enable insurer to meet situation, was denial of due process.

3. Workmen's Compensation 🔑1327

While the filing of an answer to a claim in a workmen's compensation proceedings is desirable, it is not mandatory. Labor Code, § 5506.

4. Constitutional Law 🔑318

Where insurer's answer to a claim of an employee allegedly injured in course of employment did not plead lack of coverage, but did reserve right to raise additional issues, refusal of referee to allow insurer to amend answer to set up defense of non-coverage denied due process to insurer. Labor Code, §§ 5505, 5506.

5. Workmen's Compensation 🔑1333

While the amendment of pleadings is a matter in discretion of Industrial Accident Commission, and that discretion is very broad, nevertheless that fact will not justify an arbitrary denial of right of a litigant to have a fair opportunity to present to the commission material evidence in support of reasonable and substantial defense.

6. Workmen's Compensation 🔑1333

Where insurer, in compensation proceedings, was notified of pending litigation upon October 3, hearing was held upon October 24, insured and employee resided at a point difficult to reach, and insured had taken a position adverse to insurer, the insurer did not fail to use proper diligence when it had not ascertained, because of insured's failure to co-operate, prior to the hearing, that there might be a question of lack of coverage involved, and the refusal of referee to allow insurer to amend its pleadings to cover the question was an abuse of discretion. Labor Code, §§ 5505, 5506.

◆

Leonard, Hanna & Brophy, San Francisco, for petitioner.

T. Groezinger, San Francisco, Industrial Accident Commission, for respondent.

BRAY, Justice.

Petition for writ of review on the ground that due process was denied petitioner at the hearing and in the denial of its petition for reconsideration.

Record.

Frank A. Thrasher was employed by Lester P. Cahill as a gardener in Potter Valley and was injured in the course of his employment. Petitioner was Cahill's insurance carrier until midnight, November 12th. Thrasher's application to the commission alleged November 12th as the date of injury. He testified that the correct date was November 10th. The commission found November 11th to be the date. This evidently was an error as there is no evidence whatever concerning that date. The real controversy is whether the accident occurred in Thanksgiving week, which was after the Argonaut's coverage of Cahill had expired. After an award to Thrasher against Argonaut, the latter petitioned for reconsideration. On its denial Argonaut filed its petition for writ of review. Although served in this proceeding, Thrasher has not appeared. The commission filed an answer in which it admits the asserted lack of due process and asks that in the interests of justice the findings, conclusions and award, and the order denying petitioner's petition for reconsideration, be vacated and the matter remanded for further proceedings. Cahill filed an answer denying that petitioner was in anywise denied due process.

Was Petitioner Denied Due Process?

Record.

Although Cahill claims that he was covered by the policy expiring November 12, 1951, he gave petitioner no notice of the accident. Thrasher filed his application to the commission about October 2, 1952, almost ten months after the injury. Petitioner's first knowledge of the injury was on October 3rd when it received notice that on October 2nd the commission had issued its order joining petitioner as Cahill's insurance carrier and had set a hearing at Ukiah for October 24th. October 17th, petitioner filed its answer stating that it expected to raise issues as to the nature and extent of disability, liability for medical treatment and average earnings at the time of injury. "Should other issues not now known to be proper and necessary later develop, we reserve the right to raise such additional issues in accordance with provisions of law and the rules of your Commission."

There can be little doubt that the referee acted arbitrarily. Thrasher was sworn as a witness. Shortly thereafter the referee stated that Argonaut had not filed an answer. He was then informed that it had been filed October 17th. He stated: "I don't have it. If you file your answers late, they don't catch up with the file and we don't know what you're doing with the record or the nature of your answer. Let me see a copy of it, please. Besides that, your answer comes in too late.

"Mr. McAleer [counsel for petitioner]: We received rather short notice on this.

"Referee: Your client is the one that has to answer, not you, sir, so you'd better have the mechanics of your client's office checked up so they can comply with the statute."

Thereupon Attorney Bruner stated that he was appearing for Cahill as "there is some question of coverage raised by the insurance carrier.

"Referee: There's none raised by the answer.

"Mr. McAleer: We would like to raise that issue at this time, Mr. Referee.

"Referee: You're not going to raise it. Does the employer have a policy here?

"Mr. Bruner: Yes, your Honor.

"Referee: Let me see the policy. I will take no issue on the matter of coverage, except to show who the insurance carrier was with an outstanding policy on the date of the alleged injury. * * *

"Mr. McAleer: I take it you will not allow me to raise the issue of intoxication?

"Referee: I will not hear that evidence if you didn't raise it in the answer.

"Mr. McAleer: May I make a statement at this time?

"Referee: I will hear no statement at this time. Your client has been sworn, sir. I'm getting a little tired of nurse-maiding the insurance companies along and I'm not going to do it anymore in cases where they obviously should know better."

During the examination of Thrasher his attorney stated: "* * * There was a question in Mr. Thrasher's mind as to the exact date of the injury. We have listed it as November 12th on the application but since then, he has checked the calendar and —" Thrasher then gave the date as November 10th. A Mrs. Matlock testified on cross-examination that Mrs. Cahill informed her that the Cahills had no insurance covering Thrasher at the time of the accident. On motion this evidence was stricken. Argonaut's attorney then asked for a short recess. The referee replied: "I have too many cases to try. I have six cases on the calendar. What do you want a recess for?

"Mr. McAleer: The Cahills were brought here as witnesses and I had no opportunity to investigate their testimony before the hearing.

"Referee: You mean you want time to investigate your case now? Put your witness on the stand. I will be very glad to hear them. I'm not going to give you any recess."

Argonaut then called Simpson, Cahill's stepson, who testified that while he was uncertain about it, he believed that the accident occurred during his Thanksgiving school vacation. A fellow schoolmate was with him at the time Thrasher was injured. Then occurred the following:

Question by Mr. McAleer, petitioner's counsel: "And was that friend on the ranch only—

"Referee: You're leading your witness. Next question.

"Mr. McAleer: That's all I have, Mr. Referee.

"Referee: I don't want to take away any opportunity to examine a witness but you can't lead the witness on vital matters at issue. I want the witness' testimony and not yours."

Cahill then testified but could not give the date of the accident. "I'm very poor on dates. * * * I know it was sometime around Thanksgiving but I know it was on a Sunday." Thrasher stated it was on a Saturday. Cahill without objection and under examination by the referee, testified to some length that Thrasher was drunk when he was injured. Then on examination by Cahill's counsel:

"What did you observe as to his appearance? A. Only that he was very drunk.

"Mr. Broaddus [for the applicant]: I will object to that, Mr. Referee. It is a conclusion.

"Referee: Sustained. You haven't raised the issue of intoxication here, anyway. Motion to strike is granted. You can't raise those kind of issues by bringing a man up here and expecting him to defend himself on all types of issues you didn't indicate. The carrier has filed an answer here in which they indicate only a few issues. Now, they want to raise some more and they can't do it. I'm not going to hear issues of this type."

Mrs. Cahill testified the accident "was somewhere near Thanksgiving vacation," on a Sunday before Thanksgiving. Attorney McAleer asked:

"Mrs. Cahill, who was present on the ranch on the date of the accident? A. There was quite a bunch of us there at the time, my husband and myself and we had some guests.

"Q. The names of those guests, please?

"Referee: I'm not going into an investigation now. If you think you're going out and get a further investigation of this case, I'm not going to hear of it, either now or on reconsideration. If that's the purpose of this testimony, to go out and make an investigation, I'm not going to allow it. The time and place to make an investigation is before the hearing. Any other purpose that is material to this hearing, I will be very happy to hear the testimony.

"Mr. McAleer: I have no further questions.

"Referee: If you want to ask any questions that will materially help the case, I will be very happy to hear it but I'm not going to hear it for the purpose of having you go out and investigate a case."

At the close of the testimony Attorney McAleer stated: "I don't like to argue but I would like to make a statement relative to the further issues.

"Referee: [You] may make any statement you wish.

"Mr. McAleer: I would like the record to show the insurance carrier has attempted to raise the issues of coverage and intoxication and that right was denied.

"Referee: It was denied because it wasn't raised in your answer. You expect to come in here and raise issues the man never heard of. In my opinion, that's a poor record of prosecution. What's your position?"

The report of the referee on hearing refers to the desire of the carrier's attorney to raise and produce evidence upon two new issues not previously made,—coverage and intoxication, and the refusal to hear the testimony upon such issue because not raised in the answer. "It was apparent that the carrier was not prepared to try their case and that no effective investigation had been made, up to at least the time of the answer in question. This case represents the second time in two days when carriers, represented by the same firm of attorneys, appeared for trial and were unprepared to prosecute their defense." After discussing certain of the evidence, the report continues: "At this point the carrier asked for a recess. The remark of the referee was 'No.' It was apparent from the handling of the case that the carrier had not investigated its claim, and with a number of cases on the calendar, I had no intention of taking time out so that the carrier could do what it should have done before." The report gives the testimony of Mrs. Matlock to the effect that Mrs. Cahill told her there was no insurance. The only reference in the digest of Simpson's testimony to the time of the accident is a statement that he said the accident occurred on a Sunday. While detailing Mrs. Cahill's testimony, the report states "that there were a bunch of people at the time. The carrier's attorney asked for the names or identity of these people. The referee advised that he would listen to all material evidence but he had no intention of engaging in an investigation by way of discovery or to use the hearing for purposes of investigation or doing that which should have been done previously."

In the report of the referee on decision the referee states in effect that in his opinion the answer did not constitute an answer. He then states: "It was apparent to this referee, and admitted by the carrier's attorney, that prior to the hearing the case had not been fully investigated by the carrier. It is for this reason that the attorneys sought to orally raise additional issues, without offering formal declaration thereof or an amendment to the answer filed and as contemplated by the sections and rules referred. While I am not adverse to allowing amendments in proper cases, I see no reason to do so in this case since the failure to properly prepare the case is due not to [in]advertence but to neglect on the part of the insurance carrier. It failed to properly, or at all, investigate the case. This criticism is not leveled against the attorneys for said carrier for they made every diligent effort to overcome the tremendous handicap under which they were cast by reason of the failure of the carrier to supply them with sufficient facts and an adequate investigation in the first instance. Attorneys are not magicians and the impossible is not to be expected and may not be demanded of them. The high regard in which I hold the attorneys made me reluctant to refuse admission on issues not timely or adequately raised but I cannot condone lack of adequate preparation or investigation on the part of the insurance carrier, particularly where its failure to do so has not been fully, adequately, or at all, explained."

In its petition for reconsideration petitioner set forth that its first knowledge of the accident came from the notice of hearing set for three weeks later; that in its answer it reserved the right to raise additional issues; that the case was assigned for investigation to independent investigators; that because of the remoteness of the ranch where the accident occurred (Potter Valley) it was impossible to complete the investigation, particularly since Cahill was represented by counsel and petitioner was not free to call on him for investigation; that petitioner had arranged for Cahill, Mrs. Cahill and Simpson to attend the hearing. They were requested to come to the place of the hearing in time for a conference but they did not arrive until after the hearing was in progress and counsel had no opportunity of discussing the case with them. As petitioner's request for recess was denied it was required to put the witnesses on the stand without conferring with them. Thrasher was permitted to allege a date of injury new, different and other than the date alleged in the application with no correlative permission to petitioner to protect its rights. Though the employers knew of the accident when it happened the record shows no report was ever made to petitioner. Petitioner withdrew any issue as to intoxication. The great weight of the evidence at the hearing showed that the injury was subsequent to November 13th. Petitioner now can definitely establish that the injury did not occur until after November 13th. The trial referee refused to permit petitioner to question Mrs. Cahill as to who was present at the time of injury. Since the hearing, through its investigations, petitioner learned that two disinterested persons were present, one Taylor and one Goodell; that they in company with witness Simpson were students at Palo Alto Senior High School during the fall term; that on either Friday the 16th or Saturday the 17th the three of them went to the Cahill ranch, neither Taylor nor Goodell having been there at any prior time during that month; that they remained there continuously for several days; that while there they were present when Thrasher received his injuries, and they helped extricate him from the fire; that Taylor returned to Palo Alto on November 22nd in order to be home for Thanksgiving; that the school records will show that these boys were present during all school days, and that the Thanksgiving holiday was the week commencing November 19th.

In answer to the petition for reconsideration Thrasher alleged that prior to the hearing an investigator assigned by petitioner called at the Cahill ranch and at the hospital where he was confined; that Mr. and Mrs. Cahill and Simpson were at the place of hearing at 8:45 the morning of the hearing, and that petitioner's attorney could have consulted them then; that the testimony of Goodell and Taylor could and should have been produced at the hearing. Thrasher denied that Taylor was present on the ranch at the time of the injury. He claims that although Goodell may have been on the ranch at the time Goodell did not help to extricate Tharsher from the fire, and that the issue of insurance coverage was fully developed at the hearing. Cahill likewise filed an opposition to the petition on the grounds that petitioner had failed to show diligence in discovering the evidence prior to the hearing and that it was only cumulative.

In the referee's report suggesting denial of the petition, the referee states "it should be observed that in connection with the proffered issue of 'coverage' sought to be raised by the carrier, its rights were fully protected by the introduction * * * of the policy"; that the proposed new evidence could have been discovered prior to the hearing. The petitioner is asking for a retrial "as a reward for its patent negligence." "How long must we go on underwriting the failure of preparation, the neglect of investigation, nursemaiding the carriers and insuring them of a second hearing when their own negligence or self-indulgence, as the case may be, renders them unwilling to properly, or at all, prepare their case in order that they might raise the essential issues and produce the necessary evidence indicated thereby? For my part, I see nothing to be gained by encouraging or condoning the practice involved." He then states that petitioner's answer is not an answer either in form or substance. The petition was denied by the commission, two commissioners voting to deny and one to grant.

Due Process.

The situation here is most unusual. The commission admits that the hearing was arbitrary and petitioner was denied due process. Thrasher, the injured employee, by failing to appear, makes no objection to our so finding. The only objection comes from the employer who at no time, either by himself, his wife or his stepson, has testified that the injury occurred during the period of coverage[1] and who, if the proffered testimony of Taylor and Goodell be true, will gain an undue advantage by being given insurance coverage under a policy which had expired at the time of the accident. Cahill contends that the action of the referee was justified because Argonaut was not diligent in preparing for the hearing, that it did not plead the defense of non-coverage and therefore there was no abuse of discretion in its not being able to assert such defense, that the evidence proposed to be offered by petitioner as set forth in the petition for reconsideration could have been discovered had petitioner used diligence.

---

[1] Both Cahills testified that the accident occurred on a Sunday, the stepson that it occurred during the Thanksgiving vacation and on a Sunday, while Thrasher says it occurred on a Saturday.

It is the employer only who claims that Argonaut's right to set up its defense should be denied because of claimed lack of diligence on the latter's part. Yet the facts upon which the claimed lack of diligence is based show that it was the employer's failure to cooperate with his insurer that caused the delay.

[1, 2] Certainly Argonaut was denied the right to cross-examine Mrs. Cahill as to the persons present at the time of the accident. In Walker Min. Co. v. Industrial Acc. Comm., 35 Cal.App.2d 257, 95 P.2d 188, where the commission submitted the proceeding without the insurer having an opportunity to cross-examine the claimant concerning his physical condition, the court said: "In effect, that ruling amounted to a denial of the insurer's constitutional right to due process by refusing to permit it to cross-examine a witness upon a material issue." 35 Cal.App.2d 262, 95 P.2d at page 190. See Evans v. Industrial Acc. Comm., 71 Cal.App.2d 244, 162 P.2d 488, where the refusal of the referee to hear two additional witnesses for petitioner was held to deny due process, even though their testimony was merely cumulative. Likewise, the arbitrary attitude and action of the referee towards Argonaut deprived it of its right to due process. At least as between insured and insurer the circumstances required that a short recess be given to enable the insurer to discuss with the insured his testimony and that of the members of his family who had by then assumed an adverse position towards the insurer, and also, that a continuance of the hearing be given to enable the insurer to meet this latter situation.

[3-6] As to the form of the answer, while it did not plead noncoverage, it did reserve the right to raise additional issues in accordance with law and the rules of the commission. In O'Hara v. Industrial Acc. Comm., 44 Cal.App.2d 629, at page 634, 112 P.2d 915, it was held that while the filing of an answer to a claim before the commission "is desirable" it is not mandatory. The court pointed out that under section 18 of the Workmen's Compensation Act (now Labor Code, § 5506) it is provided: "If the defendant fails to appear or answer, no default shall be taken against him, but the commission shall proceed to the hearing of the matter upon the terms and conditions which it deems proper." Section 5505 of the Labor Code, which provides that a defendant *may* file an answer, states: "Evidence upon matters not pleaded by answer shall be allowed only upon the terms and conditions imposed by the commission, or by the commissioner or referee holding the hearing." Here the referee made no attempt to impose terms, but arbitrarily and finally refused to allow petitioner to set up its defense. While the admission of evidence, the amendment of the pleadings, the conduct of the hearing, and the determination of a petition for reconsideration are matters in the discretion of the commission, and that discretion is very broad, see Peak v. Industrial Acc. Comm., 82 Cal.App.2d 926, 187 P.2d 905, nevertheless that fact will not justify an arbitrary denial of the right of a litigant to have a fair opportunity to present to the commission material evidence in support of a reasonable and substantial defense. Particularly is this so, when by reason of the absence of any objection by the employee to an annulment of the award, the issue as to diligence is raised only by the person who contributed to that lack of diligence, if any there be. As between Cahill and Argonaut we think the record fails to show a lack of diligence on the part of the latter, and that due to the arbitrary action of the referee, petitioner did not have a fair and impartial trial. As said in J. G. Boswell Co. v. Industrial Acc. Comm., 67 Cal.App.2d 347, at page 349,

154 P.2d 13, "in certain respects" it has never had its "day in court."

The findings, conclusions and award, and the petition for reconsideration are annulled and the cause remanded to the commission for further hearing.

PETERS, P. J., and FRED B. WOOD, J., concur.

120 Cal.App.2d 157

KENNERSON v. BURBANK AMUSEMENT CO., Inc. et al.

Civ. 15498.

District Court of Appeal, First District, Division 1, California.

Sept. 11, 1953.

Hearing Denied Nov. 5, 1953.

Action for damages for alleged breach of employment contract. The Superior Court, Santa Clara County, granted judgment for plaintiff, and defendants appealed. The District Court of Appeal, Peters, P. J., held that contract by which board of directors of corporation organized to operate leased theatre employed a member of board as general manager was void and unenforceable because board by such contract attempted to confer upon manager practical control and management of substantially all corporate powers.

Judgment reversed.

1. Corporations 🔑316(1), 318

Transactions that are unfair and unreasonable to corporation may be avoided, even though statutory requirements for valid transaction between corporation and its directors or corporation and any other corporation or association in which directors are also directors or financially interested are technically met. Corporations Code, §§ 800, 820.

2. Corporations 🔑316(1), 318

Statute setting forth circumstances under which transaction between corporation and directors or between corporation and another corporation or association in which directors are also directors or financially interested is not void does not operate to limit fiduciary duties owed by a director to all stockholders, nor does it operate to condone acts which, without existence of a common directorate would not be countenanced. Corporations Code, §§ 800, 820.

3. Corporations 🔑316(1), 318

Statute setting forth circumstances under which transaction between corporation and directors or between corporation and another corporation or association in which directors are also directors or financially interested is not void, does not permit an officer or director by abuse of his power to obtain an unfair advantage or profit for himself at expense of corporation. Corporations Code, §§ 800, 820.

4. Corporations 🔑316(1)

A director of corporation cannot, by reason of his position, drive a harsh and unfair bargain with corporation and, if he does so, he may be compelled to account for unfair profits made in disregard of his duty. Corporations Code, §§ 800, 820.

5. Corporations 🔑307

Directors of a corporation, though not strictly trustees, are fiduciaries and bear a fiduciary relationship to corporation and to all stockholders and must administer their duties for the common benefit. Corporations Code, § 800.

6. Corporations 🔑316(1)

A director of a corporation is precluded from receiving any personal advantage in his personal dealings with corporation without fullest disclosure to and consent of all those affected. Corporations Code, §§ 800, 820.

7. Corporations 🔑180, 307

A director and a dominant or controlling stockholder or group of stockholders are fiduciaries, and their dealings with corporation are subject to rigorous scrutiny. Corporations Code, §§ 800, 820.

8. Corporations 🔑189(12), 319(7)

Where any contract of director or dominant stockholder or group of stockholders with corporation is challenged, such director or stockholder has burden of proving the good faith of transaction and its inherent fairness from viewpoint of corporation and those interested therein. Corporations Code, §§ 800, 820.

9. Corporations ⚷186, 316(1)

The essence of the test of a good faith transaction between a director or stockholder and corporation is whether under all the circumstances, the transaction carries the earmarks of an arm's length bargain and if it does not, equity will set it aside. Corporations Code, §§ 800, 820.

10. Corporations ⚷180, 307

Where there is a violation of the principle that powers of a fiduciary, such as officer, director, or dominant stockholder of corporation, may not be exercised for the aggrandizement, preference, or advantage of the fiduciary to the exclusion or detriment of the cestuis, equity will undo the wrong or intervene to prevent its consummation. Corporations Code, §§ 800, 820.

11. Corporations ⚷305

Directors are required by statute to exercise and maintain control over corporate affairs in good faith and they may not delegate such control and management to others, and any contract so providing is void. Corporations Code, §§ 800, 820.

12. Corporations ⚷305

Contract by which board of directors of corporation organized to operate leased theatre employed a member of board as general manager with full and uncontrolled authority over bookings, personnel, admission prices, salaries, contracts and fiscal policies, was void and unenforceable, notwithstanding requirement that manager report and account to board semi-annually, since by such contract board attempted to confer upon manager practical control and management of substantially all corporate powers in violation of statutory duties of directors. Corporations Code, §§ 800, 820.

13. Corporations ⚷305

Corporate affairs must be managed by duly elected board of directors, and while board may grant authority to act, it cannot delegate its function to govern, and if it does so, the contract so providing is void. Corporations Code, §§ 800, 820.

Arvin O. Robb, San Jose, for appellants.

John H. Machado, San Jose, for respondent.

PETERS, Presiding Justice.

Plaintiff brought this action against dedefendants for damages for the claimed breach of an employment contract. The trial court found in favor of plaintiff and granted him a judgment for $49,140, the full prayer of the complaint. Defendants appeal.

Before recounting the facts, the principal characters in this complicated drama of corporate machinations should be identified.

Plaintiff, Burton H. Kennerson, when these transactions occurred, had been in the theatre business for twenty-four years, eighteen of which he had spent in a managing capacity. He was one of the organizers of the two corporate defendants, and was a director of Burbank Amusement Co. when that corporation executed the contract here involved.

The two defendants are Burbank Amusement Co., and Beverly Investment Co., related corporations. The contract here involved was between Kennerson and Burbank. Prior to the institution of this action Burbank was merged with Beverly, Beverly assumed the debts and liabilities of Burbank, and Burbank went out of existence. It is because of such assumption that Beverly is here made a defendant.

Fred M. Salih, although not a party to this action, should also be identified. At the times here involved he was a partner in a firm of building contractors that specialized in theatre construction, and was the owner of several theatres. He planned with Kennerson the creation of the two corporate defendants. He was Beverly's principal witness.

Our story opens in March of 1949. In that month Kennerson and Salih agreed that a theatre should be constructed by Salih in the Burbank suburb of San Jose upon land to be provided by Salih. It was Kennerson's idea to form two corporations, one Beverly, with a stated capital of $200,000 to purchase the land, and to build, pay for and to hold the constructed theatre, and the other, Burbank, with a stated capital of $60,000, to run the theatre and included stores. The parties also agreed that half of the total stock of both corporations would be sold to members of Salih's family, and that Kennerson was to sell shares to persons in San Jose. It was understood that Salih was to furnish the land and to build the theatre for $200,000. Salih immediately started construction in June of 1949, and in September of 1949 entered into a formal construction contract with Beverly.

It was understood between the organizers of the two corporations that Beverly was to have 20,000 shares, with a par value of $10 each, and that the operating corporation, Burbank, was to have 6,000 shares of the same par value. Salih testified that it was understood that the purchaser of ten shares of Beverly was to purchase three shares of Burbank so as to maintain a proportional interest in each corporation. Kennerson could not remember whether this had been agreed upon, and there is no writing in the record incorporating this concept. There was certainly no prohibition in the articles or bylaws against any stockholder selling his interest in either or both corporations. With its $60,000 capital Burbank was to buy equipment for the theatre, and ultimately did so.

The two corporations were incorporated in June of 1949, and permits secured for the issuance of stock. Kennerson was elected a director of Burbank, and later also secretary-treasurer. Salih was elected a director of both corporations, and also, apparently, president of both.

In November of 1949, the theatre being still unfinished, Beverly leased to Burbank the theatre and two upstairs office suites and four street level stores, for ten years, at a total rental of $200,000, with an option in Burbank to renew the lease for forty years.

Between November of 1949 and January of 1950 Kennerson decided that he wanted a contract to manage the theatre involved, and believed that he had the approval of the majority of the then directors of Burbank, but apparently feared that those directors would be voted out as directors at a stockholders' meeting of Burbank, then impending. A joint meeting of both boards was called for January 11, 1950. Prior to that date Salih and Kennerson had seriously disagreed on several matters. At this January 11th meeting all directors of both boards were present, and Kennerson presented to them a proposed contract between Kennerson and Burbank whereby Kennerson was to be employed to manage the then still unfinished theatre. Salih, and directors Kneeshaw and Brady of the Beverly board, opposed the contract, on many grounds, including the claim that it was unfair to the corporation, the charge that Kennerson was not morally fit because of his recent arrest on some unspecified charge, and that he had been approved as a director by the Department of Corporations under a misapprehension. Over the objection of the Beverly directors, the Burbank directors removed Salih as president, and, by resolution, called a special meeting of the Burbank directors for January 20, 1950, for the purpose of considering the Kennerson contract proposal.

The January 20, 1950, directors' meeting of Burbank was duly noticed, but only three—Kennerson, Thorp, the new president, and Rundle—attended, two directors being absent. Several members of the Beverly board were also present. Kneeshaw and Brady, of the Beverly board, vigorously objected to the proposed contract on the ground that it was financially unsound to enter into such a contract before the theatre was finished, that it was unfair to do so when only three directors of Burbank, one of whom was interested, were present, and on other grounds. Kneeshaw testified that Kennerson insisted on proceeding because he feared that the new directors of Burbank that would be elected at the next stockholders' meeting, to be shortly held, might not favor the contract. After a prolonged argument the three Burbank directors retired to another room where they, by the votes of Thorp and Rundle, Kennerson not voting, approved the contract, and authorized Thorp to execute it on behalf of Burbank. At this time the theatre was but seventy per cent complete, Beverly had sold but $78,500 of its shares, $75,000 of which had been paid to Salih, and Beverly owed Salih an additional $80,000. Burbank had sold $19,950 of its stock.

The resolution authorizing and approving the contract with Kennerson contained the following clause which was not incorporated into the later executed contract: "provided, nevertheless, that said approval is made upon the express agreement of B. H. Kennerson that such agreement may be modified in any respect or abrogated completely by a majority vote of the present members of the Board of Directors of this corporation."

The contract was duly signed and executed on the same day, January 20, 1950. The contract contains the following clauses:

"1. The First Party does hereby hire and/or employ the Second Party to act as General Manager of the Manor Theatre in each and all of its business operations and in all of its business dealings and operations in relation to the operation of the Manor Theatre for a period of five (5) years beginning seven days prior to the opening of the Manor Theatre in the Burbank District, Santa Clara County, California, for the agreed salary of $125.00 per week, payable weekly, plus five (5%) per cent of the gross amount of sales from all concessions such as candy, popcorn, beverages, etc., payable weekly, and Second Party agrees in return for the said five (5%) per cent to pay for all inventory shortages.

"2. The Second Party shall have the sole authority and jurisdiction in purchasing and booking all motion pictures, stage attractions and other forms of entertainment to be used at the Manor Theatre.

"3. The Second Party shall have the exclusive right to fix and establish all policies to be followed in the operation of the Manor Theatre, and to determine all charges for admission and to hire and discharge all necessary help to operate and maintain said theatre and fix all salaries and wages to be paid such help.

"4. The Second Party shall have exclusive right to sign all contracts for and on behalf of the First Party in relation to the Manor Theatre and to sign all checks to be used in connection with the operation of the Manor Theatre.

"5. The Second Party shall have the right to carry on any other business for his benefit, or engage in other work during the term of this contract, it being understood, however, that he will at all times manage the business of the First Party in a first-class manner. Second Party undertakes that the operation of said theatre will show a revenue in excess of operating costs, excluding depreciation and rent," and excluding certain catastrophes or acts of the Board of Directors of Burbank.

By clause 6 Kennerson agreed to render a semi-annual report summarizing his operations to the board of Burbank or to appear and answer questions relating to such operations. Clause 7 confers on certain shareholders of Burbank the power of cancellation in language completely different from that in the resolution of the board authorizing the contract. It reads as follows: "7. This contract may be cancelled by First Party at any time within one (1) year from the date hereof by giving sixty (60) days written notice to Second Party, and upon written consent of more than eighty (80%) per cent of those persons to whom the stock of First Party was originally issued, regardless of the number of shares of stock originally issued to them and regardless of whether or not they continue to be shareholders, and together with approval of a majority of the Board of Directors."

The 8th paragraph continues the contract for five years but provides that unless then terminated by the notices therein provided it shall continue for an additional two years. Paragraph 9 provides for vacations. The next paragraph reads as follows: "10. It is understood that all money earned, collected and taken in an account of the Manor Theatre business of the First Party shall be deposited in the Hester Branch of the Bank of America, San Jose, California, in the name of the

First Party, and from said bank account all operating expenses and other expenses of the Manor Theatre shall be paid by the Second Party before withdrawal of funds for other purposes, and First Party shall authorize said bank to permit Second Party to draw checks on said account."

The last paragraph makes its terms binding upon heirs, successors and assigns of the parties.

Two directors, Salih and Callisch, were not present at the meeting at which the resolution authorizing the execution of the contract was passed, but Callisch, some time later, "approved" the minutes. The contract was never presented to or approved by the stockholders of Burbank.

The execution of this contract led to a widening of the split between the factions, and to the filing of a series of lawsuits. Among other things, Salih's attorney wrote to the Corporation Commissioner pointing out that because Kennerson had seized control of Burbank the original purpose of organizing two corporations had been frustrated, and requested the suspension or revocation of Burbank's permit. On February 23, 1950, the Commissioner issued a desist and refrain order stopping all sales of the securities of both corporations, which, of course, tied up the financial development of both corporations. Just before this order became effective Salih increased his and his family's holdings, by purchasing an additional 3,400 shares in Beverly. At the time of the January 20th meeting he had owned but ten shares in Beverly, and but three shares in Burbank. At this time Beverly owed Salih about $130,000, and most of the money paid for the 3,400 shares was immediately repaid to Salih to apply on this debt.

In the meantime, in January of 1950, the Colombini family became a substantial stockholder in Burbank, and in May, 1950, in Beverly. All during this time various lawsuits were pending in which the Colombinis and the Salihs were opponents. But on May 4, 1950, they settled their differences, by a formal written contract, by which they agreed to work together to secure a merger of the two corporations. It was agreed that certain actions should be dismissed and that, until the merger, the Salihs should own 3,510 shares, Joseph Brady 2,000 shares, and the Colombini family 2,600 shares of Beverly. Salih was empowered to sell 4,000 shares to outsiders, and agreed to purchase the Colombini shares one year later if the Colombinis desired to sell.

In June of 1950, at a Burbank stockholders' meeting, the Salih faction attempted to merge that corporation with Beverly, but was unable to muster enough votes. One of the main purposes of the proposed merger was to cancel the employment contract of Kennerson, although Kennerson denied knowledge of this purpose, but he did know that merger plans were being discussed. Under these circumstances a special meeting of the board of directors of Burbank was called for August 11, 1950. At this time the directors were Maurice Sherman, Paul Navarra, Kennerson, George Honore and Nate Thorp, Salih apparently having been defeated as director in February of 1950. Thorp was chairman, but had died just before the August 11th meeting. One of the Colombinis was president of the corporation. At this special meeting Sherman, Navarra and Kennerson appeared, Honore being absent and Thorp being dead. Sherman was elected chairman of the board, Frank Callisch was elected to fill the unexpired term of Thorp, Colombini was removed as president and George Mendoza elected in his place, and Kennerson, who until then had only been a director, was elected secretary-treasurer of Burbank. A previous formal offer to the Salih family to sell them designated quantities of Burbank stock was revoked. Then the members present adopted the following resolution: "Be It Resolved that the Agreement of Employment * * * with B. H. Kennerson * * * be, and the same is hereby, ratified and approved, and that the right of abrogation and modification given to the Board of Directors at said meeting of January 20, 1950 be, and the same is hereby removed as a condition of said Agreement of Employment and that the present Board shall not have the right of modification or abrogation of said contract as was given the Board of Directors under the resolution of January 20, 1950."

The board also by resolution authorized Kennerson to employ a broker to rent the stores and offices in the theatre building.

Attached to these minutes is an undated page signed with six signatures by which the signatories, "constituting all of the Directors of Burbank Amusement Co., Inc. do hereby consent to the holding of the foregoing meeting * * * and do hereby ratify and approve all of the acts of the said Directors at said meeting as disclosed by the foregoing minutes." Then follow the signatures of Mendoza, who apparently was not a director although the new president, Kennerson, Sherman, Callisch, Navarra, and a somewhat illegible name, but apparently that of director George Honore. At this time, these directors owned, collectively, but a very small proportion of the total outstanding shares of Burbank.

Although the minutes recite that the resolution cancelling the abrogation clause was "unanimously carried," Kennerson testified that he did not vote upon it but that it was carried by the votes of Navarra and Sherman, the only two other directors present. Kennerson admitted that no consideration passed from him for the cancellation of this right of abrogation.

The theatre building was still incomplete at the time of this August, 1950, meeting, but probably was nearing completion. Large sums, possibly over $86,000, were owed to Salih at this time.

Almost immediately after the August 11, 1950, board meeting, a meeting of the stockholders of Burbank was called for September 4, 1950. At this meeting, by the required two-thirds majority, the stockholders voted to merge with Beverly on the basis of the exchange of one Burbank share for one Beverly share, and upon the agreement of Beverly to take over Burbank's assets and to assume its liabilities. The existing board of directors of Burbank was recalled, and a new board elected. The new board consisted of Salih, two Colombinis, Sherman, and Kennerson.

A duly noticed meeting of the new board of Burbank was called for September 19, 1950, at which four of the directors were present, Salih, two Colombinis, and Kennerson—Sherman being absent. Kennerson objected to the meeting, but his objections were overruled. Salih was elected president and a Colombini was elected secretary-treasurer. By formal resolution approved by Salih and the two Colombinis, with Kennerson abstaining, the merger was approved. (The certificate of merger was filed September 28, 1950.) By the same vote the following resolution was adopted: "Resolved that the contract agreement heretofore entered into * * * employing the said Burton H. Kennerson as manager of the Manor Theatre * * * be cancelled." Formal demand was made upon Kennerson for the books, records and files of the corporation. It should be here mentioned that later, in a mandate action, Kennerson testified that he did not know where the books were, and the mandate action was dismissed.

Salih and the Colombinis testified that they did not know at the time of this September 19, 1950, meeting that the previous board on August 11, 1950, had attempted to abrogate the cancellation clause. They voted on September 19, 1950, to cancel Kennerson's contract in the belief that they had such right under the original resolution of January 20, 1950.

Kennerson testified that he was at all times ready, able, and willing to carry on under the contract, and in February, 1951, demanded of Beverly the right to do so. This action was filed March 20, 1951.

The trial court found that the contract had been entered into as pleaded; that it had never been cancelled as therein provided; that it was still in full force and effect; that it did not improperly delegate authority to Kennerson; that Kennerson was ready to perform but had been, improperly, prevented; that the contract was "fair, just and reasonable"; that the contract was authorized, approved and ratified in good faith and in the interest of the corporation; that the financial interest of Kennerson was at all times disclosed and known to the board; that the approving vote was sufficient; and that the directors had authority to enter into the contract. Damages at $125 a week for the full seven years, with $10 a week for the concession, were awarded, and judgment granted for $49,140.

Although the factual situation is somewhat confused, certain facts clearly stand out. The two corporations were closely integrated, with Beverly putting up the capital for the land and building. Kennerson had but a very small investment in either corporation. When the joint meeting of the two boards was held on January 11, 1950, the Beverly board vigorously opposed the contract by which it was proposed to give Kennerson a contract whereby he was to control the entire business of Burbank and the sole asset of Beverly. Present at the January 20, 1950, meeting of the board of Burbank were but three of the five directors, one of whom was Kennerson. None of those present had a substantial interest in Burbank. They knew of the hot controversy over the Kennerson contract and knew of the impending stockholders' meeting of Burbank at which a new board was to be elected. Under these circumstances by a vote of two directors, and over the opposition of the directors of Beverly, the president was authorized to execute a contract. The resolution approving the contract was made upon the express agreement of Kennerson that the contract of employment could be modified or abrogated "by a majority vote of the present members of the Board of Directors." Thus, the members of the Burbank board attempted to keep in the hands of the then members of that Board the power to modify or abrogate the contract even though they might not be members of a future board or have any interest at all in the corporation.

The contract as executed did not contain the abrogation clause as authorized, but contained a clause entirely different from that authorized. The new clause purported to limit the cancellation power of Burbank to the first year of the contract, and required the written consent of eighty per cent "of those persons to whom the stock of First Party was originally issued." These persons might have sold their stock and might have no interest in the corporation at all when such power was sought to be exercised, but nevertheless it was attempted, by this unauthorized clause, to give them the power to control the destinies of Burbank so far as Kennerson's contract was concerned.

Callisch, a director of Burbank, absent from the January 20th meeting, "approved" the minutes of that meeting. The contract was never presented to or approved by the stockholders of Burbank.

Then with merger plans being discussed, and with it becoming increasingly evident that a merger would probably occur as soon as consent of the necessary two-thirds of the stockholders of Burbank could be secured, a special meeting of the Burbank board was held on August 11, 1950. Again but three directors, one of whom was Kennerson, were present. By a vote of two directors, a resolution was adopted purporting to ratify the Kennerson contract, and, without any consideration moving from Kennerson, the resolution purported to remove the cancellation provision contained in the January 20, 1950, resolution. The absent director, and a director newly-elected at that meeting purported to ratify and approve this action. Although a new board of directors of Burbank was elected on September 4, 1950, and a special meeting of the newly-elected board was called for September 19, 1950, the old board kept from the new board all knowledge of the resolution of August 11th.

The terms of Kennerson's contract must also be mentioned. He is employed as manager of the theatre "in each and all of its business operations" for a period of five years and possibly seven, at a total salary of $45,500, plus a commission. As manager he was to have "sole authority and jurisdiction" to book theatre engagements, the "exclusive right" to "fix and establish all policies to be followed in the operation of the Manor Theatre," to determine charges, to hire, fire and fix all salaries of all personnel, and the "exclusive right" to sign all contracts and checks in relation to the opertion of the theatre. He was permitted to engage in other employment. He was required to render a semi-annual report to the Burbank board. Although money from operations was to be deposited in the bank in the name of Burbank, Kennerson was authorized to pay all expenses therefrom and draw checks thereon.

It must be remembered that Burbank's sole asset was its management contract with Beverly, and its interest in the furnishings of the theatre. By this contract all of the functions of Burbank, except the rights to receive semi-annual reports from Kennerson and to question him, including control over all of the corporate policies, including finances, was turned over to Kennerson.

These transactions are attacked on the ground that the basic resolutions and contract were void because they violated the provisions of section 820 of the Corporations Code. That section provides:

> "Directors and officers shall exercise their powers in good faith, and with a view to the interests of the corporation. No contract or other transaction between a corporation and one or more of its directors, or between a corporation and any corporation, firm, or association in which one or more of its directors are directors or are financially interested, is either void or voidable because such director or directors are present at the meeting of the board of directors or a committee thereof which authorizes or approves the contract or transaction, or because his or their votes are counted for such purpose, if the circumstances specified in any of the following subdivisions exist:
>
> "(a) The fact of the common directorship or financial interest is disclosed or known to the board of directors or committee and noted in the minutes, and the board or committee authorizes, approves, or ratifies the contract or transaction in good faith by a vote sufficient for the purpose without counting the vote or votes of such director or directors.
>
> "(b) The fact of the common directorship or financial interest is disclosed or known to the shareholders, and they approve or ratify the contract or transaction in good faith by a majority vote or written consent of shareholders entitled to vote.
>
> "(c) The contract or transaction is just and reasonable as to the corporation at the time it is authorized or approved.
>
> "Common or interested directors may be counted in determining the presence of a quorum at a meeting of the board of directors or a committee thereof which authorizes, approves, or ratifies a contract or transaction."

It is contended that the basic resolutions of January 20th and August 11th were void because not passed by a "vote sufficient for the purpose", within the meaning of subdivision (a) because such resolutions were passed by the vote of but two of the five directors. It is contended that prior to the adoption of section 820 if a director necessary to constitute a quorum was interested in a transaction voted by a majority of the quorum, with or without his vote, the transaction was voidable. A qualified disinterested quorum was necessary to transact business. There are many cases broadly intimating that this was the law prior to the adoption of section 820. See Anderson v. Calaveras Cent. Min. Corp., 13 Cal.App.2d 338, 348, 57 P.2d 560; also cases collected Corporations Code Annotated p. 70. There are several cases indicating that this has remained the law subseqeunt to the adoption of section 820. Angelus Securities Corp. v. Ball, 20 Cal.App.2d 423, 432, 67 P.2d 152; Pece v. Tama Trading Co., 22 Cal.App.2d 219, 223, 70 P.2d 652. Of course, section 816 of the Corporations Code provides that a quorum consists of a majority of the directors, the bylaws of Burbank provide that three directors shall constitute a quorum, and section 817 provides or implies that a majority of the quorum may transact business. It is also argued that if the resolutions were void, they could not be ratified by a subsequent approval of the minutes. Section 820(a) however, apparently recognizes ratification as a method of approving a resolution in which a director is interested.

[1] These arguments present some very interesting questions, but they need not be decided here, because we are of the opinion that the contract here involved was void for other reasons. Section 800 of the Corporations Code provides that "all corporate powers shall be exercised by or under authority of" the board of directors. Section 820, in its very first sentence, requires that "Directors and officers shall exercise their powers in good faith, and with a view to the interests of the corporation." In addition, it is the law that "Even though the requirements of section 820 are technically met, transactions that are unfair and unreasonable to the corporation may be avoided." Remillard Brick Co. v. Remillard-Dandini Co., 109 Cal.App.2d 405, 418, 241 P.2d 66, 74; see, also, Brainard v. De La Montanya, 18 Cal.2d 502, 510, 116 P.2d 66.

[2–6] There are several statements in the Remillard case that are applicable here. At page 418, of 109 Cal.App.2d, at page 74 of 241 P.2d it is stated:

> "But neither section 820 of the Corporations Code nor any other provision of the law automatically validates such transactions simply because there has been a disclosure and approval by the majority of the stockholders. That section does not operate to limit the fiduciary duties owed by a director to all the stockholders, nor does it operate to condone acts which, without the existence of a common directorate, would not be countenanced. That section does not permit an officer or director, by an abuse of his power, to obtain an unfair advantage or profit for himself at the expense of the corporation. The director cannot, by reason of his position, drive a harsh and unfair bargain with the corporation he is supposed to represent. If he does so, he may be compelled to account for unfair profits made in disregard of his duty. Even though the requirements of section 820 are technically met, transactions that are unfair and unreasonable to the corporation may be avoided. California Corporation Laws by Ballantine and Sterling (1949 ed.), p. 102, § 84. It would be a shocking concept of corporate morality to hold that because the majority directors or stockholders disclose their purpose and interest, they may strip a corporation of its assets to their own financial advantage, and that the minority is without legal redress. * * *
>
> "It is hornbook law that directors, while not strictly trustees, are fiduciaries, and bear a fiduciary relationship to the corporation, and to all the stockholders. They owe a duty to all stockholders, including the minority stockholders, and must administer their duties for the common benefit. The concept that a corporation is an entity cannot operate so as to lessen the duties owed to all of the stockholders. Directors owe a duty of highest good faith to the corporation and its stockholders. It is a cardinal principle of corporate law that a director cannot, at the expense of the corporation, make an unfair profit from his position. He is precluded from receiving any personal advantage without fullest disclosure to and consent of *all* those affected. The law zealously regards contracts between corporations with interlocking directorates, will carefully scrutinize all such transactions, and in case of unfair dealing to the detriment of minority stockholders, will grant appropriate relief. Where the transaction greatly benefits one corporation at the expense of another, and especially if it personally benefits the majority directors, it will and should be set aside. In other words, while the transaction is not voidable simply because an interested director participated, it will not be upheld if it is unfair to the minority stockholders. These principles are the law in practically all jurisdictions. 3 Fletcher, Cyclopedia of Corps. (Perm.Ed.), p. 173, § 838, et seq.; 13 Am.Jur., p. 948, § 997, et seq.

[7–10] "The United States Supreme Court has clearly established these principles. In Pepper v. Litton, 308 U.S. 295, at page 306, 60 S.Ct. 238, at page 245, 84 L.Ed. 281, the court, unanimously, stated the following: 'A director is a fiduciary. (Citing a case.) So is a dominant or controlling stockholder or group of stockholders. (Citing a case.) Their powers are powers in trust. (Citing a case.) Their dealings with the coporation are subjected to rigorous scrutiny and where any of their contracts or engagements with the corporation is challenged the burden is on the director or stockholder not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein. (Citing a case.) The essence of the test is whether or not under all the circumstances the transaction carries the earmarks of an arm's length bargain. If it does not, equity will set it aside.' Referring directly to the duties of a director the court stated 308 U.S. at page 311, 60 S.Ct. at page 247: 'He who is in such a fiduciary position cannot serve himself first and his *cestuis* second. He cannot manipulate the affairs of his corporation to their detriment and in disregard of the standards of common decency and honesty. He cannot by the intervention of a corporate entity violate the ancient precept against serving two masters. He cannot by the use of the corporate device avail himself of privileges normally permitted outsiders in a race of creditors. He cannot utilize his inside information and his strategic position for his own preferment. He cannot violate rules of fair play by doing indirectly through the corporation what he could not do directly. He cannot use his power for his personal advantage and to the detriment of the stockholders and creditors no matter how absolute in terms that power may be and no matter how meticulous he is to satisfy technical requirements. For that power is at all times subject to the equitable limitation that it may not be exercised for the aggrandizement, preference, or advantage of the fiduciary to the exclusion or detriment of the *cestuis*. Where there is a violation of those principles, equity will undo the wrong or intervene to prevent its consummation.'

"This is the law of California. It was the law before section 311 of the Civil Code was adopted, and is the law since."

[11, 12] Inasmuch as the directors must exercise and maintain control over corporate affairs in good faith, they are prohibited from delegating such control and management to others, and any contract so providing is void. By this contract with Kennerson the board has attempted to confer upon him the practical control and management of substantially all corporate powers. The sole asset of this corporation was the management of, and the fixtures in, the Manor Theatre building. By the contract the board has attempted to transfer all control over bookings, personnel, admission prices, salaries, contracts, expenses and even fiscal policies to Kennerson. While the contract provides that moneys are to be banked in the name of Burbank, Kennerson is granted full power to withdraw the same, subject to paying expenses. Kennerson is authorized to book "other forms of entertainment," so that he could, without restraint, change the very nature of the enterprise, and could even assign his powers to others. The fact that Kennerson is under a duty to make periodic reports to the board does not constitute a sufficient retention of control over discretionary corporate policies to comply with the rule.

Kennerson admits that it is the law that a board cannot divest itself of its fundamental powers by contract, but contends that the requirement that Kennerson must report and account saves this contract from violating this rule.

[13] California has recognized the rule that the board cannot delegate its function to govern. As long as the corporation exists, its affairs must be managed by the duly elected board. The board may grant authority to act, but it cannot delegate its

function to govern. If it does so, the contract so providing is void. Smith v. California Thorn Cordage, Inc., 129 Cal.App. 93, 98, 18 P.2d 393; see discussion and cases cited 6A Cal.Jur. p. 1095, § 615; p. 1132, § 643; Ballantine on Corporations (1946 ed.), p. 136, § 48.

This also seems to be the general rule in this country. A case quite similar to the instant one is Long Park v. Trenton-New Brunswick Theatres Co., 297 N.Y. 174, 77 N.E.2d 633. There the New York Court of Appeals in a six-to-one decision held invalid, as a matter of law, a contract to manage a theatre business, which contract was somewhat similar to the one here involved. There the board attempted to delegate to another corporation the right to manage all the theatres leased or to be leased by the granting corporation. As in the instant case, full and uncontrolled authority over bookings, policies, admission prices and personnel was granted. The court held 77 N.E.2d at page 634 that by such a contract "the powers of the directors over the management of its theatres, the principal business of the corporation, were completely sterilized. Such restrictions and limitations upon the powers of the directors are clearly in violation of section 27 of the General Corporation Law of this State and the New Jersey statute.[1] (Citing cases.)" See, also Royal Theatre Corporation v. United States, D.C., 66 F. Supp. 301; Sherman & Ellis v. Indiana Mutual Casualty Co., 7 Cir., 41 F.2d 588.

Kennerson cites cases such as Oliphant v. Home Builders, 34 Cal.App. 720, 168 P. 700; Dyer Bros. Golden West Iron Works v. Central I. Wks., 182 Cal. 588, 189 P. 445, and San Diego Water Co. v. San Diego Flume Co., 108 Cal. 549, 41 P. 495, 29 L.R.A. 839, where contracts delegating some authority were upheld. But none of them involved the quantum of delegation here presented. The problem is, of course, one of degree. If the contract, as in the instant case, attempts to delegate substantially all corporate powers to an agent, then it has gone too far. Such a contract must be held to be void and unenforceable. The judgment enforcing such a contract must be reversed.

The judgment appealed from is reversed.

BRAY and FRED B. WOOD, JJ., concur.

---

120 Cal.App.2d 236

HYVARI v. MUNICIPAL COURT OF CITY & COUNTY OF SAN FRANCISCO.

Civ. 15605.

District Court of Appeal, First District, Division 2, California.

Sept. 15, 1953.

Proceeding to obtain writ of prohibition to prevent petitioner's trial in Municipal Court of City and County of San Francisco on complaint charging annoying children under age 18 and vagrancy. The Superior Court, City and County of San Francisco, William T. Sweigert, J., entered judgment adverse to petitioner, and petitioner appealed. The District Court of Appeal, Nourse, P. J., held that, where, after filing of such complaint but before trial thereon district attorney moved for dismissal of prior charge of unlawful and lewd exposure, prosecution on charge of annoying children and vagrancy was not barred, notwithstanding that both charges arose out of same incident.

Judgment affirmed.

1. Criminal Law ⟹195(1)

Where two offenses are entirely separate and distinct, and one is not necessarily included in other, prosecution for one is not bar to prosecution for other even though same testimony may be applicable to both.

---

[1] These statutes provided: "The business of a corporation shall be managed by its board of directors". N.J.S.A. 14:7-1. Section 800 of the California Corporations Code provides: "* * * all corporate powers shall be exercised by or under the authority of, and the business and affairs of every corporation shall be controlled by, a board of not less than three directors."

2. Criminal Law 🔑200(1)

Where, after filing of complaint but before trial on charge of annoying children under age 18 and vagrancy, district attorney moved for dismissal of prior charge of unlawful and lewd exposure, prosecution on charge of annoying children and vagrancy was not barred, notwithstanding that both charges arose out of same incident. Pen.Code, §§ 311, 647–a(1).

◆

Walter H. Duane, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Leo J. Vander Lans, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

Petitioner sought a writ of prohibition to prevent his trial on a complaint charging a violation of section 647–a(1) of the Penal Code—annoying children under the age of eighteen, and vagrancy. Prior to the filing of the complaint the defendant had been charged with a violation of section 311 of the Penal Code—unlawful and lewd exposure. Before being tried on this charge, but after the filing of the complaint in the second charge, the district attorney moved for the dismissal of the charge under section 311. This motion was granted.

[1, 2] The single ground raised by appellant presents an issue wholly outside the record. His question reads: "Where a person is charged with the crime of misdemeanor and the case thereafter dismissed and the defendant is discharged, may he thereafter be accused and prosecuted for an included crime of misdemeanor arising out of the original offense?"

The record here contains the pleadings and states that the matter was argued. It does not appear that any evidence was taken. How, then, can it be said that the second complaint related to "an included crime of misdemeanor arising out of the original offense"?

But on the merits the appeal is without substance. Though it was stipulated that the two charges arose out of the same "incident", that does not mean that two offenses were not committed. People v. Aiken, 108 Cal.App.2d 343, 238 P.2d 1019, has no application. There it was stipulated that both complaints were based on the same offense.

The controlling rule here is found in People v. Coltrin, 5 Cal.2d 649, 660, 55 P.2d 1161, 1166, where the court said: "Where the two offenses are entirely separate and distinct and the one is not necessarily included in the other, a prosecution for the one is no bar to a prosecution for the other even though the same testimony may be applicable to both."

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.

---

120 Cal.App.2d 135

GREENE v. ATCHISON, T. & S. F. RY. CO.

No. 15533.

District Court of Appeal, First District,
Division 1, California.
Sept. 10, 1953.

Action against a railroad company by guardian ad litem of minor children of a decedent to recover for death of decedent who was allegedly struck and killed by one of defendant's trains. The Superior Court of the State of California in and for the County of Contra Costa, Harold Jacoby, J., entered a judgment of nonsuit and the plaintiff appealed on a settled statement. The District Court of Appeal, Bray, J., held that fact that a person was found dead beside a railroad track at place where railroad owed duty of exercising ordinary care to keep a lookout for members of public, under circumstances which would warrant an inference that he had been struck by some part of train, did not throw upon railroad the burden of proving that train did not strike decedent, or that, if it did, it was not negligent in doing so.

Judgment affirmed.

1. Appeal and Error ⚷997(2)

Nonsuit entered in action against railroad for death of a decedent who was allegedly struck and killed by defendant's train would be required to be reversed if there was any evidence, including reasonable inferences therefrom, which would support a finding of defendant's negligence.

2. Railroads ⚷300

Where there was a well-defined and much-used pedestrian pathway which had been in existence for more than 20 years and which was approximately 500 feet from railroad station in municipality, and pathway traversed railroad tracks, engineer who was operating caboose and engine combination after dark had duty to anticipate presence of a pedestrian on right of way, to exercise ordinary care to discover pedestrian as caboose and engine approached pathway, and upon discovery to exercise ordinary care to avoid injuring pedestrian.

3. Railroads ⚷396(1), 398(1)

Where person was allegedly struck and killed by train, and there were no eyewitnesses, plaintiff in death action was entitled to presumption that such person exercised due care, but such presumption could not be used in proving negligence of defendant railroad.

4. Railroads ⚷327(1, 3)

It is duty of a pedestrian or motorist crossing a railroad track to look.

5. Railroads ⚷396(1)

In proper case it will be presumed that engineer of moving train sees what is in range of his vision ahead of him.

6. Railroads ⚷398(3)

Proof that engineer of a moving train had clear and unobstructed view in front of his engine by aid of a headlight, coupled with fact that later a body is seen lying alongside track by crew of a train passing over track, is no evidence that decedent when hit was plainly and clearly visible.

7. Railroads ⚷396(1)

Fact that a person was found dead beside a railroad track at place where railroad owed duty of exercising ordinary care to keep a lookout for members of public, under circumstances which would warrant inference that he had been struck by some part of railroad's train, did not throw upon railroad, in action against railroad for death, burden of proving that train did not strike decedent, or that, if it did, it was not negligent in doing so.

8. Trial ⚷69

In action for death of a decedent who was found dead beside railroad track at place where railroad owed duty of exercising ordinary care to keep a lookout for members of public, under circumstances which would warrant inference that he had been struck by some part of railroad's train, action of trial court, after motion for nonsuit was granted, in denying plaintiff's motion to reopen case to introduce evidence that caboose hop which allegedly struck decedent could be stopped within 150 feet or less when traveling at speed caboose hop was traveling, was not error under circumstances.

9. Dismissal and Nonsuit ⚷81(2)

The reopening of a case, after granting of motion for nonsuit, is in discretion of trial court.

◆

Jarvis, Miller & Decker, Hugh B. Miller, Charles W. Decker, San Francisco, for appellant.

Carlson, Collins, Gordon & Bold, John Ormasa, Richmond, for respondent.

BRAY, Justice.

From a judgment of nonsuit plaintiff, guardian ad litem of the minor children of Leroy Davis, deceased, appeals on a settled statement.

Questions Presented.

1. Was there any evidence which would have supported a finding of negligence of defendant?

2. Should the court have reopened the case to permit additional testimony as to the train's stopping distance?

Facts.

At Pittsburg, California, defendant's right of way runs in an east-west direction. There are siding tracks on either side of the right of way and between them a track for eastbound and one for westbound trains. Eastbound trains approach Pittsburg along a straight-of-way more than one and a half miles long. About 500 feet before reaching the station the right of way is traversed by a well-defined and much-used pedestrian pathway which crosses the tracks from a city street paralleling and north of the right of way, proceeds westerly along the south boundary of the right of way for a short distance, then proceeds south across a field to a community of houses and barracks where decedent, father of minor children, resided. This pathway has been in existence for more than 20 years, and was habitually used by decedent and the other residents of his community in proceeding to and from Pittsburg. For purposes of nonsuit, at least, defendant concedes that it was under the duty of exercising ordinary care towards decedent using this pathway, including the duty to keep a reasonably careful lookout for him as a member of the public.

Decedent left the home of friends in Pittsburg about 6:30 p. m. which was the last time he was seen alive. He had not been drinking. There were no witnesses to the accident. About 7 o'clock defendant's train, called a "caboose hop" consisting of an engine and caboose, crossed the pathway on the eastbound track. The engineer was one Griffith. It was dark at this time. A reasonable inference is that some portion of this train struck decedent. At about 7:30 the crew of another of defendant's trains, which was also eastbound, saw decedent's body lying 2 to 3 feet south of the south rail of the eastbound track at a point on the right of way about 20 feet east of the pathway. At the pathway decedent's severed right foot was found in the area formed by and 2 feet from the juncture of the south rail of the siding track with the south rail of the eastbound track. Decedent's cap was lying on the ground a few feet south of the south rail of the eastbound track about 10 feet east of the body. Between the foot and the body, strung out in an easterly direction and a few feet south of the south rail, was debris from decedent's pockets.

Engineer Griffith testified that he had been making this run daily for approximately 10 years and was thoroughly familiar with the entire track. This evening his headlight was burning brightly, casting a beam a quarter of a mile ahead and covering an area on both sides of the track equal to what would be covered by parallel tracks. The light would show anyone within its orbit 250 yards ahead of the train, and going 25 miles per hour the train could be stopped in less than a quarter of a mile. There was no obstruction to his view. He did not remember this particular trip but he always looked straight ahead down the track, and always blew the whistle and rang the bell. He knew of no speed limit through Pittsburg but was required to reduce to 24 miles per hour at the Railroad Avenue crossing which is approximately 500 feet east of the pathway. (A Pittsburg ordinance limits the speed at Railroad Avenue to 25 miles per hour.) He did not remember particularly that night but he always crossed Railroad Avenue at that speed. He saw no one on or near the tracks and did not know the train had struck anyone until approximately a month and a half later. Just west of the pathway and on the north side of the eastbound track there is a house switch, the light on which he could see after dark from a mile and a half to the west.

1. Defendant's Alleged Negligence.

[1-3] We are required to examine the evidence in the light of the well-known rule that if there is any evidence, including the reasonable inferences therefrom, which would support a finding of defendant's negligence, the nonsuit must be reversed. Moreover, we start with the premise that defendant was under a duty to anticipate decedent's presence on the right of way, to exercise ordinary care to discover him and upon discovery to exercise ordinary care to avoid injuring him. (There being no eyewitness, plaintiff is entitled to the presumption that decedent used due care, and hence decedent could not be deemed contributorily negligent as a matter of law. Lehmann v. Mitchell, 109 Cal.App.2d 719, 241 P.2d 573. Plaintiff concedes, however, that this presumption cannot be used in

proving negligence of defendant. See interesting discussion of this subject in Hastings Law Journal, vol. IV, p. 124.)

[4–7] Plaintiff contends that because the evidence shows that the engineer could see the light on the switch from a distance of a mile and a half, that the headlight illumined an area ahead for a distance of a quarter of a mile and an area to the right and left commensurable with that covered by an adjacent track, that the engineer could see a person within that area for a distance of 250 yards from the engine, and that a half hour later the crew of the streamliner passing over the same track saw the body of decedent, clad in light colored khaki clothes, lying beside the track, the jury had sufficient evidence from which it could have disregarded Griffith's testimony and concluded (1) that Griffith looked, but did so in a negligent manner and thus failed to see decedent who was in plain sight, or (2) that Griffith either did not look at all as he approached the pathway, or looking, saw decedent but failed to exercise due care to avoid injury to him. In support of this theory plaintiff cites cases, such as Koster v. Southern Pacific Co., 207 Cal. 753, 279 P. 788, to the effect that it is the duty of a pedestrian or motorist crossing a railroad track to look, and cases such as Young v. Southern Pacific Co., 189 Cal. 746, 210 P. 259, to the effect that it is presumed that such persons see what is in range of their vision, even though as in cases like Loftus v. Pacific Electric Ry. Co., 166 Cal. 464, 137 P. 34, such persons testified that they did look but did not see the approaching danger. Plaintiff then asks that these rules be applied to the engineer of a train. There is no question that these rules would apply to a train engineer in a proper case. The difficulty in applying them here is that there is no evidence of when or how decedent got on the right of way in the area covered by the train's headlight. Nor is there any evidence as to what portion of the caboose hop struck decedent. While it is reasonable to assume that decedent was struck by some part of the train, the jury would have to guess what part struck him and also when and how he got into a position to be struck. Proof that the engineer had a clear and unobstructed view in front of his engine by the aid of a headlight, coupled with the fact that later a body is seen lying alongside the track by the crew of a train passing over the same track, is no evidence that decedent when hit was plainly and clearly visible. What the plaintiff seeks in this case actually is an application of the doctrine of res ipsa loquitur. Thus, the fact that a person is found dead beside a railroad track at or near a place where the railroad owes the duty of exercising ordinary care to keep a lookout for members of the public, under circumstances which would warrant an inference that he had been struck by some part of the railroad's train, would throw the burden on the defendant of proving that its train did not strike him, or that if it did it was not negligent in doing so. That such doctrine is not applicable in this state to street car—pedestrian cases has been determined in Tower v. Humboldt Transit Co., 176 Cal. 602, 169 P. 227, and Ross v. San Francisco-Oakland Terminal Railways Co., 47 Cal. App. 753, 191 P. 703. The same reasoning applies to railroad trains.

Darby v. Henwood, 346 Mo. 1204, 145 S.W.2d 376, was a case involving the finding of a fatally injured pedestrian near railroad tracks when the trains of two different railroad lines had passed shortly before. Practically the same contentions made in our case were made in that case. In upholding an order granting a nonsuit the court stated, 145 S.W.2d at page 379: "As stated, the circumstances support the inference that deceased was struck by one of the freight trains that passed through Delta a short time before he was found lying by the track and fatally wounded, and, absent evidence to the contrary, the presumption is that at the time of injury deceased was exercising ordinary care for his own safety, [citations] and also the presumption is that deceased did not commit suicide." The court then quoted the rule as to when nonsuits properly may be granted, which is the same as in this state, and then said, 145 S.W.2d at page 380: "We will assume, without deciding, that the evidence, as to user was sufficient to make it the duty of defendants to exercise ordinary care to discover those who might be on or near the track at the place where deceased was found, *but the presumption of due care and against suicide, and the duty to keep a lookout do not of themselves make a case.* The burden was on plaintiff to adduce evidence that one or both railroads were guilty of negligence in respect to one or more of the acts of negligence charged. * * * The presumption that deceased was in the exercise of due care does not carry with it the presumption that the defendants, or either of them, were negligent, and no presumption of negligence, as to either railroad, arises from the fact that deceased was struck and killed by one of the trains." (Emphasis added.)

In Kelley v. Burlington-Rock Island R. Co., Tex.Civ.App., 100 S.W.2d 164, 165, plaintiff's son was found dead within three feet of defendant's railroad tracks, undoubtedly killed by one of its trains. There were no eyewitnesses. In upholding a peremptory verdict for defendant granted by the trial court, the reviewing court quoted from Texas & P. Ry. Co. v. Shoemaker, 98 Tex. 451, 84 S.W. 1049, at pages 1051, 1052, language which is appropriate here: "'The facts of the case are, however, at least as suggestive of negligence on their part contributing to their deaths as they are of such negligence on the part of the servants. The trouble about the evidence is that it merely reveals an unfortunate and deplorable occurrence, without enabling us to see what each of the parties contributed towards bringing it about, and leaves the case very much in the same attitude as those cited.'" Concerning the assumption which plaintiff there and plaintiff here asked be made that the particular engineer did not keep a proper lookout, the court said, 100 S.W.2d at page 166: "Suppose there was an utter failure to keep a proper lookout. What was the causal connection between such negligence and the death of this youth? We look in vain for an answer to this question. Unless deceased occupied such a position as to be seen, a proper lookout would not have prevented the accident. There is nothing in the physical facts at the scene of the accident which answers this important and controlling question. Manifestly, we cannot presume the existence of facts."

In Cummings v. Atlantic Coast Line R. Co., 217 N.C. 127, 6 S.E.2d 837, plaintiff's intestate was found under circumstances similar to those in our case, except that there the evidence showed that he had been intoxicated. In upholding a judgment of nonsuit the court pointed out, 6 S.E.2d at page 839: "No presumption of negligence on the part of the railroad arises from the mere fact that the mangled body of plaintiff's intestate was found on or near the track. * * * The doctrine of last clear chance does not arise until it appears that the injured party has been guilty of contributory negligence. [Citation.] When the doctrine is relied upon the burden is on the plaintiff to show by proper evidence: (1) That at the time the injured party was struck by a train of defendant he was down, or in an apparently helpless condition on the track; (2) That the engineer saw, or, by the exercise of ordinary care in keeping a proper lookout could have seen the injured party in such condition in time to have stopped the train before striking him; and (3) that the engineer failed to exercise such care, as the proximate result of which the injury occurred. * * * There must be legal evidence of every material fact necessary to support the verdict, and such verdict 'must be grounded on a reasonable certainty as to probabilities arising from a fair consideration of the evidence, and not a mere guess, or on possibilities.'" The court then said, 6 S.E.2d at page 839: "Tested by these principles the evidence offered leaves the instant case in the realm of speculation. While there is no evidence that a train passed the scene of the accident during the night in question, it may be inferred from the evidence as to the physical condition of the body and accompanying signs at the scene that the intestate was struck and killed by a train. Yet these physical facts present no reasonable theory to the exclusion of many others as to the circumstances under which the accident occurred. In what position was intestate when struck? The evidence is consonant with any of many theories which may be advanced with equal force, but all of which are speculative and rest in mere conjecture."

Plaintiff attempts to distinguish these cases from ours mainly by claiming that in them there was no evidence to support an inference that the train crew looked but failed to see that which was clearly visible, which he claims was the situation here. Assuming there was no such evidence in those cases, the distinction does not apply for the reason that in order to apply such distinction it must be guessed that decedent here was clearly visible in a position of danger at a time when the train could have been stopped. There is no evidence from which such an assumption can be made, for there is no evidence of where he was at any given moment nor of what part of the train hit him.

In Puckhaber v. Southern Pacific Co., 132 Cal. 363, 64 P. 480, a man and a boy were found dead on a track in defendant's yards. There were no witnesses to the accident. Plaintiffs, suing for the death of the boy, contended that they were killed by a backing engine and tender which passed over the particular spot earlier. It was proved that the tender had no light upon its rear. In reversing a judgment in favor of plaintiffs on the ground that the evidence was too weak to support it the court assumed that it was the engine and tender which had killed the persons and that defendant was negligent in operating them without a rear light. It then stated that there was no evidence to show any causal connection between the absence of a light and the death of the boy. "It is a basic element in every right of recovery that a defendant's negligence must contribute to the injury,—must be the approximate cause of the injury. By proving defendant's negligence, without in some way fastening that negligence to the injury, a case is not made out. This is true, even though it be assumed that the law of this state is to the effect that in the absence of evidence upon the subject it will not be presumed that deceased was guilty of negligence. * * * While, as before suggested, it may not be presumed against deceased that he became drunken and slept upon the track, or deliberately stood upon the track in front of the backing engine, the laws of self-preservation denying any inference of such conduct upon his part, still, as is said in some of the cases, the deceased may have fallen insensible upon the track in a fit, and thus have been killed without fault upon his part, and under such circumstances that the absence of the light in no way tended to his death. Tested by this illustration, a dozen lights upon the tender would not have saved his life. Neither do we consider the fact that another man was killed at the same time sufficient evidence to create a presumption that the want of the light upon the tender was the approximate cause of death. * * * It would be a guess pure and simple upon the part of the jury to so find as a fact, and a verdict and judgment cannot rest upon a foundation created upon a guess. It is as necessary for the plaintiffs to show that defendant's negligence caused the injury as it is for them to show that defendant was guilty of negligence or that the party was injured." 132 Cal. at pages 364–365, 64 P. at page 480.

Washington Terminal Co. v. Callahan, 51 App.D.C. 84, 276 F. 334, relied upon by plaintiffs, is not in point. There the decedent and his helper were working on a switch and were run over and killed by an engine moving a train of empty cars. It was the duty of the helper to keep a lookout for approaching trains while Callahan's duty was to work on the switch. "From the facts disclosed, the helper was undoubtedly confused by the noise of the passing train on the parallel track * * *." 276 F. at page 335. The engineer and fireman had a clear view of the switch for a distance of 240 feet. While no one actually saw the train strike the men, both were seen working on the switch, on which decedent was found dead under the train, immediately before the train passed. His tools, too, were on the switch. Thus, differing from our case, the evidence showed decedent's position for some time prior to the accident to be such that he must have been seen had either the fireman or engineer looked. Argo v. Southern Pacific Co., 39 Cal.App. 2d 706, 104 P.2d 77, cited by plaintiffs which considered the application of the last clear chance doctrine to the facts of that case, where eyewitnesses testified to the relative positions of the train and the auto which it struck as they approached each other, obviously is not applicable here.

2. Stopping Distance.

[8, 9] After the motion for nonsuit was granted, plaintiff moved to reopen the case to introduce evidence that a caboose hop traveling 25 miles per hour could be stopped within 150 feet or less. The settled statement says: "Neither the defense nor the Court had indicated that the failures of proof under consideration were concerned with any inability on the part of the engineer to avoid the accident by stopping the train in time." The motion to reopen was denied. It is not clear whether plaintiff is claiming that this denial was error. There was no error. The reopening of a case is in the discretion of the trial court. Moreover, as there was no evidence placing decedent in a position to be seen at that distance, this evidence would be immaterial. Again, it is conceded that the stopping distance of the train was not a factor in the granting of the nonsuit.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

---

120 Cal.App.2d 120

SASANOFF v. SASANOFF.

Civ. 19388.

District Court of Appeal, Second District, Division 3, California.

Sept. 8, 1953.

Hearing Denied Nov. 5, 1953.

Proceeding upon motion for modification of divorce decree. The Superior Court, Los Angeles County, Lewis Drucker, J., entered an order of dismissal, and plaintiff appealed. The District Court of Appeal, Parker Wood, J., held that evidence supported finding that provision in divorce decree for support payments to wife and minor child was based upon property settlement agreement executed by husband and wife prior to proceeding for divorce, and could not be modified without consent of parties.

Affirmed.

1. Divorce 🔑245(1)

Fact that agreement between parties to divorce suit recites that it is property settlement agreement, or that divorce decree refers to agreement as property settlement agreement, is not necessarily determinative of question whether provision for periodic payments of support of wife, is inseparable part of property settlement agreement which cannot be modified without consent of parties, or provision for support, which is separable from, and independent of, provisions for division of property, and can be modified by court without parties' consent.

2. Divorce 🔑245(1)

An agreement must be taken as a whole in determining whether it provides for alimony or constitutes property settlement.

3. Divorce 🔑245(1), 309

In proceeding to modify provisions of divorce decree, trial court has jurisdiction to determine whether decree was based upon property settlement agreement and therefore not subject to modification, or was based upon alimony or support allowance covenants, and therefore subject to modification.

4. Divorce 🔑245(3), 309

In proceeding to modify provisions of divorce decree for support of wife and minor child, trial court had duty to determine whether or not alimony had been awarded.

5. Divorce 🔑286, 312.6(8)

Determination of trial court in proceeding to modify provision of divorce decree for support of wife and minor child, if supported by sufficient evidence, is binding upon District Court of Appeal.

6. Divorce 🔑245(3), 309

In proceeding to modify provision of divorce decree for support and maintenance of ex-wife and minor child, evidence supported finding to effect that provision in divorce decree for payments to wife and minor child was based upon property settlement agreement executed by husband and wife prior to proceeding for divorce, and could not be amended without consent of parties.

7. Divorce ⟹164

Trial court's denial of plaintiff's request for permission to call witnesses to rebut defendant's testimony in proceeding for modification of provision of divorce decree was not an abuse of discretion, in view of agreement as to time to be allowed for hearing, and unavailability of proposed witnesses at time request was made.

◆

Joseph Stell, and Alex D. Fred, Los Angeles, for appellant.

E. Marshall Bitgood, Los Angeles, for respondent.

PARKER WOOD, Justice.

On July 12, 1945, plaintiff (wife) and defendant (husband) entered into a written agreement at the top of which were the words: "Property Settlement Agreement." On September 20, 1945, plaintiff commenced an action for divorce, and in the complaint she alleged that she had entered into a property settlement agreement disposing of their community property, including therein a provision that the defendant shall pay plaintiff $25 per week for her support until her death or remarriage, and shall pay plaintiff $25 per week for support of their minor child. She alleged further, in the complaint, that she would present the agreement for the approval of the court. She asked, in the prayer of the complaint, that the agreement be approved by the court and that "pursuant to said property settlement agreement" defendant be ordered to pay for her support $25 per week until her death or remarriage.

On November 14, 1945, plaintiff obtained an interlocutory judgment of divorce upon default of defendant. That decree stated: "The property settlement agreement entered into between the parties, dated July 12, 1945, and received in evidence, is hereby approved & so ordered. Pursuant to said agreement, defendant is ordered and directed to pay to plaintiff the sum of $25.00 per week for her support and maintenance until her death or remarriage * * *. Defendant is ordered and directed to pay to plaintiff for the support and maintenance of the minor child of the parties hereto, the sum of $25.00 per week until the further order of the Court * * *."

In the final judgment entered November 27, 1946, it was ordered that wherein the interlocutory judgment makes any provision for alimony or custody and support of children the said provision is made binding upon the parties, and wherein the interlocutory judgment relates to property of the parties the property is assigned in accordance with the terms thereof.

On September 28, 1951, plaintiff obtained an order requiring defendant to show cause why the order of November 26, 1946 (final judgment entered November 27, 1946) should not be modified—to increase the payments to plaintiff and the minor child (19 year old boy) to $150 each per week.

A court commissioner, upon a hearing on the order to show cause, sustained defendant's objection to the taking of any evidence on the issue as to "additional alimony," and recommended that the amount payable for the support of the minor be increased to $175 per month. A judge of the court approved the recommendations of the commissioner. Plaintiff made a motion that the court vacate in part the findings and conclusions of the commissioner, and that the court direct a rehearing in part upon the order to show cause, upon the ground that the commissioner refused to permit the introduction of evidence in support of plaintiff's request for modification because the court had no jurisdiction to modify "said alimony by reason of its being pursuant to a Property Settlement Agreement." The court sustained "the objections" to the findings of the commissioner "as to provisions re change of alimony only," and ordered a rehearing "as to modification of alimony."

The court, upon the rehearing, made the following findings and order: "The Court finds that the express provisions of the Property Settlement Agreement that the payments for support agreed to, is in settlement and adjustment of all property rights, and has not been overcome by extrinsic evidence. The Court finds that it has no jurisdiction to modify the decree based upon the Property Settlement Agreement. It is therefore ordered that the application for modification in re support be dismissed."

Plaintiff appeals from the judgment. She contends that the order is contrary to the evidence; that all the factors to be considered in determining the nature of the payments to be made to plaintiff under the divorce decree show that the payments were for "alimony"; and that since the provision in the divorce decree relates to alimony, and not to a property settlement agreement, the provision could be modified.

The property settlement agreement provides, in part, as set forth below.[1] Plain-

---

[1] "Whereas * * * the parties are desirous of settling all property claims * * * that either may have against the other, and * * * Whereas, each of the parties * * * in the negotiations * * * resulting in the agreement set forth herein, has respectively retained his or her own separate and independent legal counsel and * * * Whereas, the parties * * * now intend to and do hereby adjust and finally settle * * * all property rights * * * including any and all property in which they may hereafter acquire any interest * * * in any manner whatsoever, and * * * Whereas * * * it is their intention to settle * * * any differences relating to said property, irrespective of the legal status of said property * * * Now, Therefore * * * for the purpose of finally settling and adjusting all of the property rights of the parties hereto, it is mutually understood and agreed as follows, to-wit:

"(1) From and after the date hereof, the earnings of said First Party [plaintiff] shall be her sole and separate property.

"(2) * * * the earnings of said Second Party [defendant] shall be his sole and separate property.

"(3) * * * Second Party shall have no right * * * to the household furniture * * *.

"(4) * * * First Party shall have no right * * * to that certain 1941 Chevrolet automobile * * *.

"(5) * * * Second Party shall have no right * * * to the Government bonds * * *.

"(6) * * * each party shall have no right * * * to any moneys now on deposit in any bank to the credit of the other party.

"(7) Second Party agrees that he shall cause to be paid to First Party the total sum of Fifty Dollars ($50.00) per week * * * $25.00 of which said sum shall be for the support and maintenance of the First Party herein, to be paid to her until her death or marriage to some person other than Second Party; and $25.00 of which shall be for the support * * * of the minor child of the parties * * *.

"(8) Second Party agrees to continue in force a certain policy of insurance in the sum of One Thousand Dollars ($1,000.00) on his life * * *. [T]he minor child * * * to be the irrevocable beneficiary of said policy.

"(9) Second Party agrees that he shall cause the sum of Ninety Dollars ($90.00) to be paid to * * * attorney for the First Party * * * on account of attorney's fees and costs * * *.

"(10) First Party agrees that she shall hold Second Party * * * harmless of any and all obligations hereafter incurred by her.

"(11) Second Party agrees that he shall hold First Party * * * harmless of any and all obligations hereafter incurred by him.

"(12) That each of the parties hereto shall * * * retain all personal belongings * * * which each now has * * *.

"(13) It is hereby agreed * * * that the First Party may deal with * * * her own property without the consent of the Second Party; and that the Second Party may deal with * * * his own property without the consent * * * of the First Party.

"(14) The said parties * * * hereby agree that all property of every kind * * * that either may acquire * * * after the date hereof, shall be his or her separate property * * * and they each relinquish their rights of inheritance * * * and any and all rights that they might have had therein under the law, if they had not entered into this agreement * * *.

"(15) Said parties * * * renounce any and all claims and rights to act as executor * * * or personal representative of the estate of the other.

"(16) Said parties agree that it is * * * unnecessary hereafter for either party hereto to join in any deed tiff argues that paragraph "(7)" of the agreement (which provides for payments of $25 per week to the wife) indicates that said payments of $25 per week to her are for alimony, since the provision therein for discontinuance of the payments upon her death or remarriage is not consonant with a settlement of her property rights. She argues further that since the provisions relating to the support of the child and support of the wife are "intertwined" in the same paragraph those provisions are severable from the provisions relating exclusively to the property rights of the parties; and that since each party received substantially an equal share of the community property, the payments of $25 were intended as a provision for alimony. The total value of the community property was about $2,225. The wife received the furniture of the approximate value of $500, and the Government bonds of the approximate value of $525. (Total $1,025.) The husband received the automobile of the approximate value of $500, and the bank account in his name in an amount between $500 and $700. (Total between $1,000 and $1,200.) She argues further that there would have been no need to allege in her complaint that defendant was "able bodied and well able to make the payments provided for" if the payments were in settlement of property rights, and there would have been no need to pray for support money if she had an irrevocable contractual right to the payments.

At the hearing on the order to show cause the plaintiff testified that on July 12, 1945, they entered into a written property agreement which was the same as the one hereinabove described, except that the first agreement contained a provision for the payment of a total of $35 per week for her and the child (not $50 per week); at the time when the first agreement was made the defendant was living in the home with the plaintiff and the child; he continued to live there about three weeks, and in addition to paying the $35 per week he paid the rent and the ultilities ($47.50 per month for rent, and about $15 per month for utilities); when defendant was about to move from the home he said that he was going to move and "so instead of paying the rent for the house, I understand you will need more money"; it was agreed or-

of conveyance or any instrument which will transfer the fee of any property that may be acquired by either party * * *.

"(17) It is now expressly agreed * * * that the First Party does by these presents reaffirm * * * all deeds * * * and agreements of every kind * * * in the execution of which the said First Party has heretofore joined * * *.

"(18) It is further understood and agreed between the parties hereto that the provisions hereinbefore made for the First Party shall constitute a full and complete satisfaction of all claims and demands of the First Party against the Second Party * * * such as separate maintenance, support, community interest * * * alimony or of any claim or interest of any kind * * * that the said First Party might * * * claim, including any and all claims by virtue of the marital relationship * * * for any and all attorney's fees * * *.

"(19) It is agreed that this contract and agreement is no sense an agreement by and between the parties for a divorce * * *.

"(20) This agreement is intended to be, and is, a full, complete and final property settlement between the parties hereto, and it is specifically understood that the property rights arising out of the marriage contract, or arising from any other source, have been and now are settled, once and forever, and, therefore, said First Party does by these presents absolutely and forever release and discharge said Second Party * * * from any and every claim * * * and liability * * * from the beginning of the world to the end of time, except as hereinabove * * * provided. It is also specifically understood and agreed that the Second Party does * * * forever release and discharge said First Party * * * from any and every claim * * * and liability * * * from the beginning of the world to the end of time, except as hereinabove * * * provided.

"(21) In the event the parties hereto are divorced hereafter, it is agreed that * * * custody of the minor child * * * shall be granted to the First Party * * *.

"(22) First Party waives any right * * * in that certain real property * * * located at Westboro * * * New York * * *."

ally that plaintiff would need more money for the support of herself and the child; about three weeks after the original agreement was made he moved from the house, and agreed to pay a total of $50 per week; at that time page 3 of the original agreement (which contained the provision for $35 per week) was changed by counsel for the parties, pursuant to direction of the parties, to read that defendant would pay a total of $50 per week—$25 per week for plaintiff and $25 per week for the child; she did not remember whether a new page 3 was substituted for the original page 3 or whether erasures of figures on the original page 3 were made and new figures were written thereon. On the margin of page 3 of the amended agreement there is a statement, signed by the parties, that: "This page supplants page 3 originally in this agreement, and the amount of $50.00 in line 5 and $25.00 in line 9 are correct according to the agreement of the parties."

Defendant testified that he left the home on June 27, 1945; he did not see or talk to or communicate with plaintiff between said date and October 16, 1945 (when summons and complaint were served); he had no conversation with her about paying $50 per week; the negotiations which lead up to the making of those payments were conducted by their attorneys; he commenced to make the $50 payments the week after July 12, 1945; he paid by check. On cross-examination he said that he saw plaintiff several times between the time he left and July 12th; he did not remember whether he had been paying $35 per week for household expenses before he entered into said agreement; he did not take plaintiff to a place near Lake Arrowhead to visit their son in July and August, 1945; he did not remember that in July or August, 1945, he, the plaintiff and M. Blum went to Lake Arrowhead to visit the son; he did not recall visiting Mr. Broder at that time at Lake Arrowhead; he did not remember that in August, 1945, he took plaintiff and Mr. and Mrs. Rogeson to dinner at Duffy's Tavern; he did not remember any agreement other than the one for $50 per week; the value of the property in New York was about $280.

Plaintiff testified in rebuttal that in July or August, 1945, she saw defendant on several occasions; one of the occasions was at a dinner at the Gotham with Mr. and Mrs. Rogeson; another occasion was when M. Blum was present at Lake Arrowhead.

[1-6] The agreement herein is designated by the parties as a property settlement agreement. They state therein that they are desirous of settling all property claims; that they intend thereby to finally settle all their property rights; that for the purpose of finally settling all their property rights they mutually agree "as follows" (as stated in the 22 paragraphs specifying various items of agreement). In paragraph "(7)" defendant agrees to pay plaintiff $25 per week for her support until her death or remarriage. In paragraph "(18)" they agree that "the provisions hereinbefore made" for plaintiff shall be complete satisfaction of all her claims against him, such as support or alimony. In paragraph "(20)" they agree that the agreement is intended to be and is a complete and final property settlement, and their property rights arising out of the marriage have been settled "forever" and each one forever releases the other from any claim and liability "from the beginning of the world to the end of time." Each party was represented by counsel in the making of the agreement, and each attorney signed his name to the agreement as a witness to the signature of his client. The interlocutory judgment designates the agreement as a property settlement agreement, and approves it, and states that "Pursuant to said agreement, defendant is ordered * * * to pay to plaintiff * * * $25.00 per week for her support * * *." The fact, however, that an agreement recites that it is a property settlement agreement, or the fact that a divorce decree refers to an agreement as a property settlement agreement, is not necessarily determinative of the question whether a provision therein for periodic payments for support of a wife is an inseparable part

of a property settlement agreement, which cannot be modified by the court without consent of the parties; nor is such a recital or reference necessarily determinative of the question whether such provision is a provision for support that is separable from and independent of the provisions for division of property, which can be modified by the court. See Puckett v. Puckett, 21 Cal.2d 833, 840–842, 136 P.2d 1. In the Puckett case, just quoted, it was said, 21 Cal.2d at page 842, 136 P.2d at page 6: "The trial court in the interlocutory decree designated the agreement as 'a property settlement agreement.' In the order denying defendant's motion the court found that the divorce decree was made 'pursuant to and as a part of a property settlement agreement.' The presence of the provision that the monthly payments are for the support and maintenance of plaintiff and the child do not necessarily indicate alimony rather than a property settlement. The agreement must be taken as a whole." Also in the Puckett case, it was said, 21 Cal.2d at pages 840 and 841, 136 P.2d at page 5: "In the instant case the agreement was introduced in evidence and was approved by the court. Some of its terms were embodied in the divorce decree. The requirement for monthly payments was expressly based upon the agreement and those were ordered to be made. If the divorce decree together with the agreement upon which it is based may be considered to be an adjustment of property rights only, or what is commonly referred to as a property settlement, it follows that there is in effect no provision in the divorce decree for alimony strictly defined, even though periodic payments must be made. The periodic payments are not alimony. They are a part of a property settlement." As stated in the Puckett case, 21 Cal.2d at page 841, 136 P.2d at page 5: "The essential issue to be determined is whether or not the agreement was a property settlement agreement, and the monthly payments ordered by the decree in effect and essence, a phase of the property settlement rather than merely alimony." In Codorniz v. Codorniz, 34 Cal.2d 811, at page 814, 215 P.2d 32, at page 34, it was said: "[I]n modification proceedings the trial court has jurisdiction to determine whether the decree was based upon a property settlement agreement with payments provided as a phase of property adjustment and therefore not subject to modification or was based upon alimony or support allowance covenants and therefore subject to modification." It was the duty of the trial court in the present case to determine whether or not alimony had been awarded. See Tuttle v. Tuttle, 38 Cal.2d 419, 422, 240 P.2d 587. The court herein received testimony of plaintiff and defendant regarding the circumstances under which the agreement was made. The determination of the trial court, if supported by sufficient evidence, is binding upon this court. See Codorniz v. Codorniz, supra, 34 Cal.2d at pages 814–815, 215 P.2d 32. The finding of the court to the effect that the provision in the decree for payments to plaintiff was based upon the property settlement agreement is supported by the evidence. In vew of the various declarations in the agreement herein to the effect that the agreement is a final settlement of property rights and all claims of each party against the other, it does not seem likely that, if the defendant had sought to reduce the amount of the payments, the plaintiff would have asserted that the provision in the decree for payments to her was a provision for alimony which could be modified.

[7] Appellant (plaintiff) contends further that the court erred in refusing to permit plaintiff to call witnesses to rebut testimony of defendant to the effect that in July or August, 1945, he did not see plaintiff or accompany her and others to Lake Arrowhead and to Duffy's Tavern. After plaintiff had testified, plaintiff's counsel requested permission to call four other witnesses (Mr. and Mrs. Rogeson, M. Blum, and Mr. Broder) to rebut said testimony of defendant. The court, in denying the request, stated that counsel for plaintiff knew what the situation was when the agreement as to time (required for the hearing) was made. It does not appear that the witnesses were in court or available to be called as witnesses when the request was made. Also, it is to be noted that the testimony of defendant, with respect to

accompanying plaintiff and the persons mentioned, was to the effect that he did not remember that he had accompanied them. It cannot be said that the court abused its discretion in denying the request.

The order is affirmed.

SHINN, P. J., and VALLÉE, JJ., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

120 Cal.App.2d 31

MONTEREY OIL CO. v. CITY COURT OF CITY OF SEAL BEACH, ORANGE COUNTY.

Civ. 4735.

District Court of Appeal, Fourth District, California.

Aug. 27, 1953.

Rehearing Denied Sept. 23, 1953.

Hearing Denied Oct. 22, 1953.

Prohibition proceeding to restrain city court from exercising jurisdiction over criminal complaint against oil company for having violated ordinance prohibiting drilling for oil within territorial boundaries of city. The Superior Court of Orange County, Kenneth E. Morrison, J., granted temporary writ, but upon full hearing denied peremptory writ and oil company appealed. The District Court of Appeal, Mussell, J., held that state had fully occupied field of control and leasing of state owned submerged lands, and city ordinance within that field was invalid.

Reversed.

See also, Cal.App., 260 P.2d 851.

1. Municipal Corporations 🔑592(1)

An ordinance which invades a field already fully occupied by state legislation is invalid.

2. Municipal Corporations 🔑592(1)

Statutes providing for exclusive jurisdiction of state lands commissioner in regulation and control of leasing of submerged lands, whether the lands contained oil or not, completely preempted the field, and city ordinance purporting to prohibit drilling of wells within city's territorial boundaries, which included submerged lands, was void. Public Resources Code, §§ 6216, 6871 to 6878; Const. art. 11, § 11.

3. Municipal Corporations 🔑592(1)

Where territorial boundaries of city included submerged lands within three mile limit, and lands belonged to state, which had authority to lease and control lands, city could not prohibit oil company, which had valid lease from state, from drilling for oil. Public Resources Code, §§ 6216, 6871 to 6878; Const. art. 11, § 11.

4. Municipal Corporations 🔑592(1)

The provision in Public Resources Code that oil and gas lessee must abide by the law of the state and cities, does not permit municipal prohibition or regulation of surface operations authorized by State Land Commission at a drill site located over state-owned submerged lands. Public Resources Code, §§ 6216, 6828.

5. Navigable Waters 🔑37(6)

An island constitutes "filled lands" within statute permitting oil and gas lessees of tide and submerged lands to drill wells on filled lands. Public Resources Code, § 6873.

See publication Words and Phrases, for other judicial constructions and definitions of "Filled Lands".

6. Municipal Corporations 🔑625

City ordinance prohibiting oil and gas drilling operations within the territorial boundaries of the city, without reference to the question of whether the drilling would be injurious or harmful, was unreasonable and arbitrary in that an attempt was made to entirely prohibit a business operation without justification.

7. Nuisance 🔑61

In action based upon nuisance, under city ordinance, defendant's operation of an oil well at a point one and one half miles oceanward from the shoreline of the city did not constitute a nuisance per se since that alone did not indicate that public beach would be damaged or that there was danger of water pollution.

Forgy, Reinhaus, Miller & Kogler and Stanley M. Reinhaus, Santa Ana, O'Melveny & Myers, Louis W. Myers, William W. Clary, William W. Alsup, Los Angeles, for appellant.

Dana R. Williams and Chas. C. Stratton, Long Beach, for respondent.

Edmund G. Brown, Atty. Gen., and Everett W. Mattoon, Asst. Atty. Gen., for State Lands Commission.

MUSSELL, Justice.

Plaintiff Monterey Oil Company, hereinafter called "appellant", appeals from a judgment denying its petition for a peremptory writ of prohibition to restrain the City Court of the city of Seal Beach (now the Justice's Court for the Huntington Beach-Seal Judicial District), hereinafter referred to as "respondent", from proceeding with, hearing or exercising any further jurisdiction over a certain criminal complaint in an action entitled "People of the State of California v. Monterey Oil Company, No. 5846", charging appellant with having violated ordinance No. 230 of the city of Seal Beach. The said ordinance, adopted March 7, 1939, in section 1 thereof, declares it to be unlawful and a nuisance for any person, whether as principal or agent, to erect, construct, or install or to work upon or assist in any way in the erection, construction, or installation of any derrick, machinery, or other apparatus, or equipment designed or intended to be used for the purpose of drilling for oil, gas, or other hydrocarbon substances, or to drill, or operate, or to work upon or assist in any way in the drilling or operating of a well for oil, gas, or other hydrocarbon substances, or to pump or produce, gas or other hydrocarbon substances from any well not actually being drilled or existing at the time the ordinance takes effect, within the territorial limits and boundaries of said city of Seal Beach.

Appellant moved to dismiss the complaint on the grounds that respondent was without jurisdiction to try the action; that ordinance No. 230 is consitutionally invalid in its attempted application to appellant and is void and invalid upon its face for the reason that it is arbitrary and unreasonable in purporting to prohibit entirely an activity which is not in itself a nuisance or wrong or unlawful. This motion was denied and after a plea of not guilty was entered, the cause was set for trial on October 10, 1952. On October 3, 1952, appellant filed its petition in the Superior Court in Orange County for a writ of prohibition, alleging that the said ordinance is constitutionally invalid as applied to appellant; that appellant would be subjected to unreasonable and vexatious expense in time, money and delay and would suffer irreparable damage if said criminal trial were permitted to proceed against it; that nine similar proceedings based upon the same acts and conduct as were the basis of the proceedings against appellant had been commenced in respondent court against various other corporate and individual defendants; that to permit all of said proceedings to continue would result in an unnecessary multiplicity of actions and an undue burden on the courts; that it is of great importance to the welfare of the State of California that the questions presented by said petition be determined quickly.

The Superior Court issued its alternative writ of prohibition restraining respondent from further proceeding in the criminal action until further order of the court and issued an order that respondent show cause why that court should not be absolutely restrained from taking any further proceedings in the criminal action except to dismiss it.

On October 24, 1952, respondent and the city of Seal Beach, named in the petition for the writ as a real party in interest, filed their return to said petition contending and alleging that said ordinance is constitutionally valid. On October 29, 1952, the State Lands Commission, also named as a real party in interest, filed its return to the petition supporting the petitioner's position and alleging that the said ordinance is constitutionally invalid.

The trial court in its judgment, entered January 26, 1953, denied petitioner's motion for judgment on the pleadings, and having concluded that the return of the respondent city of Seal Beach created legal issues and was in the nature of a general demurrer to the petition for writ of prohibition and order to show cause, decreed that the petition did not state sufficient facts to warrant the relief demanded and denied the peremptory writ of prohibition. However, the court, in order to preserve the status quo pending any appeal by petitioner from the judgment, continued in effect during the pendency of this appeal the alternative writ of prohibition issued on October 3, 1952.

There is no dispute as to the material facts. The city of Seal Beach is a city of the sixth class, the boundaries of which extend oceanward three miles from the shoreline of the Pacific Ocean and the said city does not own or hold any title to or any proprietary interest in any of the tide or submerged lands lying within its boundaries.

On September 24, 1945, the State Lands Commission issued to appellant's assignor a lease for the production of oil and gas from tide and submerged lands located within the city limits of the city of Seal Beach. The lands covered by said lease extend from the shoreline oceanward a distance of about three miles. The said lease was issued pursuant to the applicable provisions of the Public Resources Code, § 6871 et seq., which permit leases of tide and submerged lands when it appears to the Commission that oil or gas deposits are known or believed to be contained in any such lands and may be or are being drained by wells upon adjacent lands. Section 6873 of said code also requires that each well drilled shall be "drilled only upon filled lands" or "slant drilled from an upland or littoral drill site to and into the subsurface of the tide or submerged lands covered by the lease, or * * * from a drill site located upon any pier heretofore constructed * * *." Pursuant to the terms of this lease, the authorization of the State Lands Commission, and upon obtaining consent of the United States Army Engineers to the filling of an area sufficient to there permit drilling, appellant commenced operations at a point approximately one and one-half miles from the shore for the purpose of drilling an oil well into the submerged lands. These operations led to the issuance of the criminal complaint against the appellant.

The principal and controlling issue here involved is whether said ordinance No. 230 is valid in application to the tide and submerged lands leased to appellant.

[1] Any city may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws, Cal.Const., art. XI, § 11, and, as in the instant case, a conflict may exist because the ordinance prohibits that which the State authorizes, namely, drilling operations on state-owned submerged lands. People v. Commons, 64 Cal.App.2d Supp. 925, 929, 148 P.2d 724; In re Iverson, 199 Cal. 582, 587, 250 P. 681; Markus v. Justice's Court, 117 Cal. App.2d 391, 255 P.2d 883. An ordinance is likewise invalid if it invades a field already fully occupied by state legislation. Pipoly v. Benson, 20 Cal.2d 366, 371, 125 P.2d 482, 147 A.L.R. 515. And as was said in Natural Milk Etc. Ass'n v. City and County of S. F., 20 Cal.2d 101, 109, 124 P.2d 25, 30:

> "It is the general rule that where the state law so covers the entire field that there is no room for municipal regulation, the latter regulations are necessarily in conflict with the state law." (Citing cases.)

And 20 Cal.2d on page 108, 124 P.2d on page 29:

> "It is true, as a general rule, that when there is a conflict between the local police regulations and the general police regulations of the state, the former is invalid if passed after the general law or is superseded if followed by the latter. In either case the result is the same, the local law has no effective force. There is of course the qualification with respect to chartered cities in regard to local laws dealing with purely municipal affairs, with which we are not here concerned; then the local law prevails. (18 Cal. Jur. 831, et seq.; Cal.Const., Art. XI, secs. 6 and 11.)"

In 1938 the California state legislature enacted the "State Lands Act of 1938."

Stats.Ex.Sess.1938, c. 5, p. 23. By this act a State Lands Commission was created and was vested with the administration of and jurisdiction over state lands, including oil, gas, and other mineral lands, whether uplands, tide or submerged lands. It is provided therein, in article 6, that no political subdivision of the State or any city shall grant or issue any lease, license, easement, privilege or permit vesting authority in any person to take or extract oil or gas from tide or submerged lands owned by the State; that whenever it appears to the commission that oil or gas deposits are known or believed to be contained in any such lands and may be or are being drained by means of wells upon adjacent lands not owned by the State, the commission shall thereupon be authorized and empowered to lease any such lands; that each well drilled pursuant to the terms of such lease shall be drilled only upon filled lands or shall be slant drilled from an upland or littoral drill site to and into the subsurface of the tide or submerged lands covered by the lease; that the derricks, machinery, and all other surface structures, equipment, and appliances shall be located only upon filled lands or upon the littoral lands or uplands, and all surface operations shall be conducted therefrom. Pollution and contamination of the ocean and tide lands and all impairment of and interference with bathing, fishing or navigation in the waters of the ocean or any bay or inlet thereof is prohibited and no oil, tar, residuary product of oil or any refuse of any kind from any well or works shall be permitted to be deposited on or pass into the waters of the ocean or any bay or inlet thereof. It was also provided in section 53 thereof that all leases should further provide that the lessee therein should comply with all valid laws of the United States and of the State of California and with all valid ordinances of cities and counties applicable to the lessee's operations.

As originally enacted, there was no provision in the State Lands Act of 1938 expressly granting exclusive jurisdiction over the tide and submerged lands to the State Lands Commission. In the following year the legislature enacted a statute, Stats.1939, Ch. 646, p. 2074, adding section 48 to the State Lands Act to provide expressly that the State Lands Commission should have exclusive jurisdiction over all ungranted tide and submerged lands owned by the State with the right exclusively to administer and control all such lands and may lease or otherwise dispose of them.

In 1941 the legislature incorporated the State Lands Act of 1938 into the Public Resources Code, Stats.1941, Ch. 548, p. 1875. The sections of the State Lands Act of 1938 relating to the making of oil and gas leases on tide and submerged lands are contained in Public Resources Code sections 6871 to 6878. The provisions of Section 87 of the State Lands Act of 1938, which provided that wells should be drilled from filled lands or slant drilled from upland or littoral drill sites and which prohibited pollution and contamination of the ocean and tide lands and impairment of and interference with bathing, fishing or navigation are contained in Section 6873 of the Public Resources Code.

In City of Oakland v. Hogan, 1940, 41 Cal.App.2d 333, 106 P.2d 987, the court interpreted section 48 of the State Lands Act to give exclusive jurisdiction to the State Lands Commission only in those cases where minerals were to be removed from the tide and submerged lands. Following this decision, the legislature in 1941, Stats. 1941, Ch. 1274, p. 3219, added section 6216 to the Public Resources Code for the purpose of making it clear that the exclusive jurisdiction of the State Lands Commission over the tide and submerged lands was not limited to cases where oil and gas was to be removed from such lands, but rather such jurisdiction was to be exclusive without regard to the question whether such lands should contain oil, gas or other minerals. It was provided therein that the legislature intended to and did vest in the commission full authority to administer, sell, lease, or dispose of the public lands owned by the State, including tide lands and submerged lands and that "The provisions of Section 48 of the State Lands Act of 1938 * * * shall hereafter supersede and control over any other provisions of law, whether general or special, relating to any tidelands or submerged lands * * * without regard to whether any of such lands contain or may contain oil, gas or other minerals, and any such other provisions of law in conflict therewith are repealed."

[2] The foregoing legislative enactments demonstrate clearly that the State has fully occupied the field relative to the control and leasing of state-owned submerged lands and has exclusive jurisdiction over all such leases. Not only does the ordinance in question conflict with the state law in that it prohibits what the state law authorizes, to wit, the drilling for oil on submerged oil lands, but also it invades a field already fully occupied by state legislation and is, therefore, void, insofar as it applies to regulating the leasing and control of state-owned, submerged lands described herein.

[3] The city of Seal Beach has no proprietary interest in the submerged lands involved nor is it the owner of the soil or clothed with any riparian rights and it is not authorized to prevent the drilling operations being conducted by the appellant, who has a valid lease under authority of the State of California. City of San Pedro v. Southern Pacific R. Co., 101 Cal. 333, 35 P. 993.

[4] Respondent contends that the exclusive jurisdiction of the State Lands Commission is expressly limited by the wording of Public Resources Code, section 6828, which provides in part that

> "All leases of lands containing oil or gas made or issued under this chapter * * * shall further provide that the lessee therein shall comply with all valid laws of the United States and of the State of California and with all valid ordinances of cities and counties applicable to lessee's operations, including, without limitation by reason of the specification thereof, the lessee's compliance with Division 3 of this code."

However, this contention is without merit. For the reasons heretofore stated, said ordinance No. 230 is invalid as sought to be here applied and Section 6216 of the Public Resources Code supersedes and controls any other provision of law, whether general or special, relating to any tidelands or submerged lands, and said section 6828 cannot be construed to permit municipal prohibition or regulation of surface operations at a drill site located over state-owned submerged lands, which operations are authorized and required by the State Lands Commission pursuant to general state law.

[5] It is further contended by respondent that Section 6872 of the Public Resources Code further limits the powers of the lands commission in respect to the leasing of tide lands in that it provides

> "Whenever it appears to the commission that oil or gas deposits are known or believed to be contained in any such lands and may be or are being drained by means of wells upon adjacent lands, the commission shall thereupon be authorized and empowered to lease any such lands, either as a tract or in parcels of such size and shape as the commission shall determine, for the production of oil and gas therefrom."

and; that section 6873 of said code further limits the commission in its tideland leasing activities in that it provides that all leases granted by the commission shall contain the requirement that each well shall be slant drilled from an upland or littoral site to and into the subsurface of the tide or submerged lands covered by the lease or drilled or slant drilled from a drill site located upon any pier heretofore constructed for drilling purposes and available for such drilling upon any tide or submerged lands described in the lease and the derricks, machinery and all surface structures, equipment and appliances shall be located only upon filled lands or the littoral lands or uplands or upon any pier heretofore constructed and available for such drilling upon any tide or submerged lands described in any valid existing lease. However, the commission determined herein that the best interests of the State would be served by the drilling of a well or wells from filled lands to be located in the tidelands approximately one and one-half miles, more or less, distant from the shore and at a site to be approved by the War Department. We have no hesitancy in holding that the operations being conducted by the appellant herein are upon an "island" which constitutes filled lands within the purview of the statute.

[6] If said ordinance No. 230 is construed to apply to the operations of appellant herein, as respondent contends, it is unreasonable and arbitrary in that an attempt is made therein to entirely prohibit such drilling operations without reference to the question of whether such drilling would in fact be injurious or harmful. As was said in Pacific Palasades Ass'n v. City of Huntington Beach, 196 Cal. 211, 216, 237 P. 538, 539, 40 A.L.R. 782:

> "* * * The business of boring for and producing oil is a lawful enterprise. The effect of the ordinance, absolutely prohibiting the maintenance or operation of oil wells within certain designated limits of the city of Huntington Beach, is to deprive the owners of real property within such limits of a valuable right incident to their ownership. While the use to which one may put his property may be restricted or regulated by the state, in the exercise of its police power, so far as it may be necessary to protect others from injury from such use, it is elementary that the enjoyment of the property cannot be interfered with or limited arbitrarily. In re Kelso, 147 Cal. 609, 611, 82 P. 241, 2 L.R.A.,N.S., 796 * * *."

[7] It is not apparent that appellant's operation at a point more than a mile and one-half oceanward from the shoreline at Seal Beach will constitute a nuisance, or that the public beach will be damaged or that there is danger of "water pollution".

We conclude that since the State Lands Commission has been granted exclusive jurisdiction by statute over the submerged lands here involved, the city of Seal Beach may not prohibit appellant's drilling operations on said submerged lands by ordinance No. 230. It is unnecessary to here pass upon the question of whether the said ordinance is valid and enforceable if applied to drilling operations conducted on areas in said city not under the exclusive jurisdiction and control of the State.

Judgment reversed.

BARNARD, P. J., concurs.

Hearing denied; CARTER, J., dissenting.

120 Cal.App.2d 41

MONTEREY OIL CO. v. CITY COURT OF CITY OF SEAL BEACH, ORANGE COUNTY.

Civ. 4736.

District Court of Appeal, Fourth District, California.

Aug. 27, 1953.

Rehearing Denied Sept. 23, 1953.

Hearing Denied Oct. 22, 1953.

Proceedings concerning the hearing upon a petition of oil company for peremptory writ of prohibition to restrain city from enforcing ordinance requiring building permits as applied to building built for oil drilling purposes on a "filled in" island one and one half miles off shore, but within territorial boundary of city. The Superior Court, of Orange County, Kenneth E. Morrison, J., denied peremptory writ and oil company appealed. The District Court of Appeal, Mussell, J., held that ordinance either conflicted with state statute or was within a field already fully occupied by state legislation, and either circumstance would invalidate ordinance.

Reversed.

1. Municipal Corporations 🔑592(1)

Where oil company constructed building upon a "filled in" island approximately one and one-half miles from shore, but within territorial boundary of city, city ordinance which prohibited erection of a building without a building permit, could not be applied to oil company's building on land which was exclusively owned and controlled by state. Public Resources Code, § 6301.

2. Municipal Corporations 🔑592(1)

An ordinance which invades the field already fully occupied by state legislation is invalid.

Forgy, Reinhaus, Miller & Kogler, and Stanley M. Reinhaus, Santa Ana, O'Melveny & Myers, Louis W. Myers, William W. Clary, William W. Alsup, Los Angeles, for appellant.

Dana R. Williams and Chas. C. Stratton, Long Beach, for respondent.

Edmund G. Brown, Atty. Gen., and Everett W. Mattoon, Asst. Atty. Gen., for State Lands Commission.

MUSSELL, Justice.

This is an appeal from a judgment denying the petition of appellant Monterey Oil Company for a peremptory writ of prohibition to restrain the city court of the city of Seal Beach (now the Justice's Court for the Huntington Beach-Seal Beach judicial district) from proceeding with, hearing or exercising any further jurisdiction over a certain criminal complaint in an action entitled "People of the State of California v. Monterey Oil Company, No. 5845".

The issues and proceedings are substantially the same as those in the companion appeal filed in this court, bearing the same title and numbered Civil No. 4735, Cal.App., 260 P.2d 846. In that case city ordinance No. 230 provided that it was unlawful to construct or install any derrick, machinery or apparatus designed or intended to be used for the purpose of drilling for oil, or to drill for oil, within the territorial limits of the city of Seal Beach. We there held that the city could not, by ordinance, prohibit or regulate building operations on state-owned submerged lands leased to appellant since the State, by general law, was given exclusive jurisdiction over the said lands and drilling operations; that the state law covered the entire field and that there was no room for municipal regulation; that the regulations set forth in the ordinance were in conflict with the state law and that the ordinance was unreasonable and arbitrary as sought to be applied.

In the instant case the ordinance under attack is city ordinance No. 354 and is a building ordinance which purports to prohibit and make unlawful the erection of any building or structure in the city of Seal Beach without first obtaining a separate building permit for each such building or structure from the building official of the city of Seal Beach.

The criminal complaint, filed September 4, 1952, charged appellant with erecting or constructing a building or structure contrary to the terms of the ordinance and apparently it is conceded that the building or structure involved was a temporary island or fill at a point approximately one and one-half miles seaward from the shore line of Seal Beach, which island was being constructed by appellant in accordance with the terms of a lease from the State Lands Commission. The statutory authority for the issuance of the lease, the legislative history of the state laws applicable thereto, the proceedings had in the city and superior courts and the facts relating to the issuance of the complaint herein, as well as those relating to the complaint issued for violation of ordinance No. 230 of said city, are set forth in our prior opinion, Civil No. 4735.

The statement is made in respondent's reply brief that no application to the city of Seal Beach was ever made by the appellant for the permit required by section 301 of ordinance No. 354. This assertion is answered in appellant's brief, stating that on September 23, 1952, appellant did make application for such permit, reserving in said application its contention that no permit was required and that ordinance No. 354 did not and could not properly relate to structures over submerged lands; that said permit was denied by the Seal Beach building superintendent on the ground that the proposed structure was a part of the apparatus and equipment designed and intended to be used for the drilling of oil, gas and other hydrocarbon substances in violation of ordinance No. 230 of the city of Seal Beach.

It is apparent that the ordinance here involved is sought to be applied to prevent drilling operations by appellant on submerged lands owned by the State and under its exclusive jurisdiction and control.

Section 6301 of the Public Resources Code provides in part that:

> "The commission has exclusive jurisdiction over all ungranted tidelands and submerged lands * * *. The commission shall exclusively adminis-

ter and control all such lands, and may lease or otherwise dispose of such lands, as provided by law * * *."

Section 6216 of said code, added in 1941, sets forth the powers and duties of the State Lands Commission. By it the State Lands Commission is vested with full authority to lease submerged state lands and to provide for the extraction of oil and gas therefrom. It is also provided therein:

> "(b) (*Controlling effect of § 6301.*) The provisions of Section 48 of the State Lands Act of 1938, added thereto by Chapter 646 of the Statutes of 1939, as codified in Section 6301 of this code, shall hereafter supersede and control over any other provisions of law, whether general or special, relating to any tidelands or submerged lands or the beds of navigable rivers, streams, lakes, bays, estuaries, inlets or straits, without regard to whether any of such lands contain or may contain oil, gas or other minerals, and any such other provisions of law in conflict therewith are repealed."

[1, 2] Ordinance No. 354 conflicts with the state law if it is construed to apply to the structures or buildings on exclusively owned and controlled state submerged lands and is, therefore unenforceable as against appellant under the circumstances shown by the record. People v. Commons, 64 Cal.App.2d Supp. 925, 148 P.2d 724; In re Iverson, 199 Cal. 582, 587, 250 P. 681; Markus v. Justice's Court, 117 Cal.App.2d 391, 255 P.2d 883. If construed as contended by respondent, the ordinance also conflicts with the state law in that it invades a field already fully occupied by state legislation. Pipoly v. Benson, 20 Cal.2d 366, 371, 125 P.2d 482, 147 A.L.R. 515; Natural Milk Etc. Ass'n v. City Etc. of S. F., 20 Cal.2d 101, 109, 124 P.2d 25.

It follows that the trial court erred in holding that the appellant's petition did not state facts sufficient to warrant the relief demanded and in denying a peremptory writ of prohibition.

We are here deciding only that the ordinance involved is void and unenforceable as to the state-owned submerged lands involved and we do not pass upon the validity of said ordinance as applied to state-owned lands in upland areas of the city of Seal Beach over which the state does not have exclusive control.

Judgment reversed.

BARNARD, P. J., concurs.

Hearing denied; CARTER, J., dissenting.

120 Cal.App.2d 175

FUENTES et al. v. PANELLA et al.

Civ. 15526.

District Court of Appeal, First District, Division 1, California.

Sept. 11, 1953.

Action for injuries sustained in automobile collision at highway intersection controlled by traffic signals. The Superior Court, County of Santa Clara, entered judgment for defendants, and plaintiffs appealed. The District Court of Appeal, Peters, P. J., held that where automobile driven by plaintiff wife collided with defendants' truck trailer at level intersection of highway controlled by traffic signal lights, instruction to effect that fact that vehicle entered or crossed intersection against stop signal was not conclusive proof of negligence, was properly given in view of conflicting evidence of condition of traffic signal lights at time truck trailer entered intersection.

Affirmed.

1. Appeal and Error 🔑882(12)

Plaintiffs' request for instructions which were given on subject of justification for entering intersection against stop light signal, invited error, if any, in instruction given to jury on issue of justification, and plaintiffs could not complain.

2. Trial 🔑252(7)

Where surrounding circumstances do not present any evidence at all to justify violation of traffic ordinance or statute, it is error to instruct jury on excuse for violation of traffic ordinance or statute.

3. Automobiles 🔑246(47)

In action for injuries sustained in intersectional collision, jury should be instructed on issue of justification for entering intersection against traffic signal light whether justification appears from direct evidence of admitted violation, plus evidence of justification, or appears from surrounding circumstances.

4. Automobiles 🔑245(14)

Whether circumstances are sufficient to constitute justification of violation of traffic ordinance prohibiting vehicles from entering intersection controlled by traffic signals while light is red, is question for jury, in action for injuries sustained in intersectional collision.

5. Automobiles 🔑246(47)

In action for injuries sustained when automobile driven by plaintiff wife collided with defendants' truck trailer at level intersection of highway controlled by traffic signal lights, instruction to effect that mere fact that vehicle entered intersection against stop signal was not conclusive proof of negligence upon showing of justification, was properly given in view of conflicting evidence of condition of traffic signal light when trailer entered intersection.

6. Appeal and Error 🔑216(1), 882(12)

Trial court's failure to qualify instruction to effect that entering intersection controlled by traffic signal lights while light was red was not conclusive proof of negligence, by instruction to effect that circumstances showing entry into intersection against traffic signal was beyond control of actor or for purpose of avoiding collision, was not prejudicial, where complaining party had not offered such qualifying instruction, and had joined in request for former instruction.

7. Automobiles 🔑246(58)

Where evidence in action for injuries sustained in automobile collision at highway intersection was directly conflicting upon issue of right of way, plaintiffs' proposed instruction to effect that plaintiff driver was entitled to assume that defendant driver would obey traffic signals was correctly refused as erroneously seeking to exclude defendants from benefit of instruction.

8. Automobiles 🔑246(24)

Instruction to effect that plaintiff driver was entitled to assume that defendant driver would obey traffic signals should be given only where it can be ruled as a matter of law that plaintiff driver was free of contributory negligence, and in exercise of due care.

9. Automobiles 🔑246(47)

Instruction to effect that drivers entering intersection controlled by traffic signals had duty to use due care to maintain look-out, was properly given where evidence conflicted as to who entered intersection against traffic signal.

◆

Harret W. Mannina, San Jose, Charles R. Wayland, Los Altos, for appellants.

Campbell, Hayes & Custer, Alfred B. Britton, Jr., San Jose, W. R. Dunn, Burlingame, of counsel, for respondents.

PETERS, Presiding Justice.

Plaintiffs are husband and wife. The wife, Margaret C. Fuentes, was injured when the automobile she was driving collided with the truck-trailer operated by defendant Lawrence Gaffin and owned by defendant Frank Panella, doing business as the B. Panella Drayage Co. Plaintiffs brought this action to recover for Mrs. Fuentes' injuries. Judgment based on a jury verdict was entered for defendants. Plaintiffs appeal.

Defendants concede that at all times here pertinent Gaffin was acting in the course and scope of his employment with Panella. Plaintiffs do not attack the sufficiency of the evidence to sustain the judgment, their contentions being that certain instructions were erroneously given and others erroneously refused. The evidence must be reviewed, however, to understand the points in reference to the instructions.

The accident occurred at about 1:00 p. m. on the dry, clear day of August 17, 1950, at the level intersection of McKee Road, which runs east and west, and Bayshore

Highway, which runs north and south, in Santa Clara County. Mrs. Fuentes was driving a 1931 Model "A" Ford west on McKee Road on her way to her work. Gaffin was driving a three-piece tractor, a flat bed semi-trailer and a flat bed full trailer, weighing three tons, and loaded with nineteen tons of boxed pears, north on Bayshore Highway.

At the intersection in question there are three ten-foot lanes on Bayshore, the center lane being there divided by a double line, and with ten-foot shoulders bordering the lanes. McKee is about forty feet wide. A limit line is painted across McKee at the intersection to indicate where cars should stop when required to do so before entering the intersection.

Each of the four corners of the intersection is guarded by projecting overhead signals, of the variety where the lights flash from green, to amber, to red. The signals are of the "trip" type, that is controlled automatically by the passing traffic. Green lights on McKee would automatically mean the lights on Bayshore were red, and vice versa. There was no testimony at all as to the duration of the signals, and particularly there was no evidence as to the length of the amber or caution light.

Mrs. Fuentes testified that as she approached within half a block of the intersection she noticed that the red light was against her. She brought her car to a stop at the limit line at the intersection, and waited quite a while for the light to turn green. James Hood, driving his cab east on McKee, testified that from the opposite side of the intersection he saw Mrs. Fuentes stop, as he had, for the red light. George Fereira, driving a pickup truck behind Mrs. Fuentes, also testified that Mrs. Fuentes stopped at the intersection, but was most confused as to the condition of the lights then or immediately thereafter. Mrs. Fuentes testified that when the McKee light turned green she started across the intersection, first looking to the right and then to her left, where she first observed defendants' truck approaching at about thirty-five miles an hour, and then about fifty feet from the intersection. She did not look at this truck again, because she assumed that it would stop because the lights were green for McKee Road traffic and therefore must have been red for Bayshore traffic.

Gaffin, by deposition, directly contradicted this testimony. He testified that when he was forty feet from the intersection he observed the Fuentes' car on McKee also about forty feet from the intersection, and approaching it at the same speed he was traveling, that is, twenty-five to thirty miles per hour; that he maintained this speed as he approached the intersection; that he first noticed the Bayshore traffic light while he was 150 feet from the intersection, and such light was then green; that there were no cars between his truck and the intersection; that the Bayshore light remained green as he entered the intersection.

Hood, the cab driver, estimated that the truck was going about thirty miles an hour and was about seventy-five to one hundred feet from the intersection, or it could have been fifty feet, when the light turned green for McKee traffic, and when he and Mrs. Fuentes, from opposite sides of the intersection, started to cross.

Fereira was most confused as to who was where and what the conditions of the lights were at the critical times involved. He testified on direct and redirect that when he observed the truck forty feet from the intersection it was traveling thirty-five miles an hour, and that the light on McKee was green, but on cross-examination he stated that when the truck "got pretty near even with the shoulder of McKee Road," the light on McKee "said" green.

A similar conflict exists as to the position of the parties after they entered the intersection and at the time of the collision. Mrs. Fuentes testified that after she saw the truck forty feet from the intersection she continued across slowly and did not again look at the truck because she assumed that it would stop. She next observed the truck just before the collision, at which time she had almost reached the dividing line of Bayshore. Although somewhat uncertain, she believed she was still moving when hit by the truck. From the physical facts and other evidence it appears that the tractor and semi-trailer must have passed in front of her and that she hit or was hit by the side of the full trailer at about its rear wheels.

Hood testified that he from one side, and Mrs. Fuentes from the other, had proceeded into the intersection with the green light for McKee traffic about ten or twelve feet when the truck entered the intersection. He then first realized that the truck was not going to stop, stopped himself, and observed the truck speed up and swing out in an attempt to miss the Ford. He could not see the actual collision, but heard it, and, while Mrs. Fuentes was moving when last seen by him, he thought the Ford was stopped when hit.

Fereira also agreed that Mrs. Fuentes, in accordance with the green light, was ten feet out into the intersection when the truck entered it. Although this witness had given a statement after the accident to the effect that Mrs. Fuentes had "rolled" into the side of the truck, he insisted at the trial that she was stopped when hit.

Gaffin, however, testified that the light was green for Bayshore traffic when he entered the intersection at fifteen to twenty miles per hour. Although he had observed the Fuentes' car while it was forty feet from the intersection, he did not see it again until after the accident. He did not know whether Mrs. Fuentes had or had not stopped at the intersection. He did not apply his brakes or blow his horn. He felt the impact of the collision when his equipment was in the intersection, applied his brakes, crossed Bayshore to his left side, and parked.

The left front and rear of the Ford were badly damaged. The full trailer had a slightly split supporting beam on its right side over the back wheels.

On this evidence the jury brought in an eleven-to-one verdict in favor of defendants. Plaintiffs' major contention, made in various ways, is that since Gaffin testified that he was proceeding in accordance with the green light on Bayshore, and Mrs. Fuentes testified that she was proceeding with the green light on McKee, and neither admitted, claimed or contended that they had violated the law or should be excused from such violation, it was error of a most prejudicial nature to have instructed that circumstances could excuse a departure from the standard of care set forth in the Vehicle Code in reference to traffic signals.

At the request of plaintiffs the trial court instructed, in the words of section 475 of the Vehicle Code, that the driver of any vehicle shall obey the instructions of any official traffic signal applicable to him and placed as provided by law.

Plaintiffs object to the following three instructions. The first of these, given at the request of defendants, is as follows:

> "I instruct you that Section 476 of the Vehicle Code of the State of California, insofar as it is applicable to this case reads as follows:
>
> "'Official Traffic Signals. Whenever traffic is controlled by official traffic control signals * * * exhibiting different colored lights successively, one at a time, * * * said * * * lights shall indicate and apply to drivers of vehicles and pedestrians as follows:
>
> "'(a) Green alone or "Go."
>
> "'1. Vehicular traffic facing the signal shall proceed straight through or may turn right or left or make a semicircular or U turn unless a sign at such place prohibits any such turn. But vehicular traffic * * * shall yield the right of way to other vehicles * * * lawfully within the intersection * * * at the time such signal is exhibited.
>
> * * * * * *
>
> "'(b) Yellow or "Caution" when shown following the green or "Go" signals.
>
> "'1. Vehicular traffic facing the signal is thereby warned that the red or stop signal will be exhibited immediately thereafter and vehicular traffic shall not enter the intersection when the red or stop signal is exhibited.
>
> * * * * * *
>
> "'(c) Red alone or "Stop."
>
> "'1. Vehicular traffic facing the signal shall stop before entering * * the intersection and shall remain

standing until green or "Go" is shown alone, * * *.

* * * * * *

"'(f) No person shall disobey the directions of this section except when it is necessary for the purpose of avoiding a collision or in case of other emergency * * *.'"

The "(F)" portion of this instruction was not given when the instruction was first read to the jury, but when the jury requested that certain instructions be reread this instruction was reread and "(F)" added. Plaintiffs object to the giving of "(F)".

The court, of its own motion, then gave the following instruction:

> "The mere fact that a vehicle enters or crosses such an intersection against a stop signal is not conclusive proof of negligence. This is because the controlling device may change to give the stop sign either just as a vehicle is entering the intersection or when it is so close that an attempt to stop suddenly would be futile, or would be more hazardous than crossing the intersection, or would be more liable to result in interference with other traffic. The fact that the law recognizes these possibilities, however, does not justify a driver in approaching an intersection at a careless rate of speed. He, too, is bound to know that the signal, being automatic, will not heed his approach and that it may change before he reaches the intersection. The ordinarily careful driver will adjust his speed to that possibility. Failure to obey a traffic signal may or may not be the proximate result of a negligent speed in approach.
>
> "When there is a question whether a driver was negligent in entering an intersection against an automatic stop signal, all the surrounding circumstances should be considered with a view to judging whether his conduct was justifiable, excusable and in the manner of an ordinarily prudent person.
>
> "In giving you this instruction, I do not mean to imply, nor to suggest, that any party, involved in the accident in question, did enter the intersection that is under our consideration against a stop signal, or that any party made a negligent approach to the intersection. Whether or not either of those things was done is a question of fact that you must decide."

This instruction, too, was reread to the jury at its request.

The last major instruction in this series to which objection is taken reads as follows:

> "Conduct which is in violation of any of the statutes read to you constitutes negligence per se. This means that if the evidence supports a finding, and you do find, that a person did so conduct himself, it requires a presumption that he was negligent.
>
> "However, such presumption is not conclusive. It may be overcome by other evidence showing that under all the circumstances surrounding the event, the conduct in question was excusable, justifiable and such as might reasonably have been expected from a person of ordinary prudence."

The record, as originally filed, did not show who requested this instruction, but at the oral argument it was stipulated that the record should be augmented to show that this instruction was given at the request of plaintiffs. As offered by them it had two other short paragraphs which were deleted by the trial court. One of the deleted paragraphs related to proximate cause, a subject covered elsewhere in the instructions, and the other was a restatement of paragraph one of the instruction as given.

[1, 2] It will be noted that paragraph two of the last quoted instruction tells the jury that, although the presumption of negligence arises out of a violation of the ordinance, such presumption may be overcome "by other evidence showing that under all the circumstances surrounding the event, the conduct in question was excusable." Thus, plaintiffs themselves presented, and the court gave, a so-called excuse instruction. Thus, even if it were error to have instructed on excuse, in view of the denial

of any violation and in the absence of direct evidence from either side on such issue, plaintiffs would be in no position to complain. It is well settled law that where a litigant invites error by offering instructions on a certain issue, he is in no legal position to complain that it was error to give instructions offered by the adversary, or given by the court on its own motion, on the same issue. The doctrine of invited error applies to such a situation. Wells v. Lloyd, 21 Cal.2d 452, 132 P.2d 471; Blythe v. City & County of S. F., 83 Cal.App.2d 125, 188 P.2d 40; Connor v. Pacific Greyhound Lines, 104 Cal.App.2d 746, 232 P.2d 500; see cases collected 4 Cal.Jur.2d p. 422, § 557.

We do not mean to imply that, under the facts, it was error to have instructed on the issue of excuse. It is obvious that the signal light was red, amber or green when Gaffin entered the intersection. When Mrs. Fuentes entered the intersection the McKee Road light was either red or green. Both testified that the lights were green for them. Both could not be correct. Some one was mistaken. There was no evidence at all of the duration of any of the lights, and particularly no evidence as to how long the amber or caution light remained lit. Gaffin had a legal right to enter the intersection if the Bayshore light was either green or amber. From all of the surrounding circumstances, including the conflict as to who was where when the lights changed, it is a reasonable inference from the evidence that just as Gaffin arrived at the intersection, the Bayshore light flashed amber momentarily and then flashed red. If he entered the intersection just as the Bayshore light flashed red, he might have entered the intersection in apparent violation of section 476 of the Vehicle Code. But such apparent violation might, under all the surrounding circumstances, have been excusable.

[3–5] Of course, where there is no evidence at all of justification, or the surrounding circumstances do not show it, it is error to instruct on excuse. Cavagnaro v. City of Napa, 86 Cal.App.2d 517, 195 P.2d 25; Carlson v. Shewalter, 110 Cal.App.2d 655, 243 P.2d 549; Harris v. Joffe, 28 Cal.2d 418, 170 P.2d 454. But these cases do not stand for the proposition that excuse instructions can be given only where there is an admitted violation and the violator offers evidence of justification for such violation. The jury may believe that a violation of the law has taken place, and thus disbelieve the testimony to the contrary, but at the same time believe that such violation, under all the circumstances, was justifiable because of the circumstances. Whether the circumstances were sufficient to constitute justification is a fact question. The jury should be instructed on the issue whether such justification appears from direct evidence of an admitted violation plus evidence of excuse, or appears from all the surrounding circumstances. Combs v. Los Angeles Railway Corp., 29 Cal.2d 606, 177 P.2d 293; Satterlee v. Orange Glenn School Dist., 29 Cal.2d 581, 177 P.2d 279. The evidence need not show an actual emergency. Hart v. Briskman, 110 Cal. App.2d 194, 242 P.2d 341.

[6] In the instant case, in view of the conflict as to the condition of the lights when Gaffin entered the intersection, one of plaintiffs' witnesses, Fereira, placing the truck at the intersection just when the McKee light turned green, and in view of the unknown duration of the amber light, and of all the surrounding circumstances, it must be held that the instructions on justification were properly given. This also disposes of plaintiffs' contention that certain instructions offered by them and contrary to the excuse instructions should have been given.

Plaintiffs next complain that even if the excuse instructions were properly given, they should have been qualified by an instruction to the effect that such excuse could exist only where the circumstances showing excuse were beyond the control of Gaffin, citing Ornales v. Wigger, 35 Cal.2d 474, 218 P.2d 531. This qualification to the excuse doctrine, first suggested on this appeal, is much too broad. Hart v. Briskman, 110 Cal.App.2d 194, 242 P.2d 341. Although the Ornales case did hold 35 Cal.2d page 479, 218 P.2d at page 534, that excuse instructions should be qualified "by an instruction on the type of evidence necessary to rebut the presumption of negligence", its actual holding directly refutes plaintiffs' present contention because it held that the failure to give the qualifying instruction was not prejudicial where the appellants (as in the instant case) had not themselves offered such qualifying instruction, and had joined in the request (as in the instant case) for excuse instructions. See, also, Mehling v. Zigman, 116 Cal.App.2d 729, 254 P.2d 141; Florine v. Market St. Ry. Co., 64 Cal.App.2d 581, 149 P.2d 41, on the necessity of offering qualifying instructions; see, also, Viera v. Gordon, 113 Cal.App.2d 700, 248 P.2d 981.

[7,8] Plaintiffs next object to two instructions that were given to the effect that both drivers had to use ordinary care in exercising their right-of-way which they could not negligently presume was clear, and claim that two instructions submitted by them to the effect that Mrs. Fuentes was entitled to assume that Gaffin would obey the signals should have been given. Taylor v. Sims, 72 Cal.App.2d 60, 164 P.2d 17, and Lee v. Stephens, 8 Cal.App.2d 650, 47 P.2d 1105, are cited in support of these contentions. While both of those cases did state a driver crossing with a signal has no duty to maintain a lookout, they were not ruling upon instructions at all. They used that language in rejecting a contention that plaintiff was there shown to be guilty of contributory negligence as a matter of law. In the instant case the evidence was directly conflicting, and presented fact questions, as to who was entitled to the right-of-way. The instructions offered by plaintiffs sought erroneously to limit the benefit of the rule to Mrs. Fuentes alone and to exclude Gaffin from its benefits, and were, for that reason, erroneous. Moreover, the instructions offered by plaintiffs and rejected by the trial court should be given only where it can be ruled as a matter of law that plaintiff was free of contributory negligence, because before one can rely on the due care of others he must be in the exercise of due care himself. Ribble v. Cook, 111 Cal.App.2d 903, 245 P.2d 593; Carlson v. Shewalter, 110 Cal.App.2d 655, 243 P.2d 549. These cases, and the case of Freeman v. Churchill, 30 Cal.2d 453, 183 P.2d 4, upheld instructions similar to those given here where the question, as in the instant case, as to who had the right-of-way, was a fact question. See, also, Satterlee v. Orange Glenn School Dist., 29 Cal.2d 581, 177 P.2d 279.

[9] Inasmuch as the jury was properly instructed, as already held, on the doctrine of excuse from statutory negligence, it was quite proper to instruct that each of the drivers had to use due care to maintain a lookout. Moreover, such instructions are obviously proper where the evidence is conflicting as to who is the violator.

None of the other claimed errors requires comment.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

---

119 Cal.App.2d 796

In re GORE'S ESTATE.

Civ. 15670.

District Court of Appeal, First District,
Division 1, California.
Aug. 21, 1953.

Rehearing Denied Sept. 18, 1953.
Hearing Denied Oct. 15, 1953.

Proceeding upon petition for revocation of the probate of will because of alleged insanity of testator. The Superior Court, County of Contra Costa, Harold S. Jacoby, J., denied the petition and the petitioner appealed. The District Court of Appeal, Fred B. Wood, J., held that sanity of testator was a subject upon which eye, ear, nose and throat specialist was qualified, as an expert, to testify.

Affirmed.

1. Evidence 🔑474(4)

An utter stranger does not ordinarily become an intimate acquaintance, for the purpose of testifying as to that person's sanity, within thirty minutes following their first and only meeting.

2. Evidence ⚷474(4), 537

Where patient visited eye, ear, nose and throat specialist for the purpose of a complete eye examination and specialist devoted about thirty minutes to the examination, specialist, who received degree of medicine in 1937 from University of Vienna and took up medical work in United States in 1938, was qualified to give opinion, as to patient's sanity, as an expert but not as an intimate acquaintance. Business and Professions Code, § 2137; Code Civ.Proc. § 1870, subd. 9.

3. Appeal and Error ⚷123

Judicial action, not judicial reasoning, is reviewable.

4. Evidence ⚷535

The competency of an expert witness is relative to the topic about which he is asked to testify.

5. Evidence ⚷537

If the subject matter of a requested opinion relates to matters within the knowledge and observation of every physician and surgeon, a medical witness, as an expert, need not be specialized in that field.

On Petition for Rehearing

6. Wills ⚷396

Objection that medical expert was not qualified to answer question regarding sanity of testator was not sufficient basis for claim, upon appeal, that testator lacked testamentary capacity because of delusion concerning his daughter.

◆

William B. Chaplin, Edwards & Friborg and R. Donald Chapman, Oakland, for appellant.

W. Blair Rixon, Brentwood, Tinning & DeLap and J. Vance Porlier, Richmond, for respondent.

FRED B. WOOD, Justice.

The sole question upon this appeal by the petitioner for revocation of the probate of a will is whether or not the opinion of a licensed physician and surgeon (an eye, ear, nose and throat specialist) concerning the sanity of the decedent was properly admitted in evidence.

The qualifying questions developed the following facts. The witness, Dr. Lowenstein, is a licensed physician and surgeon in this state. He took his medical training at the University of Vienna, graduating with the degree of medicine in 1937; came to this country in June, 1938, and took medical work here; was in Chicago for a short time; came to San Francisco and interned at the City and County Hospital during 1938 and 1939; was with the Green's Eye Hospital, San Francisco, for about three years; then practiced in Richmond, California, for a while, doing eye, ear, nose and throat at the shipyard; since then he has been practicing in Pittsburg; limits his practice to eye, ear, nose and throat almost exclusively.

He saw the decedent once, for about 30 minutes, on April 11, 1949, four days after the execution of the will. Decedent came to his office for an examination for his civil aeronautics license, and wanted some glasses. He gave decedent a "complete examination, the long form, blue sheet, and all kinds of questions on there." He said, "I did a complete eye examination with the Green's eye refractor and I checked his eyes, ears, nose and throat. I checked him over completely. As a matter of fact I checked—I remember I put it down here. I checked him. I even checked his urine, and it was negative. There was nothing wrong."

Respondent then asked him, "during the period of approximately 30 minutes that you had Mr. Gore [the decedent] under your observation, and during the course of your examination, would you express an opinion as to whether he was sane or insane?" Appellant objected, saying "He hasn't qualified him as an expert for one thing." The court remarked that it is not necessary to qualify "with acquaintances." Appellant stated, "I know, but in acquaintances they must be intimate acquaintances." The court remarked that it goes to the weight of the testimony and appellant renewed her objection: "I don't think he is even qualified to answer the question, to have the question put in. There is no background for it. I object to it on that ground. This man never saw him but once." The court then overruled the objection and directed the witness to answer.

The doctor answered, "To me he was absolutely sane, just as sane as I am."

Upon cross-examination, asked if, without looking at his records, he recalled what he did that day with Mr. Gore, the doctor said, "Certainly, I do. I did the usual examination. I put him before the Green refractor. I asked him questions,—is it better this way, or better that way, or that with the lens before his eyes?" Continuing, he said, "I set him in a chair. I put lenses before his eyes. I asked him if he could see better now, or put some other lens in front of his eyes, I asked him, 'Does that help you, or does it make it worse.' He seemed to answer me. I have the exact record even the axis of the ceiling which he couldn't answer unless he were able to understand what I am asking him." Decedent's ability to answer was not the only reason for the doctor's opinion, "the man appeared to me to be sane, that's all I can say." The examination was of the eyes, ears, nose and throat, "and the physical examination following the blue sheet [about 10″ x 12″] on the civil aeronautics examination form." Asked if he was a psychiatrist or a neurologist, the doctor said, "No, I am an M.D. That's all the classification I have." Upon redirect, the doctor said he found nothing wrong with Mr. Gore except that he had far sighted astigmatism.

[1–3] It appears to us that the witness was qualified to give his opinion as a physician and surgeon, one who had the opportunity to observe which this evidence discloses; not as an "intimate acquaintance" of the decedent. "An utter stranger does not ordinarily become the intimate acquaintance of another within less than 24 hours after their first meeting." In re Estate of Relph, 192 Cal. 451, 463, 221 P. 361, 366. We need not necessarily infer from the remarks of the court made before counsel restated his objection, that the court admitted the doctor's testimony solely as that of an intimate acquaintance. Even if the trial court did so, it is immaterial because the testimony was admissible as that of an expert. It is judicial action, not judicial reasoning, which is reviewable. See 4 Cal.Jur.2d 390–392, Appeal and Error, §§ 536–538.

[4, 5] The opinion of a witness "on a question of science, art, or trade, when he is skilled therein" may be given in evidence. C.C.P. § 1870, subd. 9. This commits to the trial court, in each case, the determination of the issue whether or not the witness on the stand is "skilled" in the "science, art, or trade" to which the question asked of him relates. As said by Wigmore, the competency of an expert "is in every case a relative one, i. e. relative to the topic about which the person is asked to make his statement." Evidence, 3d ed., § 555, p. 634, quoted in Sinz v. Owens, 33 Cal.2d 749, 753, 205 P.2d 3, 5, 8 A.L.R.2d 757; and in Huffman v. Lindquist, 37 Cal.2d 465, 476–477, 234 P.2d 34, 29 A.L.R.2d 485. Where the subject matter of an opinion relates "to matters within the knowledge and observation of every physician and surgeon," the witness need not have specialized in that field. Mirich v. Balsinger, 53 Cal. App.2d 103, 118, 127 P.2d 639, 646.

"The physician's and surgeon's certificate authorizes the holder to use drugs or what are known as medical preparations in or upon human beings and to sever or penetrate the tissues of human beings and to use any and all other methods in the treatment of diseases, injuries, deformities, or other physical or mental conditions." B. & P.Code, § 2137. This certificate is given by the state, through its Board of Medical Examiners, only after satisfactory completion of a long and intensive course of education and training in a wide variety of subjects, designed to assure the state and the public that the holder of such a certificate is qualified to practice all phases of the healing arts. A mere perusal of the Medical Practice Act, B. & P.Code, §§ 2000 to 2497, demonstrates that.

We think such a person, particularly in view of the years of hospital and private practice experience this doctor had, is qualified to observe a person and form and give in evidence an opinion concerning that person's sanity. He need not specialize in psychiatry to do so. As stated in Re Estate of Dolbeer, 149 Cal. 227, 248, 86 P. 695, 704, "A general practitioner who has had experience in the various kinds of mental cases is as competent to testify to the sanity or insanity of a person as the skilled expert who devotes his entire time to the study of mental diseases." One of the authorities cited in the Dolbeer case expresses the applicable principle in these words: "The liberal doctrine should be insisted on that the law does not require the best possible kind of a witness, but only persons of such qualifications as the community daily and reasonably relies upon in seeking medical advice. Specialists are in most communities few and far between; the ordinary medical practitioner should be received on all matters as to which a regular medical training necessarily involves some general knowledge. This rule has been applied for sundry subjects, chiefly that of poisons, and also of *insanity*." 1 Wigmore on Evidence, 1904 ed., 682–683, § 569.

Our attention has been called to decisions such as Huffman v. Lindquist, supra, 37 Cal.2d 465, 476–479, 234 P.2d 34, 29 A.L.R.2d 485, and Sinz v. Owens, supra, 33 Cal.2d 749, 755–758, 205 P.2d 3, which hold that a physician and surgeon, asked for his opinion concerning the standard of practice in a special field of medicine or surgery, must have had a certain amount of occupational experience in that field. Those decisions are not applicable here, where the question pertains to a subject that lies within the area of the knowledge and observation of every physician and surgeon.

This principle was pointedly applied in the recent decision of our Supreme Court in Thompson v. City of Long Beach, 41 Cal.2d 235, 259 P.2d 649. Four general practitioners had testified that appellant's impaired vision precluded her from doing the work of a stenographer satisfactorily. They relied principally on her impaired ability to read distance charts accurately and without strain, 41 Cal.2d 235, 259 P.2d 649. She cited opposing medical testimony of eye specialists in her behalf. That merely created a conflict in the record. Appellant had made no objection to the competency of the four general practitioners. Yet the court expressed the opinion that they were competent: "While they were general practitioners rather than eye specialists, this fact did not affect their competency but only went to the weight to be accorded their testimony. Cases annotation: 54 A.L.R. 860, 861.[1] Manifestly, the qualification of the general practitioners to testify as expert witnesses concerning appellant's admitted visual defects and the effects of such defects on appellant's ability to satisfactorily perform her work had no relation to their familiarity with the standards of care required in the treatment of eye conditions. So distinguishable is the situation in Huffman v. Lindquist [supra] 37 Cal.2d 465, where at page 476, 234 P.2d 34, 41, it was declared that the trial court had not abused its discretion in sustaining an objection to the qualification of an autopsy surgeon to 'testify as an expert with regard to the *question of whether defendant doctor had exercised the proper and requisite degree of skill and care.*' (Emphasis added.)" 41 Cal.2d 235, 259 P.2d 652. That fits our case, if we substitute "eye, ear, nose and throat specialist" for "general practitioner" and "mental condition" or "sanity" for "visual defects" and "eye conditions." In our case, the doctor's opinion was based on his own observations. The trial judge, when he allowed the question, passed upon the adequacy of those observations (the opportunity to observe) as well as the competency of the witness to form and give an opinion as to the decedent's sanity. We find in that ruling no abuse of discretion, no basis for a reviewing court to characterize it as error and to reverse the judgment.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

On Petition for Rehearing

PER CURIAM.

Appellant in her petition for rehearing calls attention to the fact that this Court in its opinion heretofore filed herein, did not "consider the question of a delusion as opposed to the issue of general insanity," asserting there is in this case a significant difference between those two terms because her claim that decedent lacked testamentary capacity was not predicated upon the "general insanity of the decedent," but upon his having "a limited and special form of mental derangement constituting a delusion concerning his daughter," the appellant.

---

[1] The writer of the note in 54 A.L.R. 860–869 assembles cases from various jurisdictions indicating that the majority view is that physicians and surgeons (not specialists in treating mental conditions) are competent to testify concerning sanity. 863–866.

[6] That distinction, if there be one, is not significant upon this appeal for appellant did not object to the challenged testimony of Dr. Lowenstein upon any such ground. He was asked: "* * * would you express an opinion as to whether he was sane or insane?" Appellant objected upon the ground that the doctor was not qualified to answer that question, not that it was a question which called for an opinion as to "general insanity" as distinguished from a delusion. See 260 P.2d 860.

Appellant's petition for a rehearing is denied.

120 Cal.App.2d 248

WERNER v. WERNER.

Civ. 4801.

District Court of Appeal, Fourth District, California.

Sept. 16, 1953.

Action by a wife for a divorce. From an order of the Superior Court of San Diego County, L. N. Turrentine, J., modifying interlocutory and final divorce decrees by reducing the amount of monthly alimony payments to plaintiff by defendant, plaintiff appealed. The District Court of Appeal, Mussell, J., held that the decrees, which incorporated a property settlement agreement reciting the parties' desire to settle their property rights for all time and provide for plaintiff's support and maintenance, transferring to her all of defendant's share of the community property, and providing for his payment of a specified sum monthly to plaintiff for her support and maintenance, determined all the community property rights of the parties, so as to support the trial court's determination that such payments were in the nature of alimony, not a division of property or compensation for property retained by defendant, and hence were subject to modification, and that the trial court did not abuse its discretion in reducing the amount of the payments, in view of the parties' present circumstances.

Order affirmed.

1. Divorce ⚷254

A divorce decree, adjusting parties' property rights, is not subject to modification, regardless of whether it is based on parties' agreement.

2. Divorce ⚷254

On divorced husband's application to reduce amount of his monthly payments under interlocutory and final divorce decrees to his divorced wife, superior court had jurisdiction to determine whether decrees were based on property settlement, with such payments provided for as phase of property adjustment, and hence not subject to modification, or were based on alimony or support allowance covenants and therefore subject to modification.

3. Divorce ⚷286

Whether interlocutory and final divorce decrees were based on parties' property settlement, with monthly payments to divorced wife by divorced husband provided for as phase of property adjustment, and hence not subject to modification, or were based on alimony or support allowance covenants and therefore subject to modification, was fact issue to be determined by trial court, whose implied finding that stipulation was solely for alimony money will not be disturbed on appeal from order reducing amount of payments, if reasonable and supported by substantial evidence, though contrary finding might be equally tenable.

4. Divorce ⚷254

In determining whether monthly payments, ordered by divorce decree to be made to wife by husband, are in nature of property and hence not subject to modification or of alimony, so as to authorize modification thereof, parties' property settlement agreement, incorporated in decree, must be taken as whole and consideration given to circumstances under which it was made, nature and value of property being divided, and its relation to amount of periodic payments.

5. Divorce ⚷245(1), 254

Monthly payments, ordered by divorce decree to be made to wife by husband, can not be modified, if they are in nature of property, but if they are in nature of alimony, court has power to modify them, regardless of whether they are based on parties' agreement and whether such agreement is incorporated in decree.

6. Divorce ⚷245(1)

Interlocutory and final divorce decrees, incorporating parties' property settlement agreement, which recited their desire to settle their property rights for all time and provide for wife's support and maintenance, transferred all of husband's share of community property to wife, and provided for his payment of specified sum monthly to her for her support and maintenance, determined all community property rights of parties, so as to support trial court's determination that payments were in nature of alimony, not division of property or compensation for property retained by husband, and hence subject to modification on husband's application.

7. Divorce ⚷245(3), 286

Modification of alimony payments awarded wife by divorce decree rests within trial court's discretion, and its order modifying award may not be set aside by appellate court without clear showing of abuse of discretion. Civ.Code, § 139.

8. Divorce ⚷286

On appeal from order reducing amount of monthly payments ordered by interlocutory and final divorce decrees to be made to divorced wife by her divorced husband, all conflicts in evidence and affidavits must be resolved in support of order and considered in light favorable to support rather than defeat it.

9. Divorce ⚷286

Adjustment of support money, ordered by divorce decree to be paid wife by husband, is trial judge's problem, and reviewing court has no discretion in such matter.

10. Divorce ⚷245(3)

The superior court's reduction of amount of alimony payments, ordered by its interlocutory and final divorce decrees to be made to divorced wife by divorced husband, from $50 to $14.17 per month, was not clear abuse of discretion, in view of divorced husband's affidavit that divorced wife, since original order was made, had become self-supporting, was receiving $90 per month, plus room and board, from her employment, and received $15,000 in cash from sale of home awarded her by decree, that affiant had remarried, and that his earnings were insufficient to pay amounts allowed by decree and properly maintain himself and his present wife.

◆

Ruel Liggett, Roy M. Cleator and E. C. Davis, San Diego, for appellant.

Holt & Macomber, San Diego, and Henry F. Walker, Los Angeles, for respondent.

MUSSELL, Justice.

Plaintiff appeals from an order, made upon application of defendant, reducing the monthly payments ordered to be made to plaintiff under the terms of interlocutory and final decrees of divorce.

Plaintiff contends (1) that the trial court did not have jurisdiction to modify the alimony provision of the divorce decrees since the alimony award was based upon and in consideration of a property settlement agreement which had been approved by the court and made a part of the decrees; and (2) that the court abused its discretion in making the order of modification.

[1–5] A divorce decree adjusting the property rights of the parties is not subject to modification regardless of whether or not it is based upon the agreement of the parties. However, the trial court had jurisdiction to determine whether the decrees herein were based upon the property settlement with payments provided as a phase of property adjustment and therefore not subject to modification or was based upon alimony or support allowance covenants and therefore subject to modification. Codorniz v. Codorniz, 34 Cal.2d 811, 814, 215 P.2d 32. This was an issue of fact to be determined by the trial court and where, as here, the implied finding that the stipulation was solely for alimony money is reasonable and is supported by substantial evidence it will not be disturbed on appeal even though a contrary finding might be equally tenable. Weedon v. Weedon, 92 Cal.App.2d 367, 369, 207 P.2d 78. As was said in Pearman v. Pearman, 104 Cal.App. 2d 250, 253, 254, 231 P.2d 101, 103:

> "No single factor can be relied upon in any given case to determine whether monthly payments are in the nature of property or alimony. The agreement must be taken as a whole and consideration given as to the circumstances under which it was made and the nature and value of the property being divided and its relation to the amount of the periodic payments. Puckett v. Puckett, 21 Cal.2d 833, 841–842, 136 P.2d 1. If the monthly pay-

ments are in the nature of property, they may not be modified. Puckett v. Puckett, supra, 21 Cal.2d at page 840, 136 P.2d 1. But if the payments are in the nature of alimony the court has the power to modify, whether such payments are based upon an agreement of the parties and whether or not the agreement is incorporated in the decree. Adams v. Adams, 29 Cal.2d 621, 624–626; 177 P.2d 265; Hough v. Hough, 26 Cal.2d 605, 612, 160 P.2d 15."

[6] In the present case, on December 13, 1945, plaintiff obtained an interlocutory decree of divorce. Prior thereto the parties had entered into a property settlement agreement which was approved by the court and incorporated in the interlocutory and in the final decree of December 14, 1946. On October 23, 1952, defendant obtained an order to show cause to modify the judgment by reducing the alimony provision from $50 per month to $14.17 per month by reason of a change of circumstances. The matter was heard on affidavits and the court thereupon modified the decrees by reducing the payment to be made by defendant to $14.17 per month.

The property settlement agreement involved recites that the parties are desirous of settling for all time their respective property rights *and* (emphasis ours) of providing for the support and maintenance of the wife. Defendant apparently transferred all of his share of the community property to plaintiff as there is no mention of any property rights therein transferred to him. Plaintiff, in her amended complaint, sought an award to her of the community property. The case was tried as a default matter and there is no mention in the interlocutory decree of any community property other than that described in the agreement. It is therein provided that plaintiff received the family residence, the household furniture, furnishings and equipment. A diamond ring in the possession of plaintiff was transferred to the daughter of the parties. The defendant agreed to pay certain outstanding obligations and to pay plaintiff for *her support and maintenance* (emphasis ours) the sum of $50 per month until such time as she should remarry. It was further agreed that any amount received by her from the United States Veterans' Administration should be included in the said sum of $50.

It clearly appears that any and all community property rights of the parties were determined by the provisions of the interlocutory and final decrees and that plaintiff obtained all of the community property. The evidence supports the trial court's determination that the monthly payments were in the nature of alimony and not a division of property or in the nature of compensation for property being retained by the defendant. Pearman v. Pearman, supra, 104 Cal.App.2d 254, 231 P.2d 101.

[7–9] Plaintiff's contention that the trial court abused its discretion in modifying the alimony payments is likewise without merit. A modification of award pursuant to section 139 of the Civil Code rests within the discretion of the trial court and its order may not be set aside without a clear showing of an abuse of discretion. Leupe v. Leupe, 21 Cal.2d 145–151, 130 P.2d 697. We cannot find on the record before us that the evidence was not sufficient to support a finding of changed circumstances justifying the reduction that was made. In considering the evidence and the conflicting affidavits, all conflicts must be resolved in support of the order made by the trial court and must be considered in the light favorable to support rather than defeat the order. As was said in McKee v. McKee, 108 Cal.App.2d 488, 490, 239 P.2d 37, 38:

> "Adjustment of support money in such circumstances as meet the parties before us is one of the most difficult and baffling problems which confront a trial judge. But it is his problem. Time and again it has been emphasized that a reviewing court does not have the discretion in such matters that is vested in the trial judge."

[10] Since the original alimony order was made, according to defendant's affidavit, plaintiff has become self-supporting and receives $90 per month plus her room and board from her employment. She re-

ceived $15,000 in cash from the sale of the home awarded to her by the court. Defendant's affidavit further shows that he has remarried and that his earnings are not sufficient to pay the amount allowed and to properly maintain himself and his present wife.

The reduction in alimony payments ordered by the court is not unreasonable in view of the present circumstances of the parties and no clear abuse of discretion appears.

Order affirmed.

GRIFFIN, Acting P. J., concurs.

120 Cal.App.2d 294

In re DUNN'S ESTATE.

MOCKBEE et al. v. DUNN et al.

Civ. 15637.

District Court of Appeal, First District, Division 2, California.

Sept. 18, 1953.

Proceedings to determine heirship. The Superior Court, County of Santa Clara, Byrl R. Salsman, J., entered decree for grandchildren of testatrix as heirs at law and two nephews of testatrix appealed. The District Court of Appeal, Nourse, P. J., held that grandchildren were entitled to intestate portion of testatrix' estate, as provided by the laws of intestate's succession, and were not precluded from taking their share even though testatrix specifically excluded them from her will.

Decree affirmed.

1. Evidence ⚷65

One who leaves a portion of his estate undisposed of by his will is presumed to know that the undistributed portion will pass under the statutory rules of succession.

2. Descent and Distribution ⚷48

Where testatrix' will gave residue of estate to a friend, and specifically disinherited some of her grandchildren, but friend predeceased testatrix, the disinherited grandchildren were entitled to share in residue as provided by statutory rules of succession. Probate Code, § 92.

Malovos, Mager, Newcomer & Chasuk, San Jose, W. Gordon Eustice, Los Altos, Churchill & Teague, Ventura, for appellants.

Crist, Stafford & Peters, John M. Brenner, Palo Alto, for respondents Irving F. Dunn and Robert J. Dunn.

Edgar Sinton, Max H. Margolis, San Francisco, for respondent Otis E. Dunn.

NOURSE, Presiding Justice.

In a proceeding to determine heirship the four grandchildren of the decedent had a favorable decree from which two nephews have prosecuted the appeal. There is no dispute in the facts. The sole question presented is the interpretation of the third and seventh clauses of the will of the testatrix. The third clause reads: "I declare that it is my intention which I have formed after careful consideration of excluding from share in my estate any children, grandchildren, or other descendants of me or of my deceased husband, J. T. Dunn, or any claiming to be such, except as I have herein expressly provided."

The seventh clause reads: "I give, devise, and bequeath to my friend, Jennie A. Scott, wife of Walter A. Scott of San Francisco, California, all the rest and residue of my estate of whatsoever kind and character, or wheresoever situate, remaining after the payment of all of my just debts, expenses of last illness, funeral, burial and administration, and after the fulfillment of the foregoing specific bequests and devises."

[1] Jennie A. Scott, the devisee under the seventh clause, predeceased the testatrix. The residue of the estate was therefore undisposed of by the will. The two nephew appellants contend that because of the disinherison of the grandchildren under paragraph three they, the nephews, became heirs by "implication" of the residue. The real question involved is whether when a

testatrix expressly excludes known heirs from participation in her estate she may thereby bar them from their statutory right to succeed to a portion of the estate undisposed of by the will. The answer is in the negative. If one leaves a part of his estate undisposed of by his will he will be presumed to have known that such portion will be distributed under the statutory rules of succession.

[2] The will here was carefully prepared and designed to dispose of the entire estate. The death of Jennie Scott left the residue undisposed of. That legacy therefore lapsed under section 92 of the Probate Code. That being so the testatrix is deemed to have died intestate as to that portion of the estate which under all our decisions goes to the heirs at law. In re Estate of Kunkler, 163 Cal. 797, 800, 127 P. 43; In re Estate of Hall, 183 Cal. 61, 63, 190 P. 364; In re Estate of Fritze, 85 Cal.App. 500, 505, 259 P. 992; 26 Cal.Jur. pp. 917, 918.

The rule is well stated in 2 Page on Wills (Third (Lifetime) Edition) pp. 857, 858: "If testator does not dispose of the whole of his estate by his last will and testament, and such will contains negative words of exclusion, the great majority of states hold that such negative words cannot prevent property from passing under the statutes of descent and distribution. This question comes up, as a rule, when testator provides specifically in his will that certain heirs who are named or otherwise indicated shall not receive any part of his estate. If his will disposes of part of his property, but not all, such provision is without effect as to the property of which he makes no disposition by his will."

"If testator has made a provision for an heir, which he apparently intends to be all that such heir shall receive, such heir nevertheless takes his share of any intestate property."

A closely analogous case is In re Estate of Hittell, 141 Cal. 432, 75 P. 53, where the will left all the property to two unrelated friends and expressly excluded several named heirs. One of the devisees predeceased the testatrix. The Supreme Court held that her share, being undisposed of by the will, went to the surviving heirs under the code direction. To the same effect is In re Estate of Sessions, 171 Cal. 346, 153 P. 231.

The basic theory upon which the rule rests is that when the testatrix attempts to exclude the grandchildren from her property the exclusion goes only to such property as she has disposed of by her will. The residue, originally devised to Mrs. Scott, became a part of the estate, undisposed of by the will, and as such became subject to the rules of succession.

Decree affirmed, costs to respondents to be assessed against these appellants.

GOODELL and DOOLING, JJ., concur.

---

120 Cal.App.2d 230

DICK v. SCHOENER.

Civ. 15546.

District Court of Appeal, First District,
Division 1, California.
Sept. 15, 1953.

Action by pedestrian for injuries sustained when pedestrian while crossing street was struck by automobile making left-hand turn. The Superior Court, County of Alameda, A. J. Woolsey, J., entered judgment for automobile driver, and pedestrian appealed. The District Court of Appeal, Bray, J., held, inter alia, that although court gave five formula instructions concerning pedestrian's duty and only two of such type concerning driver's duty, instructions did not result in over-emphasis of issue of contributory negligence and pedestrian's duty of care.

Judgment affirmed.

1. Appeal and Error 🔑1066

In action by pedestrian for injuries sustained when pedestrian while crossing street was struck by automobile making left-hand turn, where there was no evidence that pedestrian stepped into side of automobile, instruction which inadvertently posed hypothetical situation relative to pedestrian's stepping into side of automobile was not prejudicial, since jury could not have been misled by such instruction.

2. Appeal and Error ⚷1064(4)

While courts generally frown upon the giving of formula instructions, the mere fact of preponderance of those instructions, or even some repetition in substance of instructions, will not justify a reversal.

3. Trial ⚷229, 295(1)

No hard and fast rule can be laid down as to how many instructions can be given on any issue and determination whether instructions have resulted in overemphasis of a given issue requires study of all instructions.

4. Appeal and Error ⚷1064(4)

In action by pedestrian for injuries sustained when pedestrian while crossing street was struck by automobile making left-hand turn, where five formula instructions were given concerning pedestrian's duty and only two concerning driver's duty, duty of District Court of Appeal was to determine whether jury might reasonably conclude from instructions that it ought to find either that driver had discharged duty of care towards pedestrian or that pedestrian was guilty of contributory negligence.

5. Trial ⚷229

In action by pedestrian for injuries sustained when pedestrian while crossing street was struck by automobile making left-hand turn, although court gave five formula instructions concerning pedestrian's duty and only two of such type concerning driver's duty, instructions did not result in overemphasis of issue of contributory negligence and pedestrian's duty of care.

6. Trial ⚷260(8)

In action by pedestrian for injuries sustained when pedestrian while crossing street was struck by automobile making left-hand turn, where court instructed that automobile driver must be alertly conscious of fact that he is in charge of machine capable of projecting into serious consequences any negligence of his own and that caution must be adequate to responsibility as related to all surrounding circumstances, refusal to give instructions to effect that driver is required to use prudence and circumspection at all times was not error.

7. Trial ⚷260(1)

A party may not complain that court did not instruct in language requested by him if the subject matter of such instruction is substantially incorporated in instructions given.

8. Evidence ⚷558(3)

It was not error to permit plaintiff's doctor who admitted on cross-examination that he could find no objective basis for plaintiff's complaints, to be asked by defendant if there might not be some connection between continuance of subjective complaints and fact of pending lawsuit, even though on direct examination doctor had not mentioned subject of subjective complaints.

◆

J. Adrian Palmquist, Ralph Nathanson, Oakland, for appellant.

Brown, Rosson & Berry, Oakland, for respondent.

BRAY, Justice.

Appealing from a judgment entered upon a jury verdict against him in an action for damages for personal injuries, plaintiff contends that the court erred in giving and refusing instructions, particularly that, as in Taha v. Finegold, 81 Cal.App.2d 536, 184 P.2d 533, the instructions over-emphasized contributory negligence and plaintiff's duty.

Facts.

This accident took place in plain daylight at the intersection of Dwight Way and Milvia Street, Berkeley. Plaintiff, a pedestrian, was walking northerly in the easterly crosswalk on Milvia Street when he was struck by the car driven by defendant. That car had been proceeding southerly on the west side of Milvia Street, made a left-hand turn easterly into Dwight Way and struck plaintiff while he was in the crosswalk, just as he was crossing the white center line of Dwight Way. Neither plaintiff nor defendant saw the other until the car and the plaintiff were four to five feet apart. As plaintiff concedes that there was sufficient evidence to support the verdict, it is unnecessary to detail the evidence. Plaintiff relies entirely upon his contentions concerning the instructions given and refused, and concerning one question permitted on the issue of plaintiff's injuries.

1. Alleged Erroneous Instructions.

[1] Both plaintiff and defendant testified that it was the front of the car which struck plaintiff. Plaintiff testified after seeing the car four to five feet from him "directly in front of me" he took one to three steps forward which carried him into the path of the car. He denied that he walked into the car. He further testified that the car was "Right along side of me, in front of me and alongside of me, I suppose the front of it hit me, that's all I know, it must have been—it hit me on the left side, so it must have been on the front side of it or somewhere." The court in an instruction to the effect that an auto driver is not required to do impossible things stated that if the jury found "that the plaintiff suddenly stepped into *the side* of the defendant's automobile" etc. (Emphasis added.) Plaintiff does not challenge the correctness of the legal principles stated in the instruction but claims there is not the slightest evidence that plaintiff stepped into the *side* of the car. Plaintiff contends that the giving of this instruction was prejudicial under the rule stated in Hirshberg v. Strauss, 64 Cal. 272, 28 P. 235 (instruction on exemplary damages); In re Calkins, 112 Cal. 296, 44 P. 577 (instructions on undue influence); Stoneburner v. Richfield Oil Co., 118 Cal.App. 449, 5 P.2d 436 (instruction on contributory negligence); Head v. Wilson, 36 Cal.App.2d 244, 97 P.2d 509 (instruction on absence of driver's license). In those cases it was held that the giving of the particular instruction where there was no evidence of the subject matter was prejudicially erroneous. It is doubtful if plaintiff's testimony, in view of defendant's testimony that the front of the car struck plaintiff, justified the giving of this instruction. However, we fail to see how plaintiff could have been injured by the court saying "stepped into the side of" instead of "stepped in front of." Obviously the subject matter of the instructions in the above mentioned cases cannot be compared with this inadvertence. As said in Strandt v. Cannon, 29 Cal.App.2d 509, 85 P.2d 160, also cited by plaintiff, "The test of error in giving a correct instruction of law is whether it is misleading." 29 Cal.App.2d at page 513, 85 P.2d at page 162. See also Nelson v. Porterville Union High School Dist., 117 Cal.App.2d 96, 254 P.2d 945. It is clear that the jury could not have been misled by this instruction. In fact, at oral argument plaintiff practically conceded that the giving of this instruction alone would not justify a reversal but contended that taken in connection with the other instructions given it contributed to over-emphasis on the subject of contributory negligence.

2. Alleged Over-Emphasis.

Plaintiff concedes that all instructions given were correct statements of the law. He contends, however, that instructions given on contributory negligence and plaintiff's duty of care, both in number and because some of them were formula instructions, over-emphasized those issues.

[2] We have carefully studied the instructions and are unable to find the over-emphasis which we found in Taha v. Finegold, supra, 81 Cal.App.2d 536, 184 P.2d 533. It is true that more instructions in number were given concerning plaintiff's duty than concerning defendant's duty. An occasional repetition, in different language, occurred also. There were five formula instructions concerning plaintiff's duty, and only two of that type concerning defendant's duty. While the courts generally frown upon the giving of formula instructions, the mere fact of a preponderance of those instructions, or even some repetition in the substance of instructions, has never alone been held to justify a reversal of a case. A study of the instructions gives no indication that they were of the type described in Treadwell v. Nickel, 194 Cal. 243, 262, 228 P. 25, 33: "Instructions which are framed solely for the purpose of, and which simply have the effect, of emphasizing some particular portion of the evidence * * *." In considering the effect on the jury of the instructions, even though they

were read a second time,[1] it must be remembered that plaintiff admitted that at no time before or while crossing the street did he look for cars coming down the street or making a left turn, and did not see defendant's car until it was four or five feet away. In Taha v. Finegold, supra, 81 Cal.App.2d 536, 544, 184 P.2d 533, 537, we said: "It is not the mere repetition here that is controlling. It is the duty of the trial court to fairly instruct, and while repetition alone does not make the charge unfair, where repetition exists to the extent here, coupled with the other factors, it does make the charge unfair." In our case there were not the same factors, nor do we find extensive repetition or that the charge was unfair.

[3-5] As said by plaintiff, no hard and fast rule can be laid down as to how many instructions can be given on any issue. It requires a study of all the instructions and where, as plaintiff admits is the situation here, the instructions do not single out any particular fact for discussion, our duty is to determine whether the jury might reasonably conclude from them that it *ought to find* either that defendant had discharged his duty of care toward plaintiff or that plaintiff was guilty of contributory negligence. We find no such situation here.

3. Refused Instructions.

[6, 7] Plaintiff complains of the failure to give two legally correct instructions offered affecting the issue of contributory negligence and three affecting the duty of defendant as a driver of a motor vehicle. The court marked them as covered by other instructions given. A study of the instructions as a whole proves the court to have been correct. Plaintiff's proposed instruction No. 4 stated that the standard of care required of a driver is prudence and circumspection at all times; No. 12 stated that the driver must use reasonable care and caution for the safety of others; and No. 13 was to the effect that a person is responsible for injuries caused by lack of ordinary care in the use of his property. The court charged among other matters relating to the care required of a driver that the driver must be "alertly conscious of the fact that he is in charge of a machine capable of projecting into serious consequences any negligence of his own. Thus his caution must be adequate to that responsibility as related to all the surrounding circumstances." "In determining the question as to whether or not defendant * * * was using that care and caution ordinarily exercised by a reasonably prudent person * * *." The court also gave the usual instruction that a driver is bound to anticipate meeting vehicles and persons on the highway and to keep a reasonably prudent lookout for them. Plaintiff's requested instruction No. 8 concerning the burden of proving contributory negligence, and No. 10 to the effect that if plaintiff was acting as a reasonably prudent person he could not be guilty of contributory negligence, were likewise well covered. While the instructions given did not use the identical language of plaintiff's instructions, the rules set out in the proferred instructions were substantially covered. A party may not complain that the court did not instruct in the language requested by him if the subject matter is substantially incorporated in the instructions given. Rednall v. Thompson, 108 Cal.App.2d 662, 239 P.2d 693; Ideal Heating Corp. v. Royal Indemnity Co., 107 Cal.App.2d 662, 237 P.2d 521.

4. Cross-examination.

[8] It is obvious that it was not error to permit plaintiff's doctor, who had testified on direct examination that plaintiff had a permanent injury and who admitted on cross-examination that he could find no objective basis for plaintiff's complaints, to be asked by defendant if there might not be some connection between the continuance of subjective complaints and the fact of a lawsuit pending, even though on direct examination he had not mentioned the subject of subjective complaints.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

---

[1] After the jury had been out approximately an hour they requested that the court repeat the instructions on contributory negligence and the effect of contributory negligence on a verdict.

120 Cal.App.2d 254

In re KRUSE'S ESTATE.

SHIPMAN v. KRUSE et al.

Civ. 15720.

District Court of Appeal, First District, Division 2, California.

Sept. 17, 1953.

Hearing Denied Nov. 12, 1953.

Proceeding to determine heirship. From a decree of the Superior Court, City and County of San Francisco, I. L. Harris, J., determining that petitioner was not an heir of decedent, petitioner appealed. The District Court of Appeal, Dooling, J., held that adopted daughter of a predeceased brother of intestate decedent was not a descendant of adopting father within meaning of succession statute.

Decree affirmed.

1. Adoption ⚿21

An adopted child, while he inherits from his adopting parents, does not inherit through them from relatives of adopting parents. Probate Code, §§ 225, 257.

2. Adoption ⚿21

Adopted daughter of a predeceased brother of intestate decedent was not a "descendant" of adopting father within succession statute providing for inheritance by decedent's brothers and sisters and descendants of deceased brothers and sisters by right of representation. Probate Code, §§ 225, 257.

See publication Words and Phrases, for other judicial constructions and definitions of "Descendant".

3. Adoption ⚿21

Descent and Distribution ⚿3

The right to inherit in California depends on statutes of California, and fact that child was adopted in Nebraska could not affect her rights of inheritance in California, other than to determine her status as an adopted child. Probate Code, §§ 225, 257.

Brandenburger & White, Sacramento, for appellant.

Morrison, Hohfeld, Foerster, Shuman & Clark, San Francisco, for respondents.

DOOLING, Justice.

This is an appeal from a decree determining heirship. The appellant is the adopted daughter of John Kruse, a predeceased brother of the intestate decedent, and the respondents are surviving brothers of said intestate decedent. The decree determined that appellant is not an heir of the decedent.

The applicable statute of succession is Probate Code, section 225: "If the decedent leaves neither issue nor spouse, the estate goes to his parents * * * or if both are dead in equal shares to his brothers and sisters and to the descendants of deceased brothers and sisters by right of representation."

Appellant claims as a "descendant" of a deceased brother. The uniform current of case law in this state is opposed to appellant's contention. The decisions commence with In re Darling's Estate, 173 Cal. 221, 159 P. 606. The precise holding in that case was that an adopted child may, despite the adoption, inherit from his grandfather by blood. In the course of its discussion the supreme court stated, 173 Cal. at page 226, 159 P. at page 608: "So far as we have been able to find, there is no decision given under statutes anything like ours, to the effect that the adopted child has any right of inheritance as to the ancestors or collateral kindred of the adopting parents, or is deprived by the adoption of any right of inheritance that he had as to the ancestor and collateral kindred of his parents by blood."

[1, 2] Since this decision it has been consistently held that an adopted child while he inherits *from* his adopting parents does not inherit *through* them from the relatives of the adopting parents. In re Estate of Pence, 117 Cal.App. 323, 332–333, 4 P.2d 202; In re Estate of Jones, 3 Cal.App.2d 395, 39 P.2d 847; In re Estate of Stewart, 30 Cal.App.2d 594, 86 P.2d 1071; In re Estate of Pierce, 32 Cal.2d 265, 269, 196 P.2d 1; Probate Code, sec. 257.

Appellant relies on a series of cases construing the anti-lapse provision of Probate Code, sec. 92: "when any estate is devised or bequeathed to any kindred of the testator, and the devisee or legatee dies before the testator, having lineal descendants * * * such descendants take the estate so given by the will * * *." These cases hold an adopted child to be a "lineal descendant" of his adopting parent within the meaning of this section. In re Estate of Moore, 7 Cal.App.2d 722, 47 P.2d 533, 48 P.2d 28; In re Estate of Tibbetts, 48 Cal.App.2d 177, 119 P.2d 368; In re Estate of Esposito, 57 Cal.App.2d 859, 135 P.2d 167.

Whatever logical inconsistency may appear to exist between these two lines of cases, and in an article in 25 Cal.L.Rev. at pp. 85-87 it is argued that there is no inconsistency, the very cases relied upon by appellant, while construing Probate Code, sec. 92 as including adopted children among "lineal descendants", recognize that this is not the rule in construing the statutes with regard to intestate succession. Thus in Re Estate of Tibbetts, supra, 48 Cal.App.2d at page 178, 119 P.2d at page 369, the court says: "It may be conceded that respondent was not an heir of the testatrix", citing the Stewart and Pence cases. So in Re Estate of Esposito, supra, 57 Cal. App.2d at page 863, 135 P.2d at page 170, the court reviews the two lines of cases and concludes: "If those cases were correctly decided, as we believe they were, the right to take a legacy under section 92 is entirely independent of a right to inherit through the deceased devisee or legatee."

The contention that there should be a distinction between "next of kin" statutes, such as Probate Code, sec. 226, and a statute using the word "descendant", as in Probate Code, sec. 225, is answered by the fact that In re Estate of Jones, supra, 3 Cal.App.2d 395, 39 P.2d 847, construed sec. 225 as not giving a right of inheritance to an adopted child.

In re Estate of Mercer, 205 Cal. 506, 271 P. 1067, involved the right of an adopted child to take community property which had passed from her adopting father to his widow. It involved therefore the right to inherit, although indirectly, *from* the adopting parent, not *through* him. In re Estate of Garcia, 34 Cal.2d 419, 210 P.2d 841 involves the rights of an illegitimate child who has been legitimated and is not in point on the question of the rights of an adopted child who is a stranger to the blood.

[3] The fact that appellant was adopted in Nebraska cannot affect her rights of inheritance in California, further than to determine her status as an adopted child. The right to inherit in California depends on the statutes of California not those of Nebraska. In re Estate of Grace, 88 Cal. App.2d 956, 959, 200 P.2d 189; 2 Cal.Jur.2d 467.

Decree affirmed.

NOURSE, P. J., and GOODELL, J., concur.

---

120 Cal.App.2d 296

In re DOW'S ESTATE.

HUTCHINSON v. DOW.

Civ. 15781.

District Court of Appeal, First District,
Division 2, California.
Sept. 18, 1953.

Probate proceeding wherein deceased's daughter and heir to one-half of his estate moved for orders terminating family allowance, requiring an accounting, and closing of administration. Deceased's widow, as administratrix and as heir to other half of estate, opposed the motions. The Superior Court, City & County of San Francisco, denied the motions, and the daughter appealed. The District Court of Appeal, Nourse, P. J., held that where there were no matters pending in estate other than payment of a claim of administratrix in her individual capacity and settlement and payment of expenses of administration, continuance of family allowance was not a matter of discretion, but allowance should have been terminated as of date of motion, and that where settlement of estate had been delayed for 22 years, during which time administratrix received large sums in family allowances and deceased's daughter received nothing, daughter was en-

titled to demand that sale be made of estate property sufficient to clear indebtedness and to close estate.

Order reversed with directions.

1. Executors and Administrators ⚷197

Where, at time of hearing on motion for termination of family allowance, there were no matters pending in estate other than payment of a claim asserted by administratrix in her individual capacity and settlement and payment of expenses of administration, continuance of family allowance was not a matter of discretion, but allowance should have been terminated as of date of motion.

2. Executors and Administrators ⚷323

Where settlement of estate had been delayed for period of 22 years, during which time administratrix received large sums in family allowances and deceased's daughter, although heir to half of estate, received nothing, and where an advantageous sale could be made of estate property sufficient to clear all indebtedness and to close estate, deceased's daughter was entitled to demand that such sale be made. Probate Code, § 758.

◆

William A. White, San Francisco, for appellant.

W. P. Caubu, San Francisco, for respondent.

NOURSE, Presiding Justice.

The daughter of deceased Edgar Dow, as an heir at law and as beneficiary under the will moved for orders terminating family allowance, requiring an accounting, and the closing of the administration of the estate. The widow of deceased as administratrix and also as heir to the remaining one-half of the estate opposed the motions. She is also the owner of a claim in the sum of more than $12,000 which has been unpaid and has been drawing interest at the rate of 7% a year since the year 1931. The appellant's claim is that the widow refuses to pay this claim because of the favorable interest rate and that she refuses to account or to take proceedings for the closing of the estate in order to continue her family allowance, first fixed at $1,000 a month and reduced in July, 1947, to $500 a month continuing to date and "until further order of the Court." All other claims have long since been paid. All motions were denied (except that payment of interest on the claim of administratrix was suspended as of October 16, 1952) and this appeal followed.

The facts sufficient for the purpose of this opinion are found in the findings of facts which, of course, cannot be controverted by respondent on this appeal. We quote: "The Court finds that there are no matters pending in said estate, other than the payment of a claim asserted by the administratrix in her individual capacity, the settlement and payment of the remaining costs and expenses of administration and the determination and payment of attorneys' fees and commissions of said administratrix and a final accounting by the administratrix; and that it is to the best interests of all parties interested in said estate to immediately close said administration. That said claim of said administratrix has been pending since 1931; that at no time has said administratrix paid upon the principal or interest accruing of said claim any monies at all."

We would be justified in assuming from these facts that conclusions of law granting the motions would follow. But the court summarily concluded that all should be denied.

[1] The family allowance should have been terminated as of the date of this motion. The court found that there were no matters pending in said estate other than the payment of this claim, that the administratrix had not paid any part of the claim or of the interest thereon, and "it is to the best interests of all parties interested * * to immediately close said administration." This being so, why, the appellant asks, has the estate not been closed and the family allowance terminated? Since the court found that there were no matters pending calling for further administration (except respondent's claim and expenses of administration) the continuance of the family allowance should have been denied. On this

point the authorities are in accord. In Re Estate of Dougherty, 102 Cal.App.2d 785, 228 P.2d 857, this court, confronted by the same question on analogous facts was compelled to reverse a similar order on the well-settled ground that the continuance of such allowance was not a matter of discretion; that, as said in Re Estate of Treat, 162 Cal. 250, 256, 121 P. 1003, 1005: "The determination as to the *time* during which a 'reasonable allowance' shall be paid does not rest in the sound discretion of the court. That time is fixed by the statute, which compels the granting of such an allowance as the court may consider reasonable for such time as may be properly consumed in the settlement of the estate, with the limitation of one year in case of insolvency. See In re Dougherty's Estate, 34 Mont. 336, 343, 86 P. 38." See also In re Estate of Clark, 96 Cal.App. 243, 247, 274 P. 76; In re Moore's Estate, 72 Cal. 335, 343, 13 P. 880.

In reversing the order in Estate of Dougherty this court said, 102 Cal.App. at page 788, 228 P.2d at page 859: "We hold that when it is made to appear that the settlement of the estate is delayed by the act of the widow for the sole purpose of continuing the allowance, and that by reason of such allowance the estate has become insolvent and unable to pay the legacies under the will, it is a breach of discretion to deny an application to terminate the allowance after 'a reasonable time within which the estate should be settled.' It was shown at the time these motions were heard on September 29, 1949, that the estate was then ready to be closed and that it would be unable to pay the legacies in full. As of that date the respondent had been paid the allowance since May 30, 1948, a period of sixteen months. The motions to terminate the allowance should have been granted effective of the date they were filed."

Respondent does not controvert any of the foregoing except by the statement of facts outside the record and by the suggestion that the continuance of the family allowance is wholly a matter of discretion. As we have seen the authorities are to the contrary.

The trial court found: "That on the 22nd day of July, 1952, said administratrix' third account shows the amount of $6437.38 as cash in bank in behalf of said estate; that during the month of September, 1952, said administratrix received for and on account of regular and special dividend, declared upon said stock of said estate in said River Farms Company, the amount of $4958.50. That the market exists for said River Farms stock and a bona fide offer in the amount of $45.00 per share for any amount up to and including 1,000 shares was made on the 6th day of October, 1952; that the most recent sales of said stock have produced $45.00 per share. That notwithstanding the fact that said administratrix had in her hand monies received from the said dividends as aforesaid, said administratrix did not pay any of said monies on the payment of her said claim on which interest has been accruing since 1931." This finding fully supports appellant's position that funds were available in the hands of the administratrix to pay her claim in part and that she held stocks in the River Farms Company for which she had "a bona fide offer in the amount of $45.00 per share for any amount up to and including 1,000 shares."

[2] No reason is shown in the findings, and none is given by respondent, why this offer was not accepted other than her statement that she anticipates that the stock will reach a greater value. This of course is no reason for depriving appellant of her distributive share in the stock. The appellant, as one of the heirs, had the right under section 758 of the Probate Code to demand that such a sale be made. The trial court found that an advantageous sale could be made sufficient to clear all indebtedness and to close the estate. Settlement of the estate has been delayed for a period of twenty-two years during which time the administratrix has received large sums in family allowances. The appellant, though an heir to one-half of the estate has received nothing. Under the terms of section 758 of the Probate Code she was entitled to demand that the sale be made. The findings of facts all support her claim of

the necessity of such an order. Respondent has not made any valid defense to that claim.

The portion of the order appealed from is reversed and, on the return of the remittitur herein, the court is directed to enter its order terminating the allowance as of the date the motion was made and directing the administratrix to sell sufficient of the assets of the estate to pay all claims and costs of administration within a period of six months from the date of the remittitur, and that, in default thereof, the administratrix be removed from her office and another administrator be appointed to close the estate.

GOODELL and DOOLING, JJ., concur.

---

120 Cal.App.2d 257

PEOPLE v. WARREN.

Cr. 2926.

District Court of Appeal, First District,
Division 2, California.

Sept. 17, 1953.

Rehearing Denied Oct. 2, 1953.

Hearing Denied Oct. 15, 1953.

Defendant was convicted of possession of a knife while a prisoner in a state prison. The Superior Court, County of Marin, Thomas F. Keating, J., entered judgment of conviction and order denying motion for new trial, and defendant appealed. The District Court of Appeal, Dooling, J., held, inter alia, that where possession of knife at time charged was denied by defendant and his witnesses, testimony of another prisoner that defendant had entered prisoner's cell two days before date of charged offense and had threatened prisoner with same knife involved in such offense, had reasonable tendency to connect defendant with crime charged and was properly admitted within exception to rule that admission of evidence of other crimes is not ordinarily permitted.

Order denying new trial affirmed.

1. Criminal Law ⇨369(2)

In prosecution for possession of knife while defendant was prisoner in state prison, where possession of knife at time charged was denied by defendant and his witnesses, testimony of another prisoner that defendant had entered prisoner's cell two days before date of charged offense and had threatened prisoner with same knife involved in such offense, had reasonable tendency to connect defendant with crime charged and was properly admitted within exception to rule that admission of evidence of other crimes is not ordinarily permitted. Pen.Code, § 4502.

2. Criminal Law ⇨369(2)

Where evidence has a reasonable tendency to connect defendant with a crime charged it is admissible even though it may also show the commission of another offense.

3. Criminal Law ⇨673(5)

In prosecution of defendant for possession of knife while a prisoner in a state prison, where evidence relative to defendant's possession of identical knife two days prior to offense charged was admitted, court properly limited use of such evidence by instructing that value, if any, of such evidence depended upon whether it tended to identify defendant as perpetrator of offense charged and connected defendant with such offense. Pen.Code, § 4502.

4. Witnesses ⇨330(1)

In prosecution of defendant for possession of knife while a prisoner in a state prison, where fellow prisoner testified that defendant had entered prisoner's cell 2 days before offense charged, had threatened prisoner with knife identical to that involved and that defendant had spent night in prisoner's cell, and defendant's cellmates testified that defendant did not spend night in question in prisoner's cell, cross-examination of cellmates to attempt to break down their testimony was proper. Pen.Code, § 4502.

5. Criminal Law ⇨1169(1)

In prosecution of defendant for possession of knife while a prisoner in a state prison, testimony of prison officer that after searching defendant's cell he instructed fellow-officer to go to education building and testimony of such fellow-officer that he went to education building and asked defendant to step out of line, was preliminary to testimony that immediately thereafter defendant threw knife to floor and was not prejudicial. Pen.Code, § 4502.

6. Criminal Law ⚷1037(1)

Where alleged misconduct in argument of prosecutor was not objected to and such alleged misconduct was not so flagrant that no admonition to jury could have cured it, question of such alleged misconduct could not be raised on appeal.

7. Criminal Law ⚷722(3)

In prosecution of defendant for possession of knife while a prisoner in a state prison, where there was evidence that defendant had threatened fellow-prisoner with knife 2 days prior to offense charged, argument of District Attorney in which defendant was referred to as a dangerous man was not objectionable on alleged ground that there was nothing in record to show that defendant was dangerous. Pen.Code, § 4502.

◆

Natalie J. Holly, San Rafael, for appellant.

Edmund G. Brown, Atty. Gen., David K. Lener, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

Appellant was convicted by a jury of a violation of Penal Code section 4502, possession of a knife while a prisoner in a state prison. He appeals from the order denying his motion for new trial. Prosecution witnesses testified that appellant took the knife from his jacket and threw it on the prison floor after being directed to step out of a line of prisoners by a prison officer. Appellant and certain other prisoners testified that appellant did not take the knife from his pocket nor throw it to the floor.

[1] A prisoner, Bobby Johns, testified over objection, that in the evening two days before the date of the charged offense appellant entered his cell, pulled out a knife (identified by Johns as the same knife which other witnesses had testified was thrown to the prison floor by appellant) and held the knife to Johns' side, stating:

> "I got ways of making guys do things I want them to do. * * * You know it will got through, don't you?"

He further testified that appellant, although he was not his cellmate, spent the night in his cell and exhibited the knife to him again the next morning, and that he had reported these facts to Lieutenant Wagner, of the prison staff.

Appellant argues that the admission of this evidence of other crimes was prejudicially erroneous. However in this case the introduction of this evidence falls within a settled exception to the rule that admission of evidence of other crimes is not ordinarily permitted. Here the possession of the knife at the time charged was denied by appellant and his witnesses.

[2] Proof of his possession of the identical knife on the two separate days immediately preceding the day of the alleged offense had a strong probative value to rebut the defense testimony that he did not possess it on the date charged. Where the evidence has a reasonable tendency to connect the defendant with the crime charged it is admissible even though it may also show the commission of another offense. "It is the law that, where the proffered evidence directly throws light upon the facts of the issue being tried, it is admissible, although it proves another offense as well." People v. Ellis, 188 Cal. 682, 689, 206 P. 753, 756; People v. Vollmann, 73 Cal.App.2d 769, 782, 167 P.2d 545.

[3] The court properly limited the effect and use of this evidence by its instruction that it was received for a limited purpose only, "not to prove distinct offenses or continual criminality but for such bearing, if any, as it might have, on the question whether the defendant is innocent or guilty of the crime charged against him in this action.

"You are not permitted to consider that evidence for any other purpose * * *

The value if any, of such evidence depends upon whether or not it tends to identify the defendant as the perpetrator of the offense of which he is now accused and to connect him with it."

[4] It was equally proper on cross-examination of Kerns and Bonnet, Johns' and appellant's cellmates respectively, who had testified that appellant did not spend the night in question in Johns' cell, to attempt to break down that testimony.

[5] The testimony of the prison officer Wagner that after searching appellant's cell he instructed officer Ballard to go to the Education Building and Ballard's testimony that he went to the Education Building and asked appellant to step out of the line was preliminary to the testimony that immediately thereafter appellant threw the knife to the floor, and we can find no prejudice to appellant therein.

Appellant charges that in several particulars the district attorney was guilty of prejudicial misconduct. Insofar as these charges of misconduct concerned the introduction of evidence we have already discussed them. Appellant charges an innuendo of sexual abnormality. In no word of evidence or argument was sexual abnormality referred to.

[6] In all but one instance alleged misconduct charged in the argument of the prosecutor was not objected to and, if misconduct, cannot be relied upon by appellant. It is only where misconduct is so flagrant that no admonition to the jury could have cured it that an appellant may raise the question on appeal where no objection was interposed in the trial court. People v. Codina, 30 Cal.2d 356, 362, 181 P.2d 881. We find nothing of that kind in this record.

[7] The following is the only instance of alleged misconduct in argument where an objection was voiced:

> "Who are these witnesses (referring to appellant's witnesses) ladies and gentlemen? A first degree robbery, a second degree robbery, destruction of State property, forgery, burglary, escape. These are dangerous men, men of the same group, the same ilk, as Robert Warren.
>
> "Mrs. Holly: I am going to object to calling my client a dangerous man. There is nothing in the record to show he is dangerous and I cite it as misconduct on the part of the District Attorney."

Without deciding whether this statement may have been objectionable on other grounds, the ground specified was not well taken. The testimony that appellant threatened Johns with the knife justified the prosecutor's characterization of him. The only ground of objection "there is nothing in the record to show he is dangerous" was not well taken.

The order denying a new trial is affirmed.

NOURSE, P. J., and GOODELL, J., concur.

---

120 Cal.App.2d 273

LAMB et al. v. WARD et al.

Civ. 19575.

District Court of Appeal, Second District, Division 3, California.

Sept. 17, 1953.

Action by owners of mining claims against lessees of such claims and those holding under lessees for decreased value of mining claims due to severance of property from such claims. The Superior Court of Los Angeles County, Alfred L. Bartlett, J., entered judgment for defendants, and owners appealed. The District Court of Appeal, Parker Wood, J., held that, where, in prior action for value of property severed and removed from mining claims, plaintiffs had filed four amended complaints and had refused further opportunity to amend, judgment sustaining demurrer without leave to amend constituted judgment that plaintiffs take nothing, rather than one of dismissal, and, such judgment, having become final, was bar, under doctrine of res judicata, of subsequent action between same parties for decreased value of mining claims due to such severances and removals.

Judgment affirmed.

Judgment ⚷572(2)

Where, in prior action for value of property severed and removed from mining claims, plaintiffs had filed four amended complaints and had refused further opportunity to amend, judgment sustaining demurrer without leave to amend constituted judgment that plaintiffs take nothing, rather than one of dismissal, and, such judgment, having become final, was bar, under doctrine of res judicata, of subsequent action between same parties for decreased value of mining claims due to such severances and removals.

◆

John A. Jorgenson, Los Angeles, for appellants.

Bertram H. Ross, Los Angeles, for respondents.

PARKER WOOD, Justice.

Action for damages allegedly resulting from the removal of certain property from mining claims owned by plaintiffs. It was alleged in the complaint as a first cause of action that on October 25, 1949, plaintiffs owned certain property (described therein—including buildings, power and automotive equipment, electrical transmissions and installations, tanks and pipe lines); said property was located on certain mining claims in San Bernardino County; on said date defendants severed from the mining claims, removed, destroyed and converted to their own use all of the said property; and plaintiffs were damaged thereby in the sum of $118,935. It was alleged therein as a second cause of action that plaintiffs owned the mining claims, mentioned in the first cause of action, and the property which was located on the mining claims; the property located on the claims was used in working and developing mines thereon, and some of the items of property (specifically referred to therein) were embedded in the land or permanently resting upon or attached to it; on October 25, 1949, defendants without plaintiffs' consent took possession of a certain designated portion of the property which was on the claims, and severed, removed and destroyed same; plaintiffs' mining claims were thereby decreased in value to the extent of $118,935, and that plaintiffs were damaged in that sum. Defendants denied, in their answers, the allegations of the complaint and alleged as a special defense that plaintiffs had filed a prior action, No. 567516, against the defendants herein; that judgment therein was in favor of defendants; that said judgment has become final and is a bar to all the matters alleged in the present action. It was further alleged as a special defense therein that in another prior action, No. 566571, filed by plaintiffs against the defendants herein, there had been a *retraxit* by the payment of $600 and the dismissal of the action.

The court found that: the complaint in the prior action, No. 567516, was filed by plaintiffs against the defendants herein; it involved the identical matters which are set forth in the complaint in the present action; the judgment in the prior action was in favor of defendants, and said judgment has become final; in the former action, No. 566571, filed by plaintiffs against the defendants herein, defendants paid plaintiffs $600 in full settlement of said action, and the action was thereupon dismissed; and plaintiffs thereby settled all causes of action set forth in the present complaint. The court concluded that by virtue of the final judgment in said prior action all the matters pleaded in the complaint in the present action are res judicata, and that said prior judgment is a bar to this action. Judgment was for defendants and plaintiffs appeal therefrom.

Appellants contend that the judgment in the former action is not a bar to the present action; and that there was no *retraxit*.

On November 25, 1949, plaintiffs herein filed action No. 567516 (pleaded as a bar to the present action) against the 38 defendants named herein. The fourth amended complaint in said action purported to state a single cause of action and alleged, in part, as follows: Plaintiffs were the owners of certain unpatented placer mining claims. On August 24, 1947, plaintiffs, as lessors, and defendant Crystal Lime Corporation (thereinafter designated as "corporation"), as lessee, entered into a written lease covering said claims, a copy of which lease was attached to and made a part of the complaint. The corporation took possession of the mining claims on said date. Thereafter the corporation decided to organize a new corporate entity to be known as the Crystal Lime Company (thereinafter designated as "company"). On March 24, 1949, plaintiffs and the corporation entered into a written agreement whereby plaintiffs consented to a transfer of the lease to the company. The corporation promised it would cause the company to assume all the obligations of the corporation under the lease, and to pay to plaintiffs $5,000 for certain personal property belonging to plaintiffs on said mining claims. The company was organized and the corporation assigned the lease and transferred all of its assets to the company, and the company agreed in writing to perform all of the obligations under the lease, and it agreed to pay plaintiffs $5,000 for personal property on the claims. The company took possession of the mining claims and all of the corporation's assets. During the possession by the defendant corporation and defendant company they caused to be placed upon the mining claims certain property and improvements, the value and description of which were set forth in an inventory attached to and made a part of the complaint. Said property and improvements were used by the corporation and company in working and developing mines on the claims and were indispensable elements in mining operations thereon. Some of those items (specifically designated therein) were embedded in said land or permanently attached to it. At the time of the sale of the property (therein mentioned) the corporation and the company were in default under the lease in that they had failed to pay the minimum rental of $300, which was due on September 1, 1949, and $300 due on October 1, 1949, and that they were in default in certain other respects. On October 23, 1949, plaintiffs sent written notice by registered mail to defendant's corporation, company and Ross that unless the defaults were cured within 15 days the lease would be terminated. On November 1, 1949, plaintiffs were paid the minimum rental of $300 which matured September 1st and $300 which matured October 1st. On November 2, 1949, plaintiffs sent written notice by registered mail to said defendants that a default existed in the failure to pay the rent due on November 1, 1949, and demanded therein that such default, together with other uncured defaults specified in the prior notice be remedied within 15 days. On November 9, 1949, plaintiffs sent a written notice by registered mail to said defendants in which they again recited the defaults and made a demand for the payment of the November 1st rent, the payment of $4,900 past due on the purchase price of personal property sold to the corporation and company, demanded that all equipment, buildings and fixtures removed from the premises on October 25, 1949 be restored to plaintiffs on said premises, and demanded a deed "terminating said lease" and conveying a good and marketable title to the claims to plaintiffs. On November 19, 1949, plaintiffs sent by registered mail to all of the said defendants another copy of said notice. None of the defaults (mentioned in said notice) have been cured and each of them still exists. In the middle of October, 1949, nine of the defendants, including Ward, the corporation, the company and Ross, caused a notice to be published in various newspapers in Southern California that on October 25, 1949, they would sell to the highest bidder certain (designated) property which is listed in the inventory (attached to the complaint). On the date of the sale plaintiffs appeared and orally notified defendants and all persons present "of plaintiffs' lease" and the terms thereof, and that plaintiffs claimed ownership of the property advertised for sale and that those who purchased it would do so at their peril. Said defendants then announced that plaintiffs had no right in the property and that defendants would guarantee title. Defendants then proceeded to auction and deliver to 20 of the other defendants (specifically designated therein) certain items of the property (specifically designated therein).

At the time and place of the sale certain designated defendants converted all the property, then sold and delivered, to their own use to plaintiffs' damage in the sum of $57,120. Certain other items (foundation and retaining walls) have been rendered valueless through the severance and removal of other designated items (conveyor belt, bunker—steel construction, and motor) to plaintiffs' damage in the sum of $14,000; and other items (other foundations and retaining walls) have been rendered valueless by the severance and removal of other items (bin, motors and machinery) to plaintiffs' damage in the sum of $9,500. While 18 defendants (specifically referred to) have not sold and delivered certain designated items listed in the inventory, they claim the right to do so and are attempting to do so. Therefore a controversy exists with reference to the rights of said defendants to sell those items. The defendant's corporation and company have refused to deliver a deed "cancelling said lease" and conveying a merchantable title to said claims and have refused to deliver possession of said property to plaintiffs. Plaintiffs are informed and believe that the nine defendants who sold the property collected therefrom an aggregate sum of $25,000. Prior to the sale certain of the defendants resolved to liquidate the corporation and company and appointed defendant Ross their liquidating agent. Ross received the entire sum of $25,000 and still holds same, and has entered into a written contract with plaintiffs under which he has promised to retain possession of such funds until plaintiffs' claims are adjudicated. Defendants have not paid the $300 rental maturing November 1, 1949 nor any rental accruing since that time, and the corporation and company have not performed any of the promises they agreed to perform in said lease.

The lease, which was attached to the complaint, provided in part as follows: that upon violation of the lease by lessee, and its failure to remedy same within 15 days after the mailing of a notice to lessee by registered mail, the lease, at the option of lessor, shall end and all rights of lessee shall terminate, and lessee will immediately surrender possession of the claims to lessor; that waiver of any default shall not excuse other or subsequent defaults, and all waivers must be in writing signed by lessor; that "as long as Lessee is not in default it shall have the right to remove all equipment, machinery and personal property placed by them on said claims and not permanently affixed to the real estate, same to be removed within thirty days from the termination of the lease. Any property not so removed shall become the property of the Lessor. No buildings, underground track, pipe, ties, and timbers for permanent improvements shall be removed."

Defendants Ward, the corporation, the company and Ross demurred to said fourth amended complaint on the grounds that it failed to state a cause of action; several causes of action had been improperly united; there was a misjoinder of causes of action; and the complaint was uncertain in that it could not be ascertained in what manner plaintiffs had been damaged. The minute order states that the demurrer was sustained without leave to amend. In the recital in the judgment it is stated that the demurrer was submitted and thereafter was sustained, and "it appearing that plaintiffs did not desire a further opportunity to amend their complaint, the Court thereupon refused leave to Plaintiffs to amend." The judgment was that "Plaintiffs take nothing by this action and that said Defendants have and recover their costs herein, taxed at $14.50." Plaintiffs appealed from that judgment. They contended on appeal that the judgment was uncertain and that the complaint stated a single cause of action. The judgment was affirmed on appeal. Lamb v. Ward, 101 Cal.App.2d 338, 225 P.2d 317. The court held that there was no uncertainty in the judgment and stated that the complaint was a hopeless compilation in one count of seven separate and distinct causes of action.

With respect to appellants' contention that the former judgment is not a bar to the present action, they (appellants) argue in effect that the said judgment was a judgment of dismissal and was not on the merits. A demurrer to the original complaint was sustained with leave to amend. Demurrers to the first and second amended complaints were ordered off calendar. A demurrer to the third amended complaint was sustained with leave to amend. A demurrer to the fourth amended complaint was sustained without leave to amend,—the reason for the refusal of leave to amend being that the plaintiffs did not desire a further opportunity to amend. The judgment thereupon entered was not one of dismissal but it was a judgment that "Plaintiffs take nothing by this action." Under the circumstances here, where plaintiffs had filed four amended complaints and had refused a further opportunity to amend, that judgment was in effect a judgment that plaintiffs had had their day in court and that the controversy was determined. On the appeal from that judgment, it was stated in Lamb v. Ward, supra, 101 Cal.App.2d at page 343, 225 P.2d at page 320, that after the "demurrer had been sustained to the fourth successive amended complaint respondents were entitled to judgment." It was also stated therein, 101 Cal.App.2d at page 344, 225 P.2d at page 321, that the complaint "is now incurable unless this court should disregard the established rules with respect to the finality of judgments entered after a trial of issues at law." The decision on appeal therein was to the effect that the judgment of the trial court determined the controversy. The judgment having become final, it is a bar to a subsequent action between the same parties involving the same subject matter. The two plaintiffs and the 38 defendants in the former action (No. 567516) are the plaintiffs and the defendants in the present action. As found by the trial court, both complaints involved identical matters. Each complaint pertained to the severance and removal of the same property from the mining claims and sought a recovery of money by reason of the severance and removal. In the present case there is a purported cause of action for damages by reason of the decreased value of the mining claims allegedly resulting from the severance and removal of the same property from the mining claims, but it appears that in the former action plaintiffs sought all damages allegedly resulting to them by reason of such severance and removal. It was alleged in the former action that by reason of the severance and removal of certain machinery and equipment the foundations and retaining walls on the mining claims were damaged. It was alleged in the present action that plaintiffs' damage by reason of the severance and removal of property from the mining claims was $118,935; and that plaintiffs' damage by reason of the decreased value of the mining claims was the same amount, $118,935. It therefore appears that the amount of alleged damages was the same, whether the damages were based upon the theory of alleged conversion of personal property or upon the theory of decreased value of the mining claims as a result of severing and removing property. Appellants state in their brief that, by reason of the difficulty in ascertaining the nature of "the fixtures (were they personal property or real property?)" they set up two counts— the first based upon the theory of conversion (of personal property), and the second on the theory of damages to real estate. By reason of the judgment in the former action, No. 567516, the matters pleaded in the present action are res judicata and said judgment is a bar to the present action.

As to the matter of a *retraxit*, the trial court found, as above stated, that the defendants herein paid to plaintiffs herein $600 in full settlement of another former action, No. 566571, and said former action was thereupon dismissed and plaintiffs thereby settled all causes of action set forth in the present complaint. The court concluded that the dismissal of said action upon the receipt of $600 by plaintiffs constituted a *retraxit*. By reason of the above conclusion, regarding res judicata, it is not necessary to discuss appellants' further contention that there was no *retraxit*.

The judgment is affirmed.

SHINN, P. J., concurs.

VALLÉE, J., deeming himself disqualified, did not participate.

120 Cal.App.2d 242

HOWARD PARK CO. et al. v. CITY OF LOS ANGELES et al.

Civ. 19683.

District Court of Appeal, Second District,
Division 1, California.

Sept. 15, 1953.

Hearing Denied Nov. 12, 1953.

Petition by owners of oil producing land for writ of mandate or injunction wherein complaint was made of assessment for sanitary sewer system improvement. The Superior Court, Los Angeles County, Frank G. Swain, J., entered an order for defendants, and plaintiffs appealed. The District Court of Appeal, White, P. J., held, inter alia, that the assessment was properly spread on the basis of frontage, rather than on the basis of immediate benefit to the land by the improvement.

Affirmed.

1. Municipal Corporations ⟹451

Although work of spreading assessment for sewer system was done by employees of city bureau of assessments who prepared assessment list and diagram which was submitted to the board of public works, which approved the list and diagram as submitted without making its own independent investigation, the Board of Public Works did not unlawfully delegate its powers and duties to the employees of the bureau where the board retained its discretionary power and judgment to approve, disapprove or modify the assessment. Streets and Highways Code, § 5000 et seq.

2. Municipal Corporations ⟹469(1)

Sewer system assessment was properly assessed against land being used for oil production on basis of frontage of such land, rather than on basis of immediate benefits to be received by the land from the improvement.

3. Municipal Corporations ⟹503

The question of extent of benefits to various tracts by creation of sanitary sewer system rests within determination of assessing authority, and conclusion arrived at by such authority will not be interfered with by the courts in absence of fraud, gross injustice or demonstrable mistake. Streets and Highways Code, § 5000 et seq.

4. Municipal Corporations ⟹493(2)

Even if certain councilman had prejudged question as to whether sewage system assessment should be confirmed, where there were four more confirmation votes than were necessary for confirmation, property owners were not prejudiced because the councilman had been permitted to vote on the confirmation of the assessments.

◆

Holbrook, Tarr & O'Neill, Los Angeles, for appellants.

Ray L. Chesebro, City Atty., Bourke Jones, Asst. City Atty., Alfred E. Rogers, Deputy City Atty., Los Angeles, for respondent, City of Los Angeles.

Roscoe R. Hess, Los Angeles, for respondent, Meriwether Inv. Co.

WHITE, Presiding Justice.

This is an appeal by plaintiffs from an order of the Superior Court of Los Angeles County denying the issuance of an alternative writ of mandate on a petition that is entitled "Petition for Writ of Mandate and/or Injunction". Named as defendants in this proceeding are the City of Los Angeles, the Mayor of said city, members of the City Council, Board of Public Works and the Meriwether Investment Co., a corporation.

Plaintiffs are the owners of a tract of land in the City of Los Angeles, zoned and being used for oil production purposes, a portion of the tract lying within the boundaries of the sanitary sewer district created pursuant to section 5000 et seq. of the Streets and Highways Code (formerly the Improvement Act of 1911), and known as the Athens Boulevard and Vermont Avenue Sewer District. Meriwether Investment Company is allegedly the assignee of the contractor who constructed the sanitary sewer system in the aforesaid district, and as such assignee, is alleged to have bought or undertaken to buy the bonds to be issued for the financing of said sewer system.

In their petition for a writ of mandate and/or injunction filed in the superior court, plaintiffs prayed that the city and all its named officials "recall, withdraw and expunge" all of the proceedings taken as to assessments numbered 514, 724, 725, 850, and 851 of the Athens Boulevard and Vermont Avenue Sewer District, and to make a new assessment in accordance with certain rules prescribed by plaintiffs in their petition for the writ, and which rules, according to plaintiffs are "in accordance with law". Plaintiffs also prayed for the issuance of a "Writ of Injunction" to restrain defendant Meriwether Company from "doing any acts whatsoever to impose any liens * * * on property of plaintiffs".

The petition now before us sought a review by the superior court of the confirmation by the city council of the assessments levied against the properties of plaintiffs.

The basic contentions as advanced by plaintiffs are as follows: First, that the Board of Public Works failed to comply with section 5343 of the Streets and Highways Code, in that said body did not assess against the lands of petitioners the cost of such improvement "in proportion to the estimated benefits to be received by each of the said several lots or parcels of land", Streets and Highways Code, Sec. 5343, but proceeded in accordance with the provisions of the cited code, sections 5315 to 5327, requiring that street assessments be spread "in proportion to the frontage". Second, that the Board of Public Works unlawfully delegated its powers and duties to employees of said Board, to-wit, employees in the Bureau of Assessments of the City of Los Angeles, who prepared an assessment list and diagram which was submitted to the Board, and which list and diagram and the assessments thereunder were allegedly computed "illegally and erroneously and in violation of law by application in proportion to the frontage owned by each property owner in said district of the cost at a rate per front foot * * * of the work". That in accepting from its employees the assessment list and diagram and not making any independent investigation of its own, but approving the list and diagram as submitted, the Board of Public Works illegally delegated its powers.

At the conclusion of the hearing before the superior court, the following order was entered: "The court having read the petition herein, the reporter's transcript of the proceeding before the city council of the city of Los Angeles in the matter of the appeal of the Howard Park Company, filed herein and the several points and authorities filed by the plaintiffs and the defendants, the court now denies plaintiff's application for an alternative writ of mandate." From such order plaintiffs prosecute this appeal.

When a stay pending determination of the foregoing appeal was denied, plaintiffs applied to this court for a writ of mandate against the above-named defendants and also joined as a respondent therein, the Treasurer of the City of Los Angeles. We issued an alternative writ of mandate, briefs were filed, the cause was orally argued and, on August 5, 1953, this court rendered its decision wherein the alternative writ issued by us was discharged and a peremptory writ denied, Howard Park Company v. City of Los Angeles, 119 Cal.App.2d 515, 259 P.2d 977.

[1, 2] The foregoing basic issues presented by appellants herein were fully considered by us in the case just cited and were determined adversely to them. Upon the authority of and for the reasons stated in said decision we are satisfied that the Board of Public Works did not unlawfully delegate its powers in spreading the assessments in question, and that the procedure adopted in the instant case does no violence to section 5343 of the Streets and Highways Code.

[3] An examination of the transcript of proceedings had before the city council, and which document was before the superior court, reveals that appellants were given every opportunity to be heard before the legislative body, and that they availed themselves thereof, presenting not only oral and documentary evidence, but also presented judicial decisions affecting the legal aspect of the assessments at considerable length. There appears no evidence of fraud, gross injustice or demonstrable mistake in the conclusion arrived at in the hearings before or the conclusions arrived at by the legislative body on the question of

the extent of benefits to appellants' properties. The question, resting as it does, peculiarly in the determination of the assessing authority, the conclusion arrived at by the later will not, under the circumstances here present, be interfered with by the courts.

There is one further matter not referred to in appellants' briefs but which was included in their petition to the superior court and presented at the oral argument before us. That is the claim that at the hearing before the city council, one of the members thereof "prejudged the matter".

In that regard appellants alleged in their petition to the superior court that during the hearing, when an adjournment was taken to the following day, the councilman in whose councilmanic district the sewer district in question is located, addressed his colleagues on the council, stating, "That in his mind he was satisfied that the assessments were proper and should be confirmed". Appellants' petition then avers that immediately following the aforesaid statement by the councilman, appellants' counsel requested the president of defendant city council to rule that, by virtue of "prejudgment" of said matter, defendant Councilman Gibson was not qualified to further sit as a member of a *quasi*-judicial tribunal hearing such appeals; that nevertheless said defendant Gibson was permitted at all times thereafter to participate in such hearing and thereafter to vote on the confirmation of said assessments.

[4] We fail to see wherein appellants were prejudiced by reason of the fact that Councilman Gibson was permitted to vote on the confirmation of the assessments. Of the 15 members constituting the city council, 13 were present at the hearing in question. Eight votes, or a majority of the council, were necessary to confirm the assessments. On the rollcall, 13 members voted to confirm the assessments. Had Councilman Gibson refrained from voting or been denied the right to vote there would still remain 12 affirmative votes, or four more than necessary for confirmation of the assessments. Had the vote of Councilman Gibson been necessary in order to confirm the assessments, a different question might be presented, but such was not the case in the matter now engaging our attention.

For the foregoing reasons, the order from which this appeal was taken is affirmed.

DORAN and DRAPEAU, JJ., concur.

Hearing denied; EDMONDS, CARTER and SCHAUER, JJ., dissenting.

---

120 Cal.App.2d 349

SATTLER et al. v. VAN NATTA et al.

Civ. 19464.

District Court of Appeal, Second District,
Division 1, California.
Sept. 24, 1953.

Action for a judgment declaring a note secured by a second trust deed void, enjoining foreclosure of the trust deed, and requiring return to plaintiff of interest paid on the note. From a judgment of the Superior Court, Los Angeles County, for defendants after an order purporting to grant motions for nonsuit as to some of defendants, plaintiffs appealed. The District Court of Appeal, held that the order was improper, in view of the issues framed by the pleadings and testimony and absence from the record of any motion for nonsuit by any defendant.

Judgment reversed, and case remanded with directions.

1. Army and Navy 🔑51

A contract contrary to Servicemen's Readjustment Act violates basic public policy and is unenforceable. Servicemen's Readjustment Act of 1944, § 501, 38 U.S.C.A. § 694a.

2. Army and Navy 🔑51

The requirement of Servicemen's Readjustment Act that price paid for realty purchased by veteran shall not exceed reasonable value thereof, as established by designated appraiser, was enacted to protect veteran borrowing purchase money from acquiring property at exorbitant price. Servicemen's Readjustment Act of 1944, § 501, 38 U.S.C.A. § 694a.

3. Army and Navy ⚷51

In veteran's action to enjoin foreclosure of second trust deed securing his note on ground of defendants' fraud in securing plaintiff's signature to such instruments in violation of Servicemen's Readjustment Act, Superior Court's order, purporting to grant motions for nonsuit as to some of defendants, was improper, in view of issues framed by pleadings and testimony and absence from record of any motion for nonsuit by any defendant. Servicemen's Readjustment Act of 1944, § 501, 38 U.S.C.A. § 694a.

◆

Thomas G. Neusom, Los Angeles, for appellants.

Vincent Scott, Los Angeles, for respondent Jeanette R. Watson.

George C. Woods, Los Angeles, and Earl E. Howard, Hollywood, for respondents Kay C. Van Natta and Ethel L. Van Natta.

Swanwick, Donnelly & Proudfit, Donald O. Melton, Los Angeles, for respondent California Trust Co.

PER CURIAM.

Plaintiffs appeal from an adverse judgment following an order purporting to grant motion of defendants for nonsuit.

The complaint was filed on October 10, 1951. It set out, in the first cause of action that plaintiffs are husband and wife; that defendants Watson owned certain real property which they sold to plaintiffs in the year 1947; that plaintiffs purchased the property through an escrow at a bank for the total sale price of $8,500; that they purchased it through a loan under the Servicemen's Readjustment Act, 38 U.S.C.A. § 694a, and the Veterans' Administration appraised the property at $8,500; that the agreement was that the sale price of the property was $8,500, $1,300 cash and a loan of $7,200; that at the time of the sale defendants Watson were buying some property from defendants Van Natta and knew about plaintiffs' deal; that defendant Stone, real estate broker, asked plaintiffs to sign necessary additional papers regarding insurance and tax and that he would complete all forms and turn them over to the escrow officer; that defendants Watson, Van Natta and Stone had conspired to obtain, and by fraud and artifice, did secure plaintiffs' signatures to a note and trust deed for $2,000, in violation of title 38 of U.S.C.A.; that plaintiffs had no knowledge of the note and second trust deed until the escrow was closed and plaintiffs were in possession of the property when they received a payment book in the mail directing that payment be made; that under threat of foreclosure by defendants Van Natta and statement by Stone that it was just a mixup and that the note and trust deed were legal and that he would clear the matter up, plaintiffs paid interest but no principal for two and a half years up to February, 1950, when the Veterans' Administrator told them not to make further payment. In their second cause of action plaintiffs realleged substantially the same as the first cause of action and alleged that defendants were working in concert to evade 38 U.S.C.A. § 694a and fixed the amount of interest paid on the note and trust at $330; and in their third cause of action added that the Van Nattas and defendant California Trust Company were foreclosing on the trust deed. They asked judgment declaring the note void, enjoining foreclosure of the second trust deed and return of the money paid as interest.

Defendant Jeanette R. Watson, whose husband, defendant Claude E. Watson, had died, admitted the transaction, denied fraud or conspiracy, and alleged that the total purchase price was not $8,500, but was $10,500, the extra $2,000 being paid out of escrow by the note and second trust deed. She denied knowledge that the property was being purchased with a Veteran's loan, that plaintiffs knew that it was being so financed and kept it from defendant and should now be estopped to claim relief. She later filed an amendment to her answer setting up the defense that the action was barred by sections 337, 338 and 343 of the Code of Civil Procedure relating to limitation of actions.

Defendants Van Natta in their answer denied allegations of the complaint except that they received the note and trust deed and are proceeding to foreclose the latter. They added an amendment pleading the statute of limitation.

Defendant California Trust Co. answered by denying any knowledge of the acts of the other parties or any participation therein. All parties seem to agree that it is merely a disinterested trustee under the second trust deed.

Defendant Frank Stone is deceased and no answer was filed on his behalf.

At the trial Mrs. Watson testified that the property was being sold for $10,500, that defendant Stone had been employed by her to sell the house, that $2,000 was to be paid out of escrow; that she knew Mr. Sattler was a veteran and was applying for a Veteran's loan and also knew at the time she signed escrow instructions that the appraiser had appraised the property at $8,500; that Mr. Van Natta knew that she was getting the $2,000 out of escrow, that the sale price was $10,500, and that she talked with Mr. Van Natta about it before the escrow instructions were signed.

Mr. Van Natta testified that he did not discuss the note and second trust deed with the Watsons but did talk with defendant Stone who told them that to sell their property to the Watsons they would have to take a "$2000 second paper" and they agreed to accept the second trust deed on the property being purchased by plaintiffs but did not talk with Mr. Sattler until two and a half years after the sale.

Plaintiff Louis P. Sattler testified that he secured a Veteran's loan of $7,200 based on an appraisal of $8,500 and was told by defendant Stone that "Mrs. Watson reduced her house to $8500, so that we could get it on the Veteran's Administration," and first knew of the existence of the note and second trust deed after they had moved into the house. Before his testimony was completed, defendant Esther Maxine Sattler, his wife, was called as a witness. She testified that she called defendant Stone after they had received a book for payments on the note and he told her they had signed a second trust deed, that she asked him "what the meaning was, and he said for me to pay the interest, and he'd fix it up when it was due. He said 'I will trade the house' or do some other devilish thing." Mrs. Sattler did not complete her testimony.

When the trial had progressed thus far, and before plaintiffs had completed their case the trial judge indicated that if all of plaintiffs' evidence was in the record as to the time of the discovery of the alleged fraud that a motion was in order for a nonsuit, probably with reference to the defense of the statute of limitations. The minutes of the court show: "Motions of defendants Kay C. Van Natta and Ethel L. Van Natta and of defendant Jeanette R. Watson for a judgment of non-suit under sections 337, 338, Code of Civil Procedure is granted by the court. Judgment of non-suit under said sections is also granted as to defendant, California Trust Co."

In the reporter's transcript filed on appeal there is no record of any motion for nonsuit made by any defendant. In three places the word "(argument)" appears and the record on appeal has, by our order, been augmented by a supplemental transcript supplying the record as to what was said at the times marked "(argument)". This supplemental transcript does not show that any motion for nonsuit was made by any defendant. There was argument and discussion by counsel and comment by the court followed by the order: "The motion for non-suit will be granted as to the moving defendants, and as an incidental defendant, the California Trust Co. although it is not represented in court at this time."

We are aware of no authority under which a trial court could or should grant a motion for nonsuit which has not been made in a case where the issues framed by pleadings and testimony of witnesses and the state of the record are such as those which were before it in the present action.

[1, 2] A contract contrary to the Servicemen's Readjustment Act, 38 U.S.C.A. § 694a, violates basic public policy and is unenforceable. By that section the government endeavors to assure terms of payment which bear a proper relation to the veteran's present and anticipated income

and expenses. The requirement that the price to be paid by the veteran shall not exceed the reasonable value as established by a designated appraiser was obviously enacted to protect the borrower from acquiring property at an exorbitant price. Young v. Hampton, 36 Cal.2d 799, 805, 228 P.2d 1, 19 A.L.R.2d 830; see also, Rosenblum v. Corodas, 119 Cal.App.2d 802, 260 P.2d 151.

[3] The order purporting to grant motions for nonsuit should not have been made. Plaintiffs are entitled to have the judgment based on the order reversed. Since the case will thereby be returned to the trial court for a trial de novo all parties should be permitted to amend their pleadings if they deem it necessary.

Judgment reversed and case remanded with direction to the trial court to permit parties to file amended pleadings.

---

120 Cal.App.2d 281

CACIOPPO v. TRIANGLE CO. et al.

Civ. 15538.

District Court of Appeal, First District,
Division 1, California.
Sept. 18, 1953.

Action for personal injuries sustained by plaintiff when automobile in which she was a guest collided with truck and trailer owned by one defendant and driven by another. The Superior Court, County of Monterey, entered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Fred B. Wood, J., held that evidence was insufficient to show that plaintiff and driver of automobile were husband and wife, and doctrine imputing husband's negligence to wife was inapplicable.

Judgment reversed.

Negligence ⚿135(8)

In action for personal injuries sustained by guest in automobile which collided with truck and trailer owned by one defendant and driven by another, evidence was insufficient to show that guest and driver of automobile were husband and wife, and doctrine imputing husband's negligence to wife was inapplicable. Code Civ.Proc. § 1963, subd. 30.

Nichols, Richard, Allard & Williams, Oakland, J. Hampton Hoge, Lewis L. Fenton, Monterey, for appellant.

Lacey & Thornberry, Salinas, for respondents.

FRED B. WOOD, Justice.

June 7, 1951, plaintiff (riding as a guest of Andrew Cacioppo in his automobile, driven by him) was injured in a collision with a truck and trailer owned by defendant W. E. Simas, driven by defendant Marion Bates while in Simas' employ.

Plaintiff has appealed from a judgment entered upon the rendition of a verdict for the defendants. She claims the trial court prejudicially erred in giving the jury the question whether or not plaintiff and Andrew Cacioppo were married at the time of the accident, thereby presenting to the jury the question of contributory negligence.

Defendants invoke the disputable presumption that "a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage", Code of Civ.Proc. § 1963, subd. 30. They claim there is sufficient evidence that at and prior to the accident plaintiff and Andrew deported themselves as husband and wife, to give rise to the presumption. Let us look at that evidence and analyze it.

Andrew Cacioppo testified that at the time of the accident, June 7, 1951, plaintiff was Mrs. Gladys E. Arena, that he and she were married December 30, 1951; that he had never gone through any marriage ceremony with her prior to December 30, 1951; that prior to the accident he had introduced her as Mrs. Cacioppo; that they registered at the Salinas Valley Hospital, right after the accident, as Mr. and Mrs. Cacioppo and occupied the same room at the hospital. Plaintiff testified that at the time of the accident her name was Gladys Arena;

that she had been formerly married; she ceased to be married to her former husband in 1949; she had two children, one thirty-two and the other twenty-nine years of age at the time of the trial; she and Andrew were married December 30, 1951; she never had a marriage ceremony with Andrew prior thereto. She produced a marriage certificate which was introduced in evidence. It declares that on December 30, 1951, James H. Down, Jr., Justice of the Peace of Las Vegas, Nevada, joined Andrew Cacioppo and Gladys E. Arena in lawful wedlock. Asked if she were generally known as "Mrs. Cacioppo" at the time of the accident, she answered "Yes." Dr. Eberhardt, who attended them at the hospital following the accident, knew her as Mrs. Cacioppo; his records indicated her name was Gladys Cacioppo, information he obtained from her and Andrew. Carl Lauritzen of the highway patrol testified that plaintiff gave "Gladys Cacioppo" as her name.

That evidence falls short of the requirement of the common law that there be proof that the parties had lived together as man and wife and by their conduct to each other and to the world thus established a common, uniform and undivided repute that they were married. Whatever additionally may be required to create the statutory presumption of marriage now that licensing and solemnization are required by the substantive law, the requirement of proof of the cohabitation and repute mentioned certainly have not been dispensed with. Estate of Gill, 23 Cal.App.2d 212, 214–215, 72 P.2d 771, and authorities there cited.

In addition, even if there had been evidence of such cohabitation and repute, the instructions to the jury (given in part at the defendants' request and in part upon the court's own motion; none at the request of plaintiff)[1] were lacking in the exposition of these elements of proof necessary to the creation of the statutory presumption. In this regard the jury were told merely: "The law presumes that a man and a woman who hold themselves out as husband and wife have entered into a marriage ceremony. This may be controverted by other evidence. Remember also that in California we do not recognize and do not have such a thing as common law marriages * * *."

The prejudicial character of these errors inheres in the fact that there was evidence tending to show that Andrew, as well as the driver of the truck, was negligent, and none tending to show negligence upon the part of plaintiff, other than the negligence of Andrew which would be imputed to her if at the time of the accident she and Andrew were husband and wife.

The judgment is reversed.

PETERS, P. J., and BRAY, J., concur.

120 Cal.App.2d 343

PEOPLE v. CONERLY et al.

Cr. 872.

District Court of Appeal, Fourth District, California.

Sept. 22, 1953.

Defendants were convicted of second degree burglary. The Superior Court, Tulare County, Frederick E. Stone, J., rendered judgment against defendants and one defendant appealed. The District Court of Appeal, Griffin, Acting P. J., held that evidence supported jury's conclusions that defendant at least aided and abetted his codefendants in commission of offense.

Judgment affirmed.

Burglary 🔑41(1)

In prosecution of second-degree burglary, where stolen articles were found in possession of defendants, and where one defendant made contradictory statements concerning his actions at time crime was committed, and later attempted to assist police officers and another defendant in recovering stolen articles, evidence supported jury's conclusions that defendant at least aided and abetted his codefendants in commission of offense.

---

[1] The reporter's transcript shows the source of some, not all, of the instructions given. The parties supplied the missing information by stipulation during oral argument.

Arthur J. May, Tulare, for appellant.

Edmund G. Brown, Atty. Gen., Michael J. Clemens, Deputy Atty. Gen., for respondent.

GRIFFIN, Acting Presiding Justice.

Appellant Willie D. Ellison, together with his codefendants, Melvin Joseph Conerly and Herman Carter, were jointly charged and convicted by a jury of the crime of second-degree burglary, in that on December 30, 1952, they entered McCourt's Clothing Store in Tulare with the intent to commit theft. Appellant alone appealed from the judgment of conviction, and his sole argument is that the evidence is insufficient to support the judgment.

The record shows that about 1 p. m. on December 29th, Ellison and Conerly entered the store. Conerly inquired of the only sales lady, Mrs. Braden, the manager's wife, about a suede coat. While showing the coats to him, appellant strolled to the back of the store near the rear door entrance. The defendants were in the store about 10 minutes and left without making a purchase. About 4 p. m. appellant went to a rooming house nearby and told the caretaker he had a wife and her lady friend who wanted a room. About an hour later Conerly and appellant returned with two women, not their wives, and signed the register. Carter stayed in appellant's Cadillac car. About 9 p. m. the proprietor of the rooming house saw the men leave and later return, but never saw them after that time until he identified them at the trial. He did notice, at 7 o'clock the next morning, that they had gone. There was testimony that about 9 o'clock on December 29th Conerly and Carter went into a pool hall together and about half an hour later appellant joined them, and that about 11 p. m. the three left in the Cadillac automobile. About 8:45 a. m. on December 30, the Bradens discovered the rear door to the store was propped open, the door knobs were bent, and the rear window had been pried or jimmied, but the bars on the inside precluded entrance through this window. There were mud tracks leading to where the suede coats and clothing were located. Many trousers, overcoats, and suede coats, valued at $2,400, were missing, as well as $63 in cash taken from the till. A crowbar was found near the rear entrance to the store. Braden identified two men's suede coats in evidence as being similar to those carried by that store. A top coat, carrying the "Randolph" label, was identified by the Bradens. This store was the only store in Tulare carrying clothes of this label. Tags from the suede coats on which Mrs. Braden had written certain figures, were found in appellant's room. The three defendants were arrested in Barstow and at first each denied having any knowledge of the burglary at McCourt's store. Later Ellison admitted he was in Tulare with Conerly but stated that he had picked up a third man, a hitch-hiker, on the road to Tulare. Ellison denied owning or knowing anything about the "Randolph" top coat found in the front seat of his Cadillac car, although he had been driving the car. He denied being with any women in Tulare on December 29th.

Conerly admitted being with appellant and Carter with two women in Tulare that night. He claimed he won the top coat gambling in Los Angeles. When arrested he was wearing a suede coat similar to the one stolen from the McCourt's store. Carter admitted being with the two other defendants and the two women in Tulare. The top coat and suede jacket were found in Carter's home. He first claimed he bought these in Los Angeles. Later, appellant Ellison admitted they were with two women in Tulare when informed by the officer that Conerly had admitted that fact. En route to Tulare Carter, when in the absence of the other two defendants, admitted in detail the part he played in the burglary, and stated that the other two defendants rented the room with the two women; that about 10 o'clock Ellison and Conerly told him to stand watch while they entered the store; that after a short time they returned in the Cadillac and he jumped in and found the back seat filled with coats and clothes; that they drove back to the rooming house, picked up the girls and left; that when he arrived in front of his home he was given a jacket and top coat and was told by Ellison and Conerly that they would take care of him with some more clothing at a later time.

At the jail, Carter signed a written statement which was received in evidence against him only. After making the statement Carter went with the officers and pointed out to them where he stood while appellant and the other defendant burglarized the McCourt's store. Conerly stated that if the officers would take Ellison with him they might recover some of the stolen property because Ellison knew more about it. In Barstow Ellison was asked how to proceed to recover the stolen articles, and he replied that he had better get one of the women who was with him in Tulare, naming her, and said she might know where the articles were. They drove to her home. She was amazed to see Ellison and asked what he was doing there. Appellant replied: "We came down to try to recover some of the property that we took in Tulare". Appellant gave her a list containing certain names of persons who were supposed to have received the articles stolen in Tulare. The woman later returned the list to the officers in the presence of Ellison and said she could not recover any of them. Ellison refused to make any further statements.

Conerly later admitted the part he played in the burglary and identified the crowbar found in the store as the instrument used to pry open the back door.

At the trial appellant Ellison admitted being in Tulare that night. He said he went to sleep in the afternoon of the 29th and remained in the room until 1 a. m. the next morning when they left for Barstow. He admitted going into the store with Conerly that afternoon to inquire about the suede coat. He stated he had been feeding Conerly because Conerly had no money. He admitted conviction of three prior felonies. Conerly, after admitting a prior conviction of felony (burglary), testified that he alone committed the crime, and that Ellison and Carter had nothing to do with it. Carter failed to testify.

The corpus delicti was concededly proved by direct as well as by circumstantial evidence. The appellant's connection therewith, his felonious intent to commit the theft, and his guilty participation in the burglary was established by circumstantial evidence, when considered in connection with his flight from the scene in his car shortly after the commission of the crime, and the admissions and contradictory statements made by him. The evidence fully supports the jury's conclusion that he at least aided and abetted his codefendants in the commission of the offense. People v. Etie, 119 Cal.App.2d 23, 258 P.2d 1069; People v. Newland, 15 Cal.2d 678, 104 P.2d 778; People v. Royale, 115 Cal.App.2d 678, 252 P.2d 748; People v. Deysher, 2 Cal.2d 141, 40 P.2d 259.

Judgment affirmed.

MUSSELL, J., concurs.

120 Cal.App.2d 325

HERSUM et al. v. LATHAM et al.

Civ. 4599.

District Court of Appeal, Fourth District, California.

Sept. 21, 1953.

Action wherein plaintiffs alleged that transaction entered into between plaintiffs and defendants was usurious. The Superior Court of San Diego County, Joe L. Shell, J., rendered a judgment adverse to the plaintiffs and the plaintiffs appealed. The District Court of Appeal, Mussell, J., held that such finding was justified under evidence.

Judgment affirmed.

1. Usury 🔑**11**

In a "usurious transaction", there must be a loan of money, which is to be repaid to lender, with compensation for its use in an amount constituting a charge in excess of highest permissible rate, and as a necessary concomitant there must exist corrupt intent to exact illegal charge for use of money lent.

See publication Words and Phrases, for other judicial constructions and definitions of "Usurious Transactions".

2. Usury 🔑113

Presumptions of law are in favor of legality of transaction, and if transaction in question is open to two constructions, one making for legality, the other for illegality, in absence of evidence pointing clearly to usury it is duty of court to adopt construction in favor of lawfulness.

3. Usury 🔑117

Where defendant, pursuant to agreement with plaintiffs who were having financial difficulties, bought trust deed previously executed by plaintiffs to secure note, and money was advanced to plaintiffs as agreed and money was deposited for purchase of specified number of shares of stock of plaintiffs' business, finding that transaction was not usurious was justified under evidence even if stock had value much greater than amount of money deposited.

◆

H. F. Landgraf, San Diego, for appellants.

Johnson & Johnson, San Diego, for respondents.

MUSSELL, Justice.

Plaintiffs appeal from a judgment against them on the first cause of action in a complaint in which they alleged that defendants had extracted interest from them in excess of twelve per cent for the loan of money.

Plaintiffs were the owners of and operated a wholesale and retail lumber and supply business in Chula Vista. Prior to August 6, 1951, they became involved in financial difficulties and to secure cash for working capital and to meet their financial obligations, they procured a loan from the San Diego Wholesale Credit Men's Association and executed a promissory note therefor in the sum of $24,000. The note was secured by a deed of trust covering their home and other real property. Plaintiffs were unable to pay the note and it became apparent that their creditors would foreclose the trust deed and enforce their claims. Mrs. Hersum then, on or about June 1, 1951, approached defendant George Latham (who was manager of defendant American A–One Investment Company and who, with his wife, owned controlling interest therein) for the purpose of securing a loan. Mr. Latham testified that he informed her that he was not in the loan business; that two or three weeks later she again called upon him and asked for a loan and it was refused; subsequently the agreements, which are the subject of this controversy, were executed by the parties.

In the first of these agreements, dated August 6, 1951, between American A–One Investment Company and the plaintiffs, American agreed to purchase the $24,000 note held by the San Diego Wholesale Credit Men's Association, and to extend the note and trust deed for a period of two years, if the interest and other payments were made on it. Plaintiffs agreed to execute a chattel mortgage on their personal property as additional security. They agreed to form a corporation to take over and operate the lumber business and agreed to transfer all their assets, except clothing and personal effects, to the corporation. It was agreed that the new corporation should issue 5,000 shares of stock, of which American was to receive 2,750 shares, and that these shares would be released to plaintiffs when the said $24,000 note had been reduced to $10,000. American agreed to give plaintiffs a ten per cent discount on the $24,000 note if paid within two years. Detailed arrangements for the operation of the business by the parties were then set forth in the agreement. On September 6, 1951, an amendment to this contract was executed by the parties in which American agreed to advance an additional $10,000, secured by a trust deed and chattel mortgage and the number of shares of the new corporation to be given to American was reduced to 2,450.

On August 11, 1951, the Hersums and the Lathams executed a contract in which, in consideration of the sum of $2,400 to be deposited in escrow by the Lathams and to be used in payment of debts of the business, the Hersums agreed to sell to the Lathams 2,250 shares of the new corporation stock. The Lathams agreed to give the Hersums the right to repurchase said 2,250 shares within two years of the date of the agreement for $8,400, plus interest, provided the debt to the American A–One Investment Company was paid. This contract was also amended by an agreement executed September 6, 1951, in which the Lathams agreed to pay the Hersums an additional $100 and the original agreement was amended to substitute 2,550 shares of the new corporation stock for the said 2,250 shares thereof. The Hersums were given the right to repurchase the 2,550 shares within two years from the date of the original agreement for the sum of $10,900.

The American A–One Investment Company purchased the $24,000 trust deed. The Lathams advanced the said $10,000, as agreed, and deposited the said sum of $2,500 for the purchase of the Hersum stock as required by the August 11, 1951 agreement, and the plaintiffs now claim that the transaction involving the loan of the said $10,000 and the transfer of the said 2,550 shares of stock was usurious as said stock had a reasonable value of $33,142.69.

[1, 2] In Moore v. Dealy, 117 Cal.App.2d 89, 254 P.2d 888, 891 (hearing denied by the Supreme Court) this court held:

> "The question of whether the contract involved was usurious was one of fact for the trial court's determination and since the finding in this respect is justified by the evidence, it is binding upon us. Miley Petroleum Corp., Ltd. v. Amerada Petroleum Corp., 18 Cal.App.2d 182, 191, 63 P.2d 1210. The test is whether there was an attempt to evade the law. As was said in Rose v. Wheeler, 140 Cal.App. 217, 219, 220, 35 P.2d 220, 221:
>
> " 'In a usurious transaction, there must be a loan of money, which is to be repaid to the lender, with compensation for its use in an amount constituting a charge in excess of the highest permissible rate. And as a necessary concomitant there must exist the corrupt intent to exact the illegal charge for the use of the money lent. Lamb v. Herndon, 97 Cal.App. 193, 197, 275 P. 503.
>
> " 'The presumptions of law are in favor of legality; and therefore if the transaction in question is open to two constructions, one making for legality, the other for illegality, then in the absence of evidence pointing clearly to usury, it is the duty of the court to adopt the construction in favor of lawfulness. Coley v. Wolcott, 103 Cal.App. 140, 284 P. 241; Shelley v. Byers, 73 Cal.App. 44, 57, 238 P. 177.' "

[3] In the instant case there is substantial evidence to support the trial court's finding that the transactions were not usurious. Plaintiffs were in financial difficulties and were being pressed by their creditors. Latham testified that he was only interested in the transaction through a purchase of the stock of the corporation; that he was "buying into a bankrupt concern, a concern which was very questionable, purely and simply a gamble, and was gambling the $2,500 on the purchase of stock." The record shows that he took an active part in the management and operation of the business in order that it might become a mutually profitable business enterprise. The Lathams were hazarding their investment on the success of the enterprise rather than making a loan of money. Under such circumstances the finding of the trial court that the transactions were not usurious is supported by substantial evidence. Ambrose v. Alioto, 65 Cal.App.2d 362, 367, 150 P.2d 502.

Judgment affirmed.

GRIFFIN, Acting P. J., concurs.

120 Cal.App.2d 284

In re DANIELS' ESTATE.

BALDWIN et al. v. HARNEY.

Civ. 15477.

District Court of Appeal, First District, Division 2, California.

Sept. 18, 1953.

Rehearing Denied Oct. 16, 1953.

Proceedings on final account of administrator. The Superior Court, City and County of San Francisco, entered order settling final account and distributing the estate, and an appeal was taken by objectant. The District Court of Appeal, Goodell, J., held that a will contest can be dismissed when there is no appearance by or on behalf of contestants when case is called for trial.

Order and decree affirmed.

1. Wills 🔑288(1)

The contestant being the plaintiff and the proponent being the defendant in a will contest, contestant has the burden of going forward with his proof, and of producing some evidence legally sufficient to support his allegations, in default of which, decision on contest must be against contestant, regardless of whether any evidence whatsoever is produced by proponent. Probate Code, § 371.

2. Wills 🔑326

Provision of the Code of Civil Procedure relating to dismissals for enumerated causes, is applicable to will contest, and a will contest can be dismissed when the contestant fails to appear on the trial and the other party appears and asks for dismissal. Code Civ.Proc. § 581; Probate Code, § 1233.

3. Executors and Administrators 🔑86(2)

Where testator, on day of his death, withdrew three deposits held in joint tenancy with his wife by obtaining cashier's checks made out in favor of himself, and endorsed by him in blank, special administrator acted in accordance with his clear duty when immediately after the death of the testator the special administrator obtained possession of such cashier's checks and deposited them in his account as special administrator, until such time as it could be determined whether checks were property belonging to estate.

4. Executors and Administrators 🔑181

Where testator's special administrator obtained possession of three cashier's checks endorsed in blank by testator and representing accounts in joint tenancy with testator's wife, and judgment was subsequently entered that wife was the owner of the amounts represented by the checks as surviving joint tenant, payment from such amounts of a family allowance to wife for period of 17½ months did not amount to a depletion of the assets of the estate in contradiction of inventory and appraisement disclosing no such funds, since funds were in fact the property of the wife.

5. Executors and Administrators 🔑194(6)

An order granting a family allowance which has been permitted to become final cannot thereafter be collaterally attacked. Probate Code, § 1240.

6. Executors and Administrators 🔑504(7)

Failure of one filing exceptions and objections to an administrator's account and petition for distribution, concerning which due and legal notice had been given and posted, to appear and press the exceptions and objections, would have warranted dismissal of the exceptions and objections, and an affirmance of order settling final account of administrator and distributing the estate. Code Civ.Proc. § 581; Probate Code, § 1200.

7. Descent and Distribution 🔑51

A person convicted of manslaughter does not come within statute precluding person convicted of murder of decedent from succeeding to any portion of decedent's estate, nor is such person precluded from sharing in state on the broader ground that no person can take advantage of his own wrong, since the matter of inheritance is within the control of the Legislature, and depends wholly upon provisions of statute, without regard to notions of natural right and justice. Probate Code, § 258; Civ. Code, § 3517.

John P. Doran, San Francisco, for appellants.

W. Urie Walsh, Doyle & Clecak, San Francisco, for respondent.

GOODELL, Justice.

This is an appeal from an order of November 29, 1951 settling the final account of the administrator and distributing the estate. Of the five appellants Elizabeth T. Baldwin was the only one who filed exceptions and objections. The will, admitted to probate by an order of November 22, 1950 (from which no appeal was taken), named Jennie Daniels, the widow, as sole legatee and devisee, and left $1.00 to anyone else who claimed to be an heir. Mrs. Baldwin was a daughter of the testator by a former marriage.

The principal attack on the decree of distribution is on the ground that the estate was not ready to be closed because the contest filed by Mrs. Baldwin had never been tried.

On October 13, 1948 the testator died and five days later his will, dated February 22, 1938, was filed for probate; on November 3, 1948, the Baldwin contest was filed. The grounds were (a) that decedent had not signed the document "for any testamentary purpose whatsoever"; (b) unsoundness of mind; (c) undue influence and fraudulent representations. These representations were alleged to be that testator's wife had represented to him that if he would make his will in her favor she would make hers in his favor (mutual wills were in fact executed at the same time) but that she deprived him of the opportunity of taking under her will by killing him on October 13, 1948.

On November 24, 1948 the special administrator and Mrs. Daniels filed their answer to the contest.

On March 25, 1949 the contestant filed a memorandum to set cause for trial, wherein she demanded a jury trial. The date set was February 28, 1950. On February 20, 1950, an order was made dropping the case from the calendar "for failure to deposit jury fees (Sec. 631 C.C.P.)"

Three days later a contest was filed by appellant John Daniels.

On September 12, 1950 notice of time of trial was served and filed by the proponent stating that both contests (Baldwin and Daniels) had been set for trial without a jury on October 17, 1950 at 2 p. m. in Department 9.

On September 29, 1950 Mrs. Baldwin filed a second memorandum to set cause for trial and demanding a jury trial. Proponent promptly moved to strike it from the files on the ground that the trial had already been set for October 17. On October 24 the motion was granted, the order reciting that at the hearing of the motion there was no appearance on behalf of the contestant.

The business of the court did not admit of a trial on October 17, the day set, and the trial was reset for November 14, 1950 at 2 p. m. On October 18 a notice of trial (on November 14) was served on the contestant by the delivery of a copy to the secretary of contestant's counsel.

On November 14 at 2 o'clock the case was called and counsel for the proponent directed attention to the service of the notice of trial just mentioned. Counsel for the contestant did not appear. The Court remarked that it was 2 o'clock, but that "perhaps we could wait awhile." The record shows that a half hour recess was taken. The Court then said: "All right, if it was set and notice was given for today, there is nothing else to be done but to proceed—let the record show that there is no one here representing the contestants, and let the record show the statement of Mr. Clecak."

The proponent then proceeded to prove the will. Both subscribing witnesses testified, and the proceeding was carried on with care and deliberation, the hearing covering 19 pages of transcript. The will was admitted to probate by an order dated November 22, 1950, which was over two years after the Baldwin contest was filed.

The record shows that although Mrs. Baldwin originally demanded a jury trial she failed to deposit jury fees within the time fixed by law. Section 631, Code Civ. Proc. provides "Trial by jury may be waived * * * in manner following: * * * 5. By failing to deposit * * * a sum equal to the amount of one day's jury fees payable under the law * * * 10 days prior to the date set for trial. * * *"

Notice of time of trial was duly severed, but, as already appears, on November 14 at 2 p. m. when the case was called for trial there was no appearance for the contestant.

[1] In a will contest "the contestant is plaintiff and the petitioner is defendant * * *", § 371, Probate Code, which means of course that the contestant must be prepared to go forward with his proof, the burden being on him. In Re Estate of Relph, 192 Cal. 451, 459, 221 P. 361, 364, the court says that "the proponents are not called upon to submit any evidence until the contestants shall have produced some evidence legally sufficient to support their allegations * * *. If the contestants fail to produce such evidence, the decision of the contest must be against them, even though the proponents produce no evidence therein whatsoever [citation]."

The failure of contestant's counsel to appear left the case in the same position as that of a civil action where at the trial the plaintiff, the actor in the case, fails to show up.

[2] Section 581, Code Civ.Proc. provides that "An action may be dismissed in the following cases: * * * 3. By the court, when either party fails to appear on the trial and the other party appears and asks for the dismissal * * *."

In the case of Voyce v. Superior Court, 20 Cal.2d 479, 484, 127 P.2d 536, 539, the court says: "It is clear that section 581 of the Code of Civil Procedure, providing for dismissals, is applicable to will contests. [Citations.] That rule follows from the provisions of section 1233 of the Probate Code stating that the provisions of part II of the Code of Civil Procedure constitute the rules of practice in probate proceedings in regard to matters of procedure not otherwise covered by the Probate Code. Section 581 of the Code of Civil Procedure is in part II thereof. It has recently been held by this court that section 581 is applicable to proceedings to determine heirship, whose nature is quite similar to a will contest. O'Day v. Superior Court, 18 Cal. 2d 540, 116 P.2d 621."

O'Day v. Superior Court is a case where there was a dismissal of a petition to determine heirship where petitioners, did not show up at the time set for hearing. The court, 18 Cal.2d 545, 116 P.2d 624, said: "* * * the court was authorized to render a judgment of dismissal against petitioners for their failure to attend."

The case of Horney v. Superior Court, 83 Cal.App.2d 262, 267, 188 P.2d 552 discusses the same subject, citing, among other cases, In re Estate of Somers, 82 Cal.App.2d 757, 187 P.2d 433. In both the Horney and Somers cases petitions for hearing were denied by the Supreme Court.

The order, from which no appeal was taken, § 1240, Probate Code, left nothing outstanding or undisposed of as far as the contest was concerned.

So much for appellant's first and fifth grounds of opposition to the decree of distribution.

Appellants' second ground is that the "administrator has not fully or at all collected or accounted for the assets of the estate * * *." Appellants merely state this ground; they do not elaborate or argue it, or specify wherein there has been a failure to collect assets or account for them.

Appellants' third ground is that the granting of the petition for distribution "would rob the said Elizabeth T. Baldwin of her right of recovering the moneys distributed by the decree * * * in the event that the judgments in Superior Court, No. 396,815 and Superior Court No. 402,310 * * * are reversed and set aside, both said judgments being now on appeal;" This ground will be discussed presently under appellants' exceptions to the account.

Appellants' fourth ground is a repetition, stated in different words, of their second exception to the account relating to the payment of a family allowance to Jennie Daniels. It, too, will be discussed presently.

This brings us to the exceptions and objections to the final account, of which there are three.

The first is that three joint tenancy deposits are shown in the account as receipts, whereas the inventory shows they are no part of the estate.

The facts respecting these deposits are as follows:

[3] On October 13, 1948, the day of testator's death, there stood in joint tenancy in the names of himself and his wife Jennie Daniels, three savings accounts, one in Federal Savings & Loan Association, $4,733.47; one in the Morris Plan, $6300, and one in Eureka Federal Savings & Loan Association, $6,722.21, aggregating $17,755.68. On that day the testator went to each of these institutions and withdrew all three deposits by obtaining cashiers' checks made out in favor of himself for the full amount standing in each deposit, which he endorsed in blank. Immediately after the death the special administrator sought and obtained possession of these three checks *as it was his clear duty to do,* and deposited them in his account as special administrator.

When the inventory was filed the administrator showed therein only the following property as belonging to the estate: 24 shares of the capital stock of Hearst Consolidated Publications, Inc., appraised at $535.99, and a 1940 Ford Sedan appraised at $250. However, he explained his possession of the proceeds of the three joint tenancy checks by an addendum to the inventory shown in the footnote.[1]

Appellants do not suggest any other means or method whereby these three checks aggregating $17,755.68 drawn to the order of the testator *and endorsed by him in blank* could have been safeguarded. As a matter of fact the petition for special administration shows that its purpose was so that the petitioner could endeavor "to recover said checks or a portion thereof, and if such appointment is not made the estate will be in danger of sustaining a very serious loss." Moreover, at the time the inventory was filed (as shown by the addendum) the three joint tenancy accounts were in litigation in two actions, in both of which the estate was a party defendant. One had been tried and was on appeal; the other not yet tried. Both judgments quieting the title of Jennie Daniels as surviving joint tenant of the three accounts were ultimately affirmed by this court.[2]

---

[1] "At the time of the death of decedent, there was in the possession of his attorneys, cashiers' checks payable to decedent and endorsed in blank by him in the aggregate sum of $17,755.68. These checks represented moneys drawn out by decedent on the date of his death from the joint tenancy bank accounts of the decedent and his widow without the consent of his widow, Jennie Daniels. The checks were taken into the possession of the Special Administrator in order to safeguard the same.

"It is the contention of Jennie Daniels that said moneys do not properly belong in the estate of decedent and that they belong to her as surviving joint tenant. This contention was sustained by the Superior Court of the State of California, in and for the City and County of San Francisco, in action numbered 396,815, entitled: Jennie Daniels, Plaintiff, vs James Harney, as special Administrator of the Estate of Shull H. Daniels, deceased, Elizabeth T. Baldwin and John Daniels, Defendants.

"In that case the Court made and entered its order decreeing that all of said moneys belong to Jennie Daniels, the surviving widow as the surviving joint tenant. Notice of appeal has been filed by children of decedent by a prior marriage. Said matter is also the subject of litigation in connection with some real property owned in joint tenancy by decedent and Jennie Daniels in that certain action numbered 402,310 on the files of the Superior Court of the State of California, in and for the City and County of San Francisco, entitled: Jennie Daniels, Plaintiff, vs Elizabeth T. Baldwin, John Daniels, also known as John S. Daniels, also known as John Shull Daniels, George Lewis, John Lewis, Viola Lewis Mackin, James Harney, as Special Administrator of the estate of Shull H. Daniels, alias, deceased, and James Harney, as Administrator with the Will annexed of the estate of Shull H. Daniels, alias, deceased, Defendants.

"The administrator makes no claim to said moneys."

[2] In action No. 396,815 the affirmance was on May 28, 1952, about 16 months after the inventory was filed, Daniels v. Harney, 111 Cal.App.2d 400, 244 P.2d 773. In No. 402,310 the affirmance was

When the account was settled and the decree of distribution signed neither appeal had been decided. True, as said in Re Estate of Delaney, 110 Cal. 563, 567, 42 P. 981, 983, "The fact that the property was in litigation might have been a reason for the court, in the exercise of its discretion, to delay a settlement of the account until the litgation should be determined * * *" but the Superior Court had already entered judgment that the three joint tenancy accounts belonged to Jennie Daniels as surviving joint tenant, and "there was no presumption that it would be reversed". In re Estate of Delaney, supra. Even if there had been a reversal the money would still have been distributable to Jennie Daniels as sole legatee under the will (which had been admitted to probate a year before the distribution and no appeal had been taken). The decree of distribution recited that the pending appeals "should not in any way prevent the distribution of the estate of said decedent to the said Jennie Daniels * * * pursuant to the provisions of the said last will and testament * * *."

The joint tenancy money had come into the administrator's possession in an unimpeachable way, and it certainly had to be removed from the estate by some legal means or other. The decree of distribution solved this problem since, viewed either way, the joint tenancy money (or the $12,087.48 which then remained of it) belonged to Jennie Daniels. Appellants have not shown how they, or any of them, could have been entitled to any part of this money, under any theory.

Appellants' second exception to the account (and their fourth ground of attack on the petition for distribution, discussion of which was deferred) is an attack on the family allowance of $300 a month which was paid for 17½ months, aggregating $5250.

[4] The ground of this exception is that it is "a metaphysical impossibility for said administrator to pay out as family allowance moneys which he swears in his inventory and appraisement he does not have, and which he swears he never did have." Obviously the $5250 could not have been paid out of the meager $535.99 of Hearst stock and a $250 Ford—making $785.99; it must necessarily have been paid out of the joint tenancy money in the administrator's possession and which, under any view, was really Jennie Daniels' money. Under appellants' own argument *the true assets of the estate were not at all depleted by the family allowance.*

[5] Over and above that, the order granting the family allowance was an appealable order, § 1240, Probate Code, but no appeal was taken. In Re Estate of Roberts, 27 Cal.2d 70, 162 P.2d 461, which, also, was an appeal from a decree settling an account and for distribution, appellants attacked an order for family allowance, just as appellants do now on the same kind of appeal. The court said, 27 Cal.2d at page 76, 162 P.2d at page 465: "Having failed to take an appeal within the time prescribed or to petition for the modification of the order after the filing of the inventory, appellants cannot attack the order collaterally in the present proceeding. [Citations, including 11A Cal.Jur. p. 542.]" The Roberts case was cited in respondent's brief, but neither it nor the subject of family allowance is touched on in appellants' closing brief.

Appellants' third exception to the account is merely a restatement of their first and second exceptions to the account, already discussed.

[6] And, finally, the record shows that at the time set for hearing the administrator's account and petition for distribution the appellant Elizabeth T. Baldwin failed to appear in person or by counsel to present and press before the court the exceptions and objections which she had filed. The account and petition were filed on November 6, 1951; § 1200, Probate Code requires the clerk to give at least 10 days' notice by posting, and it requires the court to make a finding of due notice. In its

---

on January 23, 1953, almost two years after the inventory was filed, Daniels v. Baldwin, 115 Cal.App.2d 487, 252 P.2d 351. A petition for hearing was denied by the Supreme Court in the latter case.

order of November 29, 1951 the court found "that due and legal notice of the hearing of said account and petition has been duly and legally given to all persons interested in the estate of the said decedent for the time and in the manner prescribed by law * * *."

The hearing was set for November 21, 1951. On November 19 the exceptions and objections were filed. When the matter was called on the 21st, counsel for Mrs. Baldwin did not appear. The court of its own motion continued the hearing to the 23rd with directions to the administrator's counsel to try in the meantime to get in touch with adversary counsel. On the 23rd counsel again failed to appear and the administrator's counsel reported that he had personally served a notice on his adversary by putting it under the door of his office—nobody being present therein. The court then proceeded with the hearing, approved the account and ordered distribution.

The failure of appellants to appear at the hearing of the account and for distribution would seem to be a sufficient reason, by itself, for the affirmance of the order and decree appealed from. Mrs. Baldwin had filed, only two days before, the exceptions and objections just discussed in detail, but she did not see fit to appear and present them to the court (see authorities already cited).

One of the grounds of the Baldwin contest was that the will was executed under the representation made by Jennie Daniels to her husband "that if he would sign said purported will she would give him an opportunity by will to succeed to her entire estate" but that she "deprived decedent of such opportunity by killing said decedent October 13, 1948". It is also alleged that the Coroner's jury at the inquest into decedent's death returned a verdict that "Said decedent came to his death at the hands of Jennie Daniels and we, the jury, charge the said Jennie Daniels with the crime of murder." Mrs. Daniels was tried for murder but convicted of manslaughter. Appellants argue that the Baldwin contest raised the defense that she could not qualify as an heir or devisee of decedent because he had met death at her hands.

[7] In Re Estate of Kirby, 1912, 162 Cal. 91, 121 P. 370, 39 L.R.A.,N.S., 1088, the Supreme Court had before it a piece of legislation enacted seven years before, § 1409, Code Civ.Proc. which read: "No person who has been convicted of the murder of the decedent shall be entitled to succeed to any portion of his estate; but the portion thereof to which he would otherwise be entitled to succeed descends to the other persons entitled thereto under the provisions of this title." Section 258, Probate Code as it now reads is substantially the same as the original section. The court held that a person convicted of manslaughter did not come within the provisions of the section. In re Estate of Lysholm, 79 Cal.App.2d 467, 179 P.2d 833 cites several later cases on the same subject. The Kirby case is a sufficient answer to appellants' contention, but they invoke the broader ground that "No one can take advantage of his own wrong", § 3517, Civ. Code, and in that connection stress questions of morality and public policy. The Kirby case supplies the following answer to those arguments: "Whether this accords with natural right and justice is a question upon which we cannot enter. The right of inheritance in this state does not depend upon the ideas of court or counsel as to justice and natural right. The entire matter is in the control of the Legislature, and depends wholly upon the provisions of the statute, regardless of our notions of natural right and justice. In re Estate of Wilmerding, 117 Cal. [281], 284, 49 P. 181; Sharp v. Loupe, 120 Cal. [89], 91, 52 P. 134, 586; In re Estate of Porter, 129 Cal. 88, 61 P. 659, 79 Am.St.Rep. 78."

"The right of inheritance * * * *as well as the right of testamentary disposition* are entirely within the control of the state legislature and are subject only to the conditions prescribed by such body. [Citations; emphasis added.]" In re Estate of Scott, 90 Cal.App.2d 21, 23, 202 P.2d 357, 358. The legislature has not seen fit in almost 50 years since the enactment of § 1409, Code Civ.Proc. (now § 258, Pro. Code) to extend the rule which that section announces.

Beck v. West Coast Life Ins. Co., 38 Cal.2d 643, 241 P.2d 544, 26 A.L.R.2d 979, which appellants cite, is not in point since it involved a policy of life insurance.

The order and decree appealed from are affirmed.

NOURSE, P. J., and DOOLING, J., concur.

120 Cal.App.2d 108

BOWERS v. OLCH et al.

Civ. 19121.

District Court of Appeal, Second District, Division 3, California.

Sept. 8, 1953.

As Modified on Denial of Rehearing Sept. 30, 1953.

Hearing Denied Nov. 5, 1953.

Action against three surgeons, a hospital, and a nurse, as administrative supervisor of the hospital's operating rooms, for damages resulting from alleged negligence in leaving a needle in plaintiff's abdomen after a surgical operation on him. From a judgment of nonsuit as to one of the surgeons, the hospital, and the nurse by the Superior Court of Los Angeles County and a judgment thereof on a jury's verdict for the other surgeons, plaintiff appealed. The District Court of Appeal, Parker Wood, J., held that the res ipsa loquitur doctrine applied to the hospital's resident surgeon, assisting in the operation as second assistant surgeon, and to the hospital, as well as to the principal surgeon and the first assistant surgeon, but not to the nurse.

Judgment on the verdict reversed, and judgment of nonsuit reversed as to the resident surgeon and the hospital and affirmed as to the nurse.

1. Appeal and Error 🔑1050(1)

Evidence 🔑555

In action for alleged negligence in leaving a needle in plaintiff's abdomen after a surgical operation, admission of defendant principal surgeon's testimony as to how, in his opinion, the needle could or might have gotten into plaintiff's body, for purpose of rebutting inference raised by res ipsa loquitur doctrine that such defendant and defendant first assistant surgeon were negligent, was error prejudicial to plaintiff, in absence of evidence of existence of hypothetical facts assumed by witness as basis for such opinion.

2. Physicians and Surgeons 🔑18(8)

In action for alleged negligence in leaving a needle in plaintiff's abdomen after surgical operation, evidence was insufficient to support jury's verdict for principal surgeon and first assistant surgeon on theory that plaintiff sustained no damage, though there was substantial evidence that removal of needle by another surgeon was unnecessary and that it was so encased in adhesions as to be harmless to plaintiff, where such other surgeon testified that needle had punctured colon and caused peritonitis, operation to remove it lasted about four hours, plaintiff was in hospital 70 days, surgeon charged $5,000 for operation, and plaintiff suffered mental anxiety as result of knowing that needle was in his body.

3. Hospitals 🔑7

Every person in whose custody hospital patient is placed for any period is bound to exercise ordinary care to see that no unnecessary harm comes to him, and each of such persons is liable for injury to him as result of failure to exercise such care.

4. Physicians and Surgeons 🔑18(6)

In action for alleged negligence in leaving needle in plaintiff's abdomen after surgical operation on him in hospital, res ipsa loquitur doctrine applied to hospital's resident surgeon, assisting in operation as second assistant surgeon, as he had custody of plaintiff jointly with principal surgeon and first assistant surgeon.

5. Hospitals 🔑7

A hospital is liable for its employee's negligence in caring for patient in hospital.

6. Hospitals 🔑8

In action against hospital and its resident surgeon, as well as principal and first assistant surgeons, whom resident surgeon assisted in operation on hospital patient, for injuries to him as alleged result of negligence in leaving needle in his abdomen after operation, res ipsa loquitur doctrine applied to hospital, as well as to all such surgeons.

7. Physicians and Surgeons ⚷18(6)

In action for alleged negligence in leaving needle in plaintiff's abdomen after surgical operation on him in hospital, res ipsa loquitur doctrine was inapplicable to defendant registered nurse, who, as supervisor of hospital's operating rooms, assigned two competent nurses to attend operation, and was not herself present thereat or in any other place with plaintiff and had no control over or custody of him.

8. Physicians and Surgeons ⚷16

A registered nurse, acting as supervisor of hospital's operating rooms in assigning nurses to attend operation on patient, was not liable because of such assignment for injuries to patient as result of negligence in leaving needle in his abdomen after operation.

9. Master and Servant ⚷310

The respondeat superior doctrine is inapplicable to relationship between employer's supervising employee and his subordinate employees, for whose negligence in performance of their work law shifts financial responsibility from supervisor, exercising immediate control over subordinate employees, to employer. Civ.Code, § 2351.

10. Limitation of Actions ⚷95(1)

The statute of limitations as to action against surgeon for malpractice in leaving foreign substance in patient's body after performing operation on him does not commence to run until patient discovers or by reasonable diligence should discover that such substance was left in his body. Code Civ.Proc. § 340, subd. 3.

11. Limitation of Actions ⚷95(1)

A malpractice action, commenced within year after plaintiff discovered that a needle was left in his abdomen after surgical operation on him in hospital, was not barred by statute of limitations as to hospital's resident surgeon participating in operation, which was performed over one year before commencement of action, as statute of limitations did not commence to run as to such surgeon until plaintiff discovered that needle was left in his body. Code Civ.Proc. § 340, subd. 3.

12. Limitation of Actions ⚷172

Since action, commenced within year after plaintiff discovered that a needle was left in his abdomen after surgical operation on him, to recover damages for surgeons' alleged negligence, was not barred by statute of limitations as to defendant hospital's codefendant resident surgeon, who assisted defendant's principal and first assistant surgeons as second assistant surgeon in operation, action was not barred as to hospital. Code Civ.Proc. § 340, subd. 3.

13. Limitation of Actions ⚷95(1)

The statute of limitations as to malpractice suits does not start to run until plaintiff discovers or by exercising reasonable care should discover wrongful injury complained of. Code Civ.Proc. § 340, subd. 3.

14. Limitation of Actions ⚷199(1)

The questions as to when plaintiff in malpractice suit discovered or should have discovered his injury and its actionable origin, so as to start running of statute of limitations are for trier of facts. Code Civ.Proc. § 340, subd. 3.

15. Evidence ⚷538

In action against three surgeons, a hospital, and a nurse, who, as administrative supervisor of hospital's operation rooms, assigned two competent nurses to attend surgeons' operation on plaintiff, to recover damages for negligence in leaving a needle in plaintiff's abdomen after operation, another surgeon, who performed operation to remove needle, was qualified witness to testify that established general practice in hospitals wherein he had performed operations was for two nurses attending operation to count sponges and instruments, including needles, simultaneously.

◆

Morris Lavine, Los Angeles, for appellant.

De Forrest Home, Los Angeles, for respondents Olch, Shulman and Freiden.

Schell, Delamar & Loring, Los Angeles, for respondent Cedars of Lebanon Hospital.

Loeb and Loeb, and John L. Cole, Los Angeles, for respondent Pearson.

Clarence Hansen, Los Angeles, amicus curiae on behalf of appellant.

PARKER WOOD, Justice.

Action against three surgeons, a hospital, and the supervisor of the operating rooms for damages resulting from alleged negligence during a surgical operation. Trial was by jury. Motions for nonsuit were granted as to the second assistant surgeon (who was the resident surgeon of the hospital), the hospital, and the nurse. Judgment of nonsuit was entered pursuant thereto. Verdicts were in favor of the principal surgeon and the first assistant surgeon, and judgment was entered pursuant thereto. Plaintiff appeals from the judgment of nonsuit and the judgment based upon the verdict. He contends that the verdict was contrary to the evidence; that the court erred in granting the motions for nonsuit, in admitting and excluding certain evidence, in instructing the jury, and in refusing to allow an amendment to the complaint.

On June 25, 1946, Dr. Isaac Y. Olch, who was employed and paid by plaintiff, performed an operation upon plaintiff at the Cedars of Lebanon Hospital and removed about three-fourths of plaintiff's stomach. Dr. Alex Shulman, who was employed and paid by Dr. Olch, assisted in the operation as the first assistant surgeon. Dr. Morris Freiden, who was employed and paid by the Cedars of Lebanon Hospital as surgical resident, assisted in the operation as the second assistant surgeon. Helen Pearson, who was a registered nurse and the administrative supervisor of the nine operating rooms of the hospital, assigned two nurses to attend the operation, and they were in the operating room during the operation. Miss Pearson was not in the operating room.

About April 1, 1950, plaintiff who had had recent attacks of fever and had enlarged lymph glands under his jaw and arms, was examined by Dr. Simkin at the Midway Hospital in Los Angeles. The examination showed tenderness particularly in the stomach along the right rib margin. X-rays of plaintiff, taken in that hospital on April 7, 1950, showed a curved surgical needle within the soft tissues of the left upper quadrant (of the abdomen) below the rib margin. Dr. Simkin did not tell plaintiff that the X-rays showed a needle. (That doctor testified that the wife of plaintiff, who is a nurse, saw those X-rays on April 7th.) On April 8th Dr. Simkin discussed the matter of the needle with Dr. Olch and sent the X-rays to him. About April 16, 1950, plaintiff heard for the first time that a needle was in his abdomen—he heard a technician at the Midway Hospital say that an X-ray showed a needle in the plaintiff's stomach. Appellant went to Dr. Olch's office on April 20th and Dr. Olch showed him the X-ray and told him that it was not necessary to remove the needle since it was undoubtedly encased in scar tissue, but if he wanted it removed it could be removed without cost to him. Plaintiff declined that offer and went to see Dr. Furnish. (On April 25th plaintiff and Dr. Simkin discussed the matter of the needle.) On July 14, 1950, Dr. Furnish operated upon plaintiff, in the presence of Drs. Olch, Shulman and Freiden, and removed the needle. It took about four hours to perform the operation—the needle was in the splenic flexure of the large intestine in a band of fibrous tissue or adhesions, which band was about 2 inches long and 1 inch thick. In working the needle loose (in the adhesions) it broke in two.

[1] Appellant contends that the court erred in permitting Dr. Olch to give his opinion as to how the needle got into appellant's body. He (appellant) argues that the opinion was based upon surmise, conjecture and speculation and that such an opinion cannot be used to rebut the inference of negligence which arose under the doctrine of res ipsa loquitur. The needle was left in appellant's abdomen during the operation by Dr. Olch in 1946. Dr. Olch testified that he did not know how the needle got into appellant's abdomen; that in his opinion he did not leave the needle there; that he had no specific independent

recollection of the operation in 1946. Counsel (Mr. Home) for Drs. Olch, Shulman and Freiden asked Dr. Olch as follows: "Do you have an opinion as to how the needle in this case got into the body of Mr. Bowers?" Dr. Olch answered: "Yes, I do. It got in in one of two ways, in my opinion." Thereupon counsel for appellant said: "I object to this. It is a question for the jury to determine. It is incompetent, irrelevant and immaterial." The judge said: "I don't know how the jury is going to get inside that incision and see how it got there unless somebody tells them." The objection was overruled, and Dr. Olch testified: "These laparotomy pads are put up in packages of six. They are put up in these packages in the supply room of the operating suite. We have an operating suite of nine rooms, nine operating rooms. We must have around 50 nurses and trained attendants who prepared these pads. The pads are done just like this, the rings folded inside. They are piled in sixes and either tied with string or wrapped together and then sterilized. All this goes on at this large table where all the nurses and attendants work at it and do these things. Now, one way that this needle could have gotten in is that in the course of the preparation of these pads at some previous time a needle may have gotten stuck or attached to the pad and it was not seen or noticed, and it was sterilized with the other pads, and then came on our table; so that it was a needle that was brought into the wound by the pad that was used in the wound, the needle having accidentally gotten stuck to the pad at some previous time. The other way in my opinion that it could have gotten in was that the nurse and the second assistant, who in this case was Dr. Freiden, were the two men who would pass sponges to us—

"Q. [By Mr. Home] Two people, you mean? A. [By Dr. Olch] Dr. Freiden usually passed to Dr. Shulman these sponges, and they are kept on this little Mayo tray where these needles are, and it is perfectly possible that as a sponge is quickly picked up and passed into the field it may have picked up a needle with it, and when the sponge is used to pack off intestines, left in the wound in that manner."

It is agreed that under the doctrine of res ipsa loquitur plaintiff made a prima facie case against respondents, Drs. Olch and Shulman. Respondents argue that Dr. Olch gave his opinion, as an expert, that the needle got into the abdominal cavity in one of two ways; and that the opinion was admissible to rebut the inference of negligence raised by the doctrine of res ipsa loquitur. The doctor did not assert that he observed any occurrence or heard any statement or thing that would indicate that a needle did stick to a pad or was picked up by a sponge. He did not state any fact as a foundation for his opinion. His opinion was not based upon any occurrence during the preparation of the pads, or during the operation, from which an expert in surgery or otherwise could properly form an opinion that while packages of pads were being prepared in the supply room a needle actually did stick to a pad, and later the pad (with the needle adhering thereto) was placed in the abdominal cavity; or that a needle was picked up, during the operation, by a sponge which was on the tray with the needle, and that the sponge (with the needle adhering thereto) was placed in the abdominal cavity. Such an opinion was in effect a statement that if any of the 50 nurses and attendants who helped prepare the pads in the supply room put a pad against a needle and the needle stuck to the pad, and if that pad with needle attached were brought into the operating room, and if they were placed in the body, the needle could have or might have become detached from the pad while the pad was in the body; or if a sponge upon a tray in the operating room picked up a needle which was also on the tray, and if the sponge with the needle attached were handed by a nurse to Dr. Freiden, and if he handed them to Dr. Olch, and if Dr. Olch placed them in the body, it is "perfectly possible" the needle could have or might have become detached from the sponge while it was in the body. There was no evidence herein that any such factual conditions existed. There was no basis for assuming such a hypothetical set of facts as a basis for such an expert opinion. If such an opinion were admissible, it would seem that it would also be proper for a doctor, called as a witness by plaintiff, to testify (without any factual foundation for his opinion) that in his opinion it is "perfectly possible" that Dr. Olch or Dr. Shulman could have or might have dropped a needle into the body while they were using the needle holders or clamps in handing needles back and forth above the body. Also if such opinion evidence were proper, it would seem that the best witness, in a case similar to this, would be one with the best imagination as to the various combinations of events that could or might "possibly" cause a needle to be left in a body. The opinion herein of Dr. Olch was merely his conjecture as to how the needle could have or might have gotten into the abdominal cavity. It was prejudicial error to receive that evidence.

[2] Said respondents (Drs. Olch and Shulman) also assert that in any event the evidence was sufficient to support the verdict on the theory that the jury found liability, but further found that plaintiff sustained no damage. They argue that there was substantial evidence that it was not necessary to remove the needle and that the needle in appellant's body was so encased in adhesions that it was harmless to plaintiff. (Testimony of Dr. Olch and other doctors called as witnesses by respondents.) Before the operation to remove the needle was performed, it was not known whether the needle was encased in adhesions. Dr. Furnish testified that it was necessary to remove the needle, that it had punctured the colon, caused peritonitis and the illness which plaintiff suffered preceding the finding of the needle. The operation to remove the needle lasted about four hours, plaintiff was in the hospital 70 days, and the surgeon's charge for the operation was $5,000. Even if it be assumed that the testimony of Dr. Furnish was disregarded by the jury, it cannot be said that the leaving of the needle in plaintiff's body was beneficial or that it did not damage him to some extent. Even if it would have been good judgment, as said respondents assert, not to remove the needle, it cannot be said that the presence of the needle in the body was not damaging to plaintiff, at least to the extent that plaintiff suffered mental anxiety as a result of knowing that the needle was in his body. He said that he nearly went crazy and was very nervous when he learned about the needle. A finding that plaintiff was not damaged at all would not have been supported by the evidence.

[3, 4] Appellant also contends that the court erred in granting the motions for nonsuit by Dr. Freiden, the hospital and Miss Pearson. He argues that the doctrine of res ipsa loquitur was applicable as to them and that they should have been required to rebut the inference of negligence. He cites the case of Ybarra v. Spangard, 25 Cal.2d 486, 154 P.2d 687, 162 A.L.R. 1258, and asserts that under the decision therein the said doctrine was applicable to all the defendants herein. In said Ybarra case the court said, 25 Cal.2d at page 491, 154 P.2d at page 690: "Every defendant in whose custody the plaintiff was placed for any period was bound to exercise ordinary care to see that no unnecessary harm came to him and each would be liable for failure in this regard." Dr. Freiden assisted in the operation as second assistant surgeon, and in that capacity he performed duties ordinarily performed by an intern. As resident surgeon at the hospital it was his duty to assign interns and assistant resident surgeons to their various duties, and it was also his duty to assist the attending physicians and to direct the care of patients on the clinic service. Dr. Olch testified that in performing the operation herein there were four persons "on the team" in a group around the operating table; the team consisted of himself, Dr. Shulman, Dr. Freiden and a nurse; they "worked as a team" in the operation on plaintiff; his first assistant assisted him in making a cut; the sewing up inside and outside was done by him with Dr. Shulman and Dr. Freiden assisting him. Dr. Freiden testified that he did not remember this particular operation; he found out that he helped Dr. Olch do an operation on plaintiff; he did not remember whether he pulled or handled any needles, and if he were second

assistant he would have no occasion to do it. The participation of Dr. Freiden in the operation was such that, under the decision in the Ybarra case, he had custody of plaintiff jointly with the other doctors. The doctrine of res ipsa loquitur applies to Dr. Freiden.

[5, 6] As to the applicability of said doctrine to the hospital, it appears, as above shown, that Dr. Freiden was employed by the hospital as resident surgeon and was paid by the hospital. A hospital is liable for the negligence of its employee in caring for a patient in the hospital. See Cavero v. Franklin etc. Benevolent Soc., 36 Cal.2d 301, 308, 223 P.2d 471. The doctrine of res ipsa loquitur was applicable to the hospital herein.

[7–9] As to Miss Pearson, it appears that she, as supervisor of the nine operating rooms, assigned two competent nurses to attend the operation, that she was not present at the operation or any other place with plaintiff, and she had no control or custody of plaintiff. The said doctrine was not applicable to her. Furthermore, she was acting as a supervising employee of the hospital in assigning the nurses and, under the circumstances here, she would not be liable by reason of the assignment. In Malloy v. Fong, 37 Cal.2d 356, at pages 378, 379, 232 P.2d 241, at page 254, it was said: "The doctrine of *respondeat superior* is not applicable to the relationship between a supervisor and his subordinate employees. * * * It is not the supervisor's work that is being performed * * *. For these reasons, the law has shifted financial responsibility from the supervisor, who exercises immediate control, to the employer * * *. Section 2351 of the Civil Code codifies this principle and has been uniformly interpreted to exempt superior employees from vicarious liability to third persons for the tortious conduct of subordinates." It was proper to grant Miss Pearson's motion for a nonsuit.

[10, 11] Appellant also contends that the action against Dr. Freiden and the hospital was not barred by the statute of limitations, since the action was commenced within one year after appellant discovered that the needle had been left in his body. Those respondents (Dr. Freiden and the hospital) assert that the action was barred as to them one year after June 25, 1946, the date the operation was performed by Dr. Olch. This action was commenced on May 9, 1950. Appellant discovered on or about April 16, 1950, that the needle had been left in his body. As to Dr. Freiden, he participated in the operation in which a foreign substance (needle) was left in appellant's body. If a surgeon performing an operation upon a person leaves a foreign substance in the body, the statute of limitations as to an action against him, based upon alleged malpractice, does not commence to run until the said patient has discovered, or by reasonable diligence should have discovered, that a foreign substance was left in his body. Pellett v. Sonotone Corp., 55 Cal.App.2d 158, 160, 130 P.2d 181; Costa v. Regents of Univ. of California, 116 Cal.App.2d 445, 254 P.2d 85; Huysman v. Kirsch, 6 Cal.2d 302, 312–313, 57 P.2d 908. In Huysman v. Kirsch, supra, the court applied the principle applicable in workmen's compensation cases, with respect to the statute of limitations, to a malpractice case. It was said therein, 6 Cal.2d at page 312, 57 P.2d at page 913: "The principle * * * approved by our decision [referring to a workmen's compensation case], was that the statute of limitations should not run against an injured employee's right to compensation during the time said person was in ignorance of the cause of his disability and could not with reasonable care and diligence ascertain such cause." It was further stated therein, 6 Cal.2d at page 313, 57 P.2d at page 913: "We can see no good reason why, if the statute of limitations did not begin to run in one case [workmen's compensation case], that it should run in the other [where surgeon left rubber tube in body]." The statute of limitations did not commence to run as to Dr. Freiden until appellant discovered that the needle had been left in his body. The action as to Dr. Freiden was not barred by the statute of limitations, Code Civ.Proc. § 340, subd. 3.

[12–14] With reference to the hospital, it appears that Dr. Freiden was its agent and that since the action was not barred as to him it would not be barred as to the hospital. In Costa v. Regents of Univ. of California, supra, the plaintiff received X-ray and other medical treatments at the University of California Hospital from two physicians who were employed by the hospital. The hospital was conducted under the authority of the regents of the university. The last time plaintiff therein went to the hospital for treatment by the two physicians was January 10, 1947. That action was commenced November 5, 1948 (about 20 months after the last time plaintiff went to the hospital and physicians for treatment). Judgment in the trial court therein was in favor of the regents and the physicians. On appeal therein, it was contended by the regents and the physicians that the action was barred by the statute of limitations. The court held, on appeal, that the action was not barred. The judgment in that case was reversed as to the regents and the physicians. The court said, 116 Cal.App.2d at pages 454, 455, 254 P.2d at page 91: "[T]he rule is settled in this state that in malpractice cases the statute cited does not start to run until the date of discovery, or the date when, by the exercise of reasonable care plaintiff should have discovered the wrongful injury. * * * Although Huysman v. Kirsch and some of the cases following it related to foreign substances negligently left by the defendant in the body of the patient, the rule is not restricted to such cases. * * * In Airola v. Gorham, 56 Cal.App.2d 42, 46, 133 P.2d 78, this court quoted the rule of Huysman v. Kirsch even as an example of a broader principle applicable also outside the field of malpractice. As in compensation cases * * * the issues when the plaintiff discovered his injury and its actionable origin, or should have discovered them * * * are questions for the trier of facts." In the present case, the action as to the hospital was not barred by the statute of limitations.

By reason of the above conclusion that the motion for a nonsuit was properly granted as to Miss Pearson (the supervisor), it is not necessary to discuss the contention that the action as to her was also barred by the statute.

[15] Appellant also contends that the court erred in striking out the testimony of Dr. Furnish to the effect that the established general practice in hospitals in this community in 1946 was that two nurses count simultaneously the sponges and instruments, which include needles. The motion of respondents to strike that testimony was made upon the ground that the witness was not qualified to testify on that subject. Dr. Furnish testified that he had practiced medicine and surgery in California since 1932, and since that time had performed an average of 400 or 500 major operations per year; in 1946 he was part owner of two hospitals, and was connected with the Bellevue, Alvarado, Suburban and Culver City Hospitals; that he had performed operations in the following hospitals: Hollywood Presbyterian, Methodist, Queen of Angels and St. Vincent's; he knew the practice, with respect to counting needles, in the Methodist Hospital and St. Vincent's Hospital but he did not know the practice in the following hospitals: Good Samaritan, California Lutheran, Hollywood Presbyterian, Queen of Angels, White Memorial or General. The judge said, in ruling upon the motion to strike out the testimony, that the matter regarding the counting of needles in hospitals was immaterial. Dr. Furnish was a qualified witness. One of the nurses, present during the operation upon plaintiff, testified that she had no recollection of attending the operation; that at that time in 1946 she would not count the needles; that as the practice was in 1946 the other nurse would not routinely have counted the needles. The other nurse, present at the operation, testified that she did not remember attending the operation, and did not remember counting any needles from June 23 to September 6, 1946. The court erred in striking out said testimony of Dr. Furnish.

By reason of the above conclusions, it is not necessary to discuss other contentions on appeal.

The judgment (upon the verdict) as to defendants Dr. Olch and Dr. Shulman is reversed. The judgment of nonsuit as to Dr. Freiden and the Cedars of Lebanon Hospital is reversed. The judgment of nonsuit as to defendant Pearson is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

Hearing denied; EDMONDS and SPENCE, JJ., dissenting.

LAUBISCH v. ROBERDO et al.[*]

Civ. 19299.

District Court of Appeal, Second District, Division 3, California.

Sept. 16, 1953.

Hearing Granted Nov. 12, 1953.

Action to quiet title to realty and for damages and rent. The Superior Court of Los Angeles County, rendered a judgment adverse to defendant and defendant appealed. The District Court of Appeal, Parker Wood, J., held that evidence did not establish that sale of realty to plaintiff under writ of enforcement of default decree of foreclosure entered in action to foreclose mechanic's lien recorded against the realty, was duly, regularly and timely held.

Judgment reversed with direction.

Prior opinion 259 P.2d 66.

1. Time 🔑10(1)

Under presidential proclamation stating that day of funeral of former President of United States was day of mourning and prayer, and failing to state that it was a holiday or a day for public fast or thanksgiving, such day was not a "holiday" within statutory provision extending period of time for performance of act provided or required by law to be performed within a specified period of time by such number of days as equal number of holidays appointed by President or by Governor which occur within or during such period. Code Civ. Proc.1949, § 12a(b); Political Code, § 10.

See publication Words and Phrases, for other judicial constructions and definitions of "Holiday".

2. Time 🔑10(1)

August 16, 1945, known as "V-J Day", was not a "holiday" within statutory provision extending period of time for performance of act provided or required by law to be performed within a specified period of time by such number of days as equal number of holidays appointed by President or by Governor which occur within or during such period, since there was no proclamation that such day was to be holiday for all persons, and executive order subsequently listed such day as holiday after such day had passed and then for limited purpose, and since executive order did not limit or restrict access to public offices or institutions for transaction of business on such day. Code Civ.Proc.1949, § 12a(b); Political Code, § 10; Proclamations Nos. 2648, 2660, U.S. Code Congressional Service 1945, pp. 1179, 1193; Executive Order No. 9240, U.S. Code Congressional Service 1942, p. 1251; Nos. 9597, 9600, U.S. Code Congressional Service 1945, pp. 1289, 1293.

3. Quieting Title 🔑44(4)

In action to quiet title to realty, evidence did not establish that sale of realty to plaintiff under writ of enforcement of default decree of foreclosure entered in action to foreclose mechanic's lien recorded against a realty was duly, regularly and timely held. Code Civ.Proc.1949, §§ 674, 681, 684, 685.

◆

Ernest W. Pitney, Los Angeles, for appellant.

Glen Behymer, Los Angeles, for respondent.

PARKER WOOD, Justice.

Action to quiet title to real property and to recover damages and rent. Defendant

---

[*] Subsequent opinion 277 P.2d 9.

Lily A. Cowan, in her answer to the complaint, denied that plaintiff was the owner of the property, admitted that she claimed an interest in the property adverse to plaintiff; and as an affirmative defense alleged that she had been in possession of the property, under a written contract of purchase, from August 21, 1942 to the date of the answer, had paid all taxes on the property during that time, and that plaintiff had no right, title or interest in said property. The judgment was that plaintiff is the owner of and entitled to possession of the property, and that he recover from defendants rent in the sum of $1,295; that defendants and those claiming under them are restrained from asserting any title to the property adverse to plaintiff. Defendant Lily A. Cowan appeals from the judgment.

At the trial the parties stipulated as follows: On January 1, 1939, the Title Insurance and Trust Company was vested with legal title to the property here involved. On that date said company made an executory contract to convey the property to Mora Willison. On September 26, 1939, Mora Willison assigned the contract to Violet E. Bell. Thereafter, Violet E. Bell had improvements made on the property, and, as a result thereof, the Hammond Lumber Company recorded a claim of mechanic's lien on August 16, 1940. In an action to foreclose the lien, the defendants, the Title Insurance and Trust Company and Violet E. Bell, defaulted. A decree of foreclosure, which ordered the sale of the property, was entered January 27, 1941. The value of the property at the time of said decree was about $1,500. On August 21, 1942, Violet E. Bell assigned her interest under the contract to defendant Lily A. Cowan and her husband, S. B. Cowan, as joint tenants. S. B. Cowan died on August 19, 1947. The Title Insurance and Trust Company made a deed, dated April 27, 1944, which recited that the property was conveyed to Mabel Roberdo. On January 16, 1946, Hammond Lumber Company instructed the commissioner, who had been appointed in the decree of foreclosure, to proceed with the sale. On February 7 or 8, 1946, a writ of enforcement was issued. On March 5, 1946, the commissioner sold the property to plaintiff (for $201), and issued his certificate of sale. On March 7, 1947, a deed to the property, executed by the commissioner, was recorded. On May 18, 1949, Mabel Roberdo conveyed the property by a deed to Jennie Wentworth, which deed was recorded June 24, 1949. On July 29, 1949, Jennie Wentworth made a conveyance to Lily A. Cowan, which was recorded on November 23, 1949. The payments provided for under the (above-mentioned) agreement of sale between the Title Insurance and Trust Company and Mora Willison were made by Mr. and Mrs. Cowan from August 21, 1942 to and including September 1, 1949, at which time the balance of the contract price was paid by Mrs. Cowan. The taxes on the property for the years 1940–41 and 1941–42 were paid by the Title Insurance and Trust Company. The taxes for the years 1943, 1944, 1946, 1948 and 1949 were paid by Mr. and Mrs. Cowan. Plaintiff paid the taxes in April, 1947, which consisted of the first installment, which was then delinquent, the penalty, and the second installment, which would have become delinquent the next day. On November 1, 1941, plaintiff delivered a check to the tax collector, and received a bill (plaintiff's Exhibit 8) which was stamped paid on November 25, 1949. One George Hath was in possession of the property as a purchaser under a contract with the Cowans, and he later became a tenant of the Cowans. Since October 13, 1947, someone connected with the "defense" has been in possession of said property.

Plaintiff, who was the only witness, testified: that on March 8, 1947 (the day after the commissioner's deed was recorded), he went upon the premises and found George Hath and his family in possession of the premises; Hath told plaintiff he had purchased the property from Mr. and Mrs. Cowan on a conditional sales contract; that he was behind in his payments and the Cowans "cancelled out" on him and he lost everything he had paid; Hath stated he finally made an arrangement with the Cowans to remain on the premises and pay rent, —paying the rent by making repairs on the premises; plaintiff notified Hath that he had purchased the property and Hath said that he was going to move the following weekend "as there was an action pending" (municipal court file, entitled Cowan v. Hath, was received in evidence by reference); about a week later Hath, who had not moved from the property, told plaintiff that he was going to move the following weekend; on April 3, 1947, plaintiff rented the property to William Hamilton for a period of one year from April 17, 1947; Hath moved from the property on April 5th; Hamilton and his family went into possession on April 5th and remained there until October 13, 1947; on October 14, 1947, plaintiff went to the premises and found the house vacant and the doors and windows open; while he was locking the house, appellant (Mrs. Cowan) appeared and demanded possession; a Mr. Sullivan, who lived next door, appellant and another woman lunged against the front door and tried to break in, and plaintiff then called the police; after the officers arrived, they called a city attorney, and arranged for a meeting of the parties at 4 o'clock on that day (with the city attorney); plaintiff, appellant and her attorney attended the meeting; each party told the city attorney what his interest was; the city attorney then said it was a question of title about which nothing could be done at the moment and told the parties there should be no violence; plaintiff then returned to the premises and found that Mr. Sullivan had broken into the premises and taken possession; after plaintiff purchased the property he did not communicate with the Cowans and tell them he had purchased it; the first time he met Mrs. Cowan was on the property in October, 1947; he paid $201 for the property; he entered into a written lease with the Hamiltons and received $420 from them at the time of the execution of said lease; no part of that sum has been repaid.

The court found, among other things, that plaintiff has been the owner of the property involved herein since March 7, 1947; that about October 14, 1947, while plaintiff was the absolute owner and entitled to possession of the premises, defendant Lily A. Cowan entered into possession of the premises without license from plaintiff and wrongfully withheld possession of the premises and still continues to withhold possession thereof from plaintiff; it is not true that defendant Lily A. Cowan paid all taxes upon said real property during the period elapsing between the date of plaintiff's acquisition of title and the date of the trial of the action herein, but that it is true that plaintiff paid part of the taxes during said period; it is not true that defendants or either of them acquired any interest or title in said premises by adverse possession; plaintiff acquired title to said property by purchasing it at a mechanic's lien foreclosure sale, conducted under a writ of enforcement of the foreclosure decree which directed the sale of the property by the commissioner; the commissioner duly and regularly conducted the sale and issued the commissioner's certificate of sale to plaintiff; the sale under the writ of enforcement held on March 5, 1946 was duly, regularly and timely held; no redemption was made "from said sale," and the commissioner's deed, pursuant to said certificate of purchase, was duly and regularly made and was recorded March 7, 1947.

Respondent's (plaintiff's) claim of title is based upon the commissioner's deed which he received as purchaser of the property at the foreclosure sale.

Appellant (defendant) contends that the finding that it is true that the sale under the writ of enforcement was duly, regularly and timely held is not supported by the evidence. She argues that the sale was not held timely because the writ of enforcement was not issued within five years after the date of entry of judgment on January 27, 1941. The writ of enforcement bears the stamped date of February 7, 1946 but above the stamped figure "7" is the pen-and-ink figure "8." It is therefore not clear whether the writ was issued on February 7th or 8th. The attorney for plaintiff said, at the trial, that the date is "probably February 8th." The trial judge said, in his memorandum opinion, that the date "is probably February 8, 1946," and that "the writ of enforcement issued on February 8, 1946, was within the five-year period." It appears that the judge and the attorneys proceeded upon the basis that the writ was issued on February 8th. If it be assumed that the writ was issued on February 8, 1946, it was issued 12 days after the expiration of five years from the entry of the judgment on January 27, 1941. Respondent (plaintiff) asserts, however, that the five-year period had not expired for the reason the said period was extended under the provisions of section 12a(b) of the Code of Civil Procedure, in that, the President or Governor appointed 12 such holidays as those which are referred to in that section.[1] According to the written opinion of the trial judge, those 12 days extended the said five-year period. If said period were extended by those 12 days, the period as extended would have expired on February 8, 1946, and therefore the writ of enforcement would have been issued on the last day of the five years as extended. Appellant asserts that two of said 12 days were not holidays appointed by the President or Governor as referred to in said section. The two days so referred to by appellant are April 14, 1945, which was the day of the funeral of President Franklin D. Roosevelt, and August 16, 1945, known as a "V-J Day."

Section 10 of the Political Code (now section 6700(n) of the Government Code) provides that holidays include "every day appointed by the President of the United States or by the Governor of this State for a public fast, thanksgiving or holiday".

[1] With reference to April 14, 1945, the proclamation of President Truman did not state that it was a holiday or a day for public fast or thanksgiving. It did not state, as asserted in respondent's brief, that it was "a day of special fast, mourning and prayer." The proclamation[2] was that it was a day of "mourning and prayer." Said April 14th was not a holiday within the meaning of said section 12a.

[2] With reference to August 16, 1945, there was no proclamation by President Truman that said day was a day for public fast or thanksgiving. On August 17, 1945, an Executive Order[3], No. 9597, of President Truman (pertaining to compensation to be paid for work done on holidays) was filed. That order, dated August 14, 1945, amended Executive Order No. 9240, U.S. Code Congressional Service 1942, p. 1251 (pertaining to such compensation) which

---

[1] Section 12a of the Code of Civil Procedure (in effect during the period involved here) provided in part: "As to any act provided or required by law to be performed within a specified period of time, such period of time is hereby extended—

"(a) * * *

"(b) By such number of days as equals the number of holidays (other than special holidays) appointed by the President or by the Governor and which occur within or during such period; and

"(c) * * *."

[2] Proclamation 2648, dated April 13, 1945, U. S. Code Congressional Service 1945, p. 1179, Federal Register, Vol. 10 (1945), page 4009: "A proclamation To the People of the United States: It has pleased God in His infinite wisdom to take from us the immortal spirit of Franklin Delano Roosevelt, the 32nd President of the United States. * * * Now, therefore, I, Harry S. Truman, President of the United States of America, do appoint Saturday next, April 14th, the day of the funeral service for the dead President, as a day of mourning and prayer throughout the United States. I earnestly recommend the people to assemble on that day in their respective places of divine worship, there to bow down in submission to the will of Almighty God, and to pay out of full hearts their homage of love and reverence to the memory of the great and good man whose death they mourn. * * * Harry S. Truman."

[3] Executive Order 9597 "Amending Executive Order No. 9240 Entitled 'Regulations Relating to Overtime Wage Compensation.' By virtue of the authority vested in me * * * it is ordered that Section I B of Executive Order No. 9240 of September 9, 1942, entitled 'Regulations Relating to Overtime Wage Compensation', be, and it is hereby, amended to read as follows: 'No premium wage or extra compensation shall be paid for work on customary holidays except that time and one-half wage compensation shall be paid for work performed on any of the following holidays only: New Year's Day Fourth of July Labor Day Thanksgiving Day Christmas Day V–J Day and either Memorial Day or one other such holiday of greater local importance.' Harry S. Truman." U. S. Code Congressional Service 1945, p. 1289, Federal Register, Vol. 10 (1945), page 10111. Filed August 17, 1945.

was made by President Roosevelt on September 9, 1942. Said former Order No. 9240 provided: "No premium wage or extra compensation shall be paid for work on customary holidays except that time and one-half wage compensation shall be paid for work performed on any of the following holidays only: New Year's Day Fourth of July Labor Day Thanksgiving Day Christmas Day and either Memorial Day or one other such holiday of greater local importance." Said Order No. 9597, made by President Truman, amended said Order No. 9240 by inserting therein after the words "Christmas Day" the letters and word "V-J Day." Since no date was specified therein as "V-J Day," it cannot be concluded from the form of that order that August 16, 1945 was there referred to as a holiday. On August 20, 1945, an Executive Order [4], No. 9600, dated August 18, 1945, of President Truman was filed, which order also amended said Order No. 9240 by inserting therein after the words "Christmas Day" the following dates: "August 15, 1945 August 16, 1945". On August 25, 1945, an acting director of Office of Contract Settlement issued a regulation regarding "Fair Compensation for War Contractors," which related particularly to "Treatment of Amounts Paid to Employees for August 15 and 16, 1945." That regulation provided that "Amounts may be included in the settlement of terminated contracts * * * for payments made to employees for work done on August 15 and 16, 1945." Attached to that regulation was a memorandum [5] by President Truman, dated August 24, 1945, which stated in part: "When the news was received on August 14, 1945, that the Japanese had accepted the Potsdam declaration; a statement was issued from the White House that the days of August 15 and 16, 1945, would be declared holidays for war workers under Executive Order 9240, which provides for holiday premium pay." A proclamation [6] of President Tru-

---

[4] Executive Order 9600 "Amending Executive Order No. 9240 Entitled 'Regulations Relating to Overtime Wage Compensation'. By virtue of the authority vested in me * * * it is ordered that Section IB of Executive Order No. 9240 of September 9, 1942, entitled 'Regulations Relating to Overtime Wage Compensation', be, and it is hereby, amended to read as follows: 'No premium wage or extra compensation shall be paid for work on customary holidays except that time and one-half wage compensation shall be paid for work performed on any of the following holidays only: New Year's Day Fourth of July Labor Day Thanksgiving Day Christmas Day August 15, 1945 August 16, 1945 and either Memorial Day or one other such holiday of greater local importance.' Harry S. Truman." U. S. Code Congressional Service 1945, p. 1293, Federal Register, Vol. 10 (1945), page 10158. Filed August 20, 1945.

[5] Memorandum by President Truman, attached as Exhibit A to regulation of acting director of Office of Contract Settlement: "When the news was received on August 14, 1945, that the Japanese had accepted the Potsdam declaration; a statement was issued from the White House that the days of August 15 and 16, 1945, would be declared holidays for war workers under Executive Order 9240, which provides for holiday premium pay. An Executive Order effectuating this was subsequently issued; and the Secretary of Labor publicly expressed my hope that war workers who did not work on those days would be paid by their employers at straight-time rates. There was widespread observance of these holidays, which represented an appropriate recognition of the magnificent contribution made by war workers to our victory. In view of these actions, contractors who pay the war workers among their employees for time off taken during these two days should be reimbursed by the Government to the extent that the Government is compensating these contractors on a cost basis. * * * " (Federal Register, Vol. 10 (1945), page 10985.)

[6] Proclamation 2660 "(Victory; Day of Prayer) By the President of the United States of America.

"A Proclamation The war lords of Japan and the Japanese armed forces have surrendered. They have surrendered unconditionally. * * * It has come with the help of God * * *. Let us give thanks to Him, and remember that we have now dedicated ourselves to follow in His ways to a lasting and just peace and to a better world. Now, Therefore, I, Harry S. Truman, President of the United States of the United man (filed August 17, 1945), entitled "Victory: Day of Prayer," designated Sunday, August 19, 1945, as a day of prayer and thanksgiving for victory in the war with Japan. It thus appears that there was no *proclamation* by the President appointing August 16, 1945 as a holiday, but there was an Executive Order whereby August 16, 1945 was added to a list of holidays appearing in a former Executive Order, which former order provided that it was permissible to pay "time and one-half wage compensation" for work performed on the holidays listed therein. It also appears (from the President's memorandum attached to the regulation of the Office of Contract Settlement) that on August 14, 1945 "a statement was issued from the White House that the days of August 15 and 16, 1945, would be declared holidays for war workers under Executive Order 9240 [former order]," and that contractors who paid war workers for time off on those days should be reimbursed by the government. It is to be noted that the Executive Order which added August 16, 1945 to said list of holidays was made on August 18, 1945 which, of course, was after August 16th—the alleged holiday. It is also to be noted that the memorandum, attached to said regulation, states that said August 15 and 16 would be declared *holidays for war workers.* In other words, the Executive Order did not appoint or proclaim in advance of August 15 and 16 that said days would be holidays; and the statement issued by "the White House" on August 14th, referred to in the memorandum, was not a proclamation or appointment that August 15 and 16 would be holidays applicable to all persons, but it was a statement that those days would be declared holidays for a certain group or class of persons, namely, "war workers." Apparently the purpose of the Executive Order was to fix the compensation for persons who had worked on those days; and the purpose of the memorandum was to provide for reimbursement of employers who paid war workers who did not work on those days. It does not appear that those days were designated holidays at such a time and in such a manner that public offices and institutions would not be open for transaction of business on those days. The order made after said days had passed would not limit or restrict, of course, the transaction of business on said days. If the statement issued by the White House on August 14th be regarded as a proclamation that August 15 and 16 were holidays, then it appears that those days were special holidays applicable to war workers. Section 10 of the Political Code provides: "A special or limited holiday is hereby defined as a holiday applying only to a special class or classes of business, or a special class or classes of persons, and not appointed to be generally observed throughout the State by all classes of business and all classes of persons." Said Section 10 also provides that: "* * * on any day appointed by the President or by the Governor as a special or limited holiday all courts, public schools and public offices of this State and of any city, county * * * shall be open and shall function in their normal and usual manner and all other public functions shall be performed as on days which are not holidays and all contracts shall be performed and business transacted as usual except only as to or by the particular class of business or persons expressly limited or restricted by the provisions of the proclamation appointing or declaring such special or limited holiday." Section 12a of the Code of Civil Procedure provides that special holidays do not extend time under said Section 12a. The purpose in enacting said Section 12a of the Code of Civil Procedure was to give persons, who were required by law to perform a certain act within a certain time, an ex-

States of America, do hereby appoint Sunday, August 19, 1945, to be a day of prayer. I call upon the people of the United States, of all faiths, to unite in offering their thanks to God for the victory we have won, and in praying that He will support and guide us into the paths of peace. I also call upon my countrymen to dedicate this day of prayer to the memory of those who have given their lives to make possible our victory. * * * Harry S. Truman." U. S. Code Congressional Service 1945, p. 1193, Federal Register, Vol. 10 (1945), page 10111.

tension of time within which to perform the act, if the President or Governor should appoint a holiday within the period when the act should be performed—the extension of time to be equal to the number of such holidays. Said Section 12a, added to the Code of Civil Procedure on March 10, 1933, was declared to be an urgency measure, and it went into effect immediately. At that time there was a financial and business depression throughout the state and nation, and the Legislature considered that by reason of economic conditions it might be necessary to declare holidays by executive proclamation. That such was the purpose of the section and that those were the circumstances under which it was enacted are indicated by the statements of the Legislature in declaring the section to be an urgency measure. In the 1933 Statutes (in enacting said Section 12a and other sections) it was said at page 307: "The facts constituting the necessity [for declaring the statute an urgency measure] are as follows: The necessity of declaring holidays by executive proclamation, due to economic conditions, and the possible continuance of such necessity for a greater or shorter period, require that suitable changes in the law, effected by this act, be made immediately, in order *to avoid or prevent the loss or impairment of rights dependent upon the performance of acts required to be performed within a specified period of time.*" (Italics added.) Since there was no proclamation in advance of said August 15 and 16 or at all that said days were to be holidays for all persons, and since the Executive Order listed them as holidays after said days had passed and then only for the purpose of fixing compensation of employees and allowing reimbursement of employers, and since such references to said days as holidays did not limit or restrict (under the provisions of Section 10 of the Political Code) access to public offices or institutions for the transaction of business on those days, it appears that said days were not holidays that would extend time within the meaning of said Section 12a. Even if it be assumed that the said five-year period could be extended under said Section 12a, the 3 days, namely, April 14, 1945, and August 15 and 16, 1945, should not have been included as days which would extend time under said section. If those 3 days are eliminated from said 12 days, and if it be assumed that said five-year period could be extended under the section, then it would appear that the time was extended 9 days (instead of 12 days) and the last day of the five-year period would have been February 5, 1946. Assuming, but not deciding, that the five-year period could be extended under the section (to February 5, 1946), the writ of enforcement, whether issued on February 8th or 7th in 1946, was not issued within five years after the entry of judgment on January 27, 1941.

Respondent (plaintiff) asserted, in his petition for rehearing, that an additional Thanksgiving Day should be included in the list of days that would extend the five-year period. He refers to the two Thanksgiving Days in November, 1941, and asserts in effect that only one of them was included in said list of 12 days. The written opinion of the trial judge shows that he included Thanksgiving Day, November 27, 1941 (appointed by the Governor) as a holiday. (He referred to it as one of the undisputed holidays.) His opinion also shows that he found that Thanksgiving Day, November 20, 1941 (appointed by the President) was a holiday, and that he counted it as one of the 12 days. (He referred to it as one of the disputed holidays.) It therefore appears that both Thanksgiving Days in 1941 were included in the list of 12 days.

Respondent also contends that it was not necessary to have a writ of enforcement issued, for the reason that the decree of foreclosure in the mechanic's lien case created the lien against the property and directed that the property be sold to satisfy the amount of the lien. He argues that there was no limit as to the time when the sale could be made. Section 684 of the Code of Civil Procedure provides: "When the judgment is for money, or the possession of real or personal property, the same may be enforced by a writ of execution; and * * * when the judgment requires the sale of property, the same may be enforced by a writ reciting such judgment, or the material parts thereof, and directing the proper officer to execute the judgment, by making the sale and applying the proceeds in conformity therewith; * *." In Knapp v. Rose, 32 Cal.2d 530, 197 P.2d 7, the judgment debtors contended that only a writ of execution could issue properly and that because a document entitled "writ of enforcement" was obtained the certificate of sale and deed were void. The writ therein recited that a second judgment had been entered which ordered certain property to be sold, and a copy of the judgment was attached to the writ. The court therein said, 32 Cal.2d at page 534, 197 P.2d at page 9: "It is, therefore, immaterial whether the writ was entitled a 'writ of enforcement,' 'writ of execution,' or 'order of sale,' as long as the substance of it was sufficient and in conformance with the statute. The writ obtained by Rose [judgment creditor] fulfilled these requirements." A writ of enforcement was necessary herein. According to statutory provisions, a writ of enforcement should be issued within five years after the entry of judgment. Section 681 of the Code of Civil Procedure provides: "The party in whose favor judgment is given may, at any time within five years after the entry thereof, have a writ of execution issued for its enforcement. * * *" It was stated in Dorland v. Hanson, 81 Cal. 202, at page 204, 22 P. 552, at page 553, that: "Section 681 must be held to apply to a judgment the object, purpose, and effect of which is to enforce the payment of money, whether the same be a personal judgment against the party indebted, or a decree foreclosing a lien for an amount due." Section 674 of said code provides that a judgment lien, resulting from the recording of an abstract of the judgment, "continues for five years from the date of the entry of the judgment or decree unless the enforcement of the judgment or decree is stayed on appeal * *." Section 685 of said code provides: "In all cases the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, and after due notice to the judgment debtor accompanied by an affidavit or affidavits setting forth the reasons for failure to proceed in compliance with the provisions of section 681 of this code." There was no motion herein to obtain an order of court for enforcement of the judgment after the lapse of five years. As above stated, the writ of enforcement herein was not issued within five years after the entry of judgment, even if it be assumed that said five year period could be extended under the provisions of said Section 12a(b).

[3] The evidence was not sufficient to support the finding that the sale under the writ of enforcement was duly, regularly and timely held.

By reason of the above conclusions, it is not necessary to consider other contentions upon appeal.

The judgment is reversed; and the superior court is directed to enter a judgment that plaintiff has no right, title or interest in said property, and has no claim or lien thereon.

SHINN, P. J., and VALLÉE, J., concur.

---

120 Cal.App.2d 303

PEOPLE v. MOORE.

Cr. 2916.

District Court of Appeal, First District, Division 2, California.

Sept. 18, 1953.

Prosecution under indictment charging robbery and commission of two prior felonies. From a judgment of conviction in Superior Court, City and County of San Francisco, H. A. Van Der Zee, J., defendant appealed. The District Court of Appeal, Nourse, P. J., held that evidence sustained conviction.

Affirmed.

1. Robbery 🔑24(1)

Evidence that accused participated in, aided, or abetted in commission of robbery sustained conviction for robbery. Pen. Code, § 211.

2. Criminal Law ⚷1159(2)

After conviction, all intendments are in favor of judgment, and verdict will not be set aside unless record clearly shows that upon no hypothesis whatsoever is there sufficient substantial evidence to support it.

3. Criminal Law ⚷59(3)

Presence of one at commission of felony by another is evidence to be considered in determining whether or not he was guilty of aiding and abetting, as presence, companionship and conduct before and after offense are circumstances from which participation in criminal intent may be inferred.

4. Criminal Law ⚷59(1)

Where two or more persons enter upon common undertaking, whether by prearrangement, or entered into on spur of moment, and that undertaking contemplates commission of criminal offense, each of parties to undertaking is equally guilty of offense committed, whether he did an overt act or not.

◆

Charles R. Garry, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Clayton R. Janssen, Jr., Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

Defendants Suber, Hurd and Moore were charged with robbery under section 211, Penal Code. The information also charged Moore with two prior felony convictions. The cause was tried without a jury and judgment was given for second degree robbery and two prior convictions of felony as to defendant Moore. A motion for probation as to all three was denied.

Defendant Moore alone appeals from the judgment on the ground of insufficiency of the evidence to sustain the conviction, claiming there was no evidence to show that appellant participated in, aided, or abetted any robbery.

The events leading to the arrest and conviction of the defendants are as follows: The robbery took place on October 22, 1952, about 3:30 A.M. when Frank Lopez was returning to his hotel located at 156 Third Street, San Francisco. As Lopez was going up the stairs, his friend who was partially crippled preceding him, three men approached Lopez. One of them, later identified as Hurd, pulled him down the stairs and then with his companion Suber proceeded to search Lopez, taking from him seven dollars in bills, which Lopez later identified by the manner in which then were folded. He had folded them separately the long way and then folded them over three times. Lopez testified he saw a knife lying in the hand of Suber but did not know whether it was open or not. While the robbery was taking place Moore was standing about four or five feet from them. According to the testimony of Lopez, "He [Moore] just stood at the steps. He did not do nothing. He did not say nothing; he just stood there." Lopez, after ascertaining that his crippled friend was getting up the stairs safely, ran out to watch in which direction his assailants went. He followed them and on Third Street hailed a patrol car, told the police officers he had been robbed, entered the car and directed the police officers in the direction he had seen the defendants going. The three men were located on Fourth and Mission Streets and identified by Lopez as the men who had robbed him. They were searched, and, according to the testimony of the two officers, the seven dollars and the knife were found on Moore. Lopez immediately identified the money by the way it was folded. Appellant points out that there was a conflict in the evidence as to which man was in possession of the stolen money. However at the trial the testimony of the two police officers that Moore was in possession of the stolen money and knife was certain and positive; that of Lopez, who thought the money was found on Suber, was not certain or positive. He testified when questioned as to the search of the three men by the police officers: "They took it away from—I believe it was this fellow with the red shirt [identified as Suber]". Later on cross-examination the question was asked: "Who had these seven bills at the time these men were arrested? A.

The fellow with the red shirt. Q. You testified a moment ago that it may have been two of them that had the bills. A. * * * I don't know if they did or not, but I know that was my seven dollars, that's what I am getting at." That Lopez could not have been sure which man was in possession of the stolen bills was brought out later in the following testimony: "Q. Your best memory, then, as to who had them at the time they were arrested, was the man in the red shirt, Mr. Suber; is that your best memory? A. They both had bills, as far as that goes. I don't know which one they got the folded bills from but they both had bills." On the continuation of the cross-examination of Lopez in which he was questioned on the manner in which the defendants were searched the question was asked: "Did they go through the pockets of Mr. Suber? The Court: If you know. Were you watching the search? A. No, I was not watching. I was not paying any particular attention to it." As opposed to this rather uncertain testimony as to the finding of the stolen bills we have the unequivocal testimony by the two police officers that the money and knife were found on defendant Moore.

The defendants all denied having taken any part in the robbery or any knowledge of it, stating that they had been at a birthday party for a friend living on Howard Street, that they had left the friend's place at about 3:30 in the morning and were going home when the police officers stopped them and searched them. The friend had left town at the time of the trial and was not available as a witness.

[1, 2] Though the defendants denied the robbery and there was some conflict in the testimony concerning the possession of the stolen bills at the time of the arrest, a reading of the entire record shows that there is substantial evidence to sustain the conviction of Moore of robbery. As is said in People v. Gutierrez, 35 Cal.2d 721, 727, 221 P.2d 22, 25: "After conviction all intendments are in favor of the judgment and a verdict will not be set aside unless the record clearly shows that upon no hypothesis whatsoever is there sufficient substantial evidence to support it."

[3, 4] Appellant cites no authorities in support of his contention that because Moore said nothing and did nothing during the progress of the robbery that he was not a participant and did not aid or abet the robbery. Appellant was not a mere bystander or onlooker. He may have committed no overt act during the robbery but none was required. His presence could have given encouragement to his companions and acted as a deterrent to any continued resistance on the part of Lopez. He was in the position of a lookout and though he gave no warning none was required. He was in the company of the other defendants before the crime was committed, remained with them during the robbery, fled with them from the hotel, and when arrested in company with the others had the knife and stolen bills in his possession. That is sufficient to make him a participant in the crime. "The presence of one at the commission of a felony by another is evidence to be considered in determining whether or not he was guilty of aiding and abetting; and it has also been held that presence, companionship, and conduct before and after the offense are circumstances from which one's participation in the criminal intent may be inferred." 22 C.J.S., Criminal Law, § 88, page 161; State v. Bishop, 317 Mo. 477, 296 S.W. 147, 149. "Where two or more persons enter upon a common undertaking, whether by prearrangement, or entered into on the spur of the moment, and that undertaking contemplates the commission of a criminal offense, each of the parties to the undertaking is equally guilty of the offense committed whether he did an overt act or not." Haney v. State, 20 Ala.App. 236, 101 So. 533, 536; 22 C.J.S., Criminal Law, § 87, page 156.

"Undoubtedly, it is the law that before one can be stigmatized as an abettor he must have instigated or advised the commission of the crime, or have been present for the purpose of assisting in its consummation. In the instant case we are satisfied that the facts therein proven require that the order appealed from be affirmed. It was the province of the jury to declare appellant's guilt or innocence, and unless we can say that it clearly appears that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below, the verdict of the jury, which has been approved by the trial court, cannot be set aside upon the ground 'of insufficiency of the evidence.'" People v. Hymer, 118 Cal.App.2d 28, 257 P.2d 63, 66.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.

120 Cal.App.2d 381

BARDEEN et al. v. LANGFORD et al.

Civ. 19897.

District Court of Appeal, Second District, Division 1, California.

Sept. 25, 1953.

Rehearing Denied Oct. 14, 1953.

Action to quiet title to realty. The trial court entered a judgment quieting title in plaintiffs, and defendants appealed. The plaintiffs moved to dismiss the appeal and the defendants petitioned for an order permitting defendants to perfect their appeal. The District Court of Appeal held that evidence did not justify permitting defendants to perfect appeal which was not perfected within time required by rule on ground that defendants' failure to perfect appeal promptly was due to inadvertence and excusable neglect.

Appeal dismissed.

Appeal and Error 🔑357(1)

Evidence did not justify permitting defendants to perfect appeal which was not perfected within time required by rule on ground that defendants' failure to perfect appeal promptly was due to inadvertence and excusable neglect.

Hightower & Martin and John Laurie Martin, Los Angeles, for appellants.

Iverson & Hogoboom and Paul E. Iverson, Los Angeles, for respondents.

PER CURIAM.

Motion by plaintiffs to dismiss appeal filed by defendants Langford and Lambert.

The certificate of the clerk of the Superior Court shows judgment for plaintiffs quieting title in them, as lessees, to certain real property as against the named defendants. Notice of appeal was filed August 7, 1953. Up to the date of the certificate, September 2, 1953, the clerk states, "No notice to clerk to prepare record on appeal has been filed; accordingly no transcript has been certified or filed."

Plaintiffs move to dismiss the appeal under Rule 10(a), Rules on Appeal, because defendants (as appellants) have not taken prompt steps to perfect their appeal, have not complied with the requirements of Rule 4(a) or (b) or 5(a), Rules on Appeal, and no extension of time had been granted by the trial court, as permitted by Rule 45(b), Rules on Appeal. See Rules on Appeal, 36 Cal.2d, pages 3, 5, 12, 35.

Defendants' response to the motion is to "petition for an order permitting them to perfect their appeal" on the ground that their failure to perfect their appeal within the prescribed time was due to inadvertence and excusable neglect. An affidavit of their attorney sets out a conversation and correspondence looking toward a settlement of the controversy. Plaintiffs and their attorney have filed affidavits denying that there have been or now are any negotiations for settlement. Their attorney further states that defendants' attorney wrote him about a settlement, to which he replied that conversations between counsel would not produce results but that any such talks should be between their clients. Plaintiff H. A. Bardeen states that defendant Langford called him for the first time on September 21 (one day prior to hearing on the motion to dismiss) and Langford stated that his attorney had not suggested that he contact plaintiff to discuss settlement. Plaintiffs' attorney points out that defendants' attorney did not request extension of time for taking necessary steps to perfect appeal and no assurance was given that any such request would be granted; that defendants' attorney knew that no extension would be agreed to; that plaintiffs are in default on their lease because of conduct of defendants and are in danger of losing all their rights in the property unless the appeal is determined speedily.

As stated in the case of Heatly v. Heatly, 83 Cal.App.2d 677, 680, 189 P.2d 748, 750: "The purpose and effect of the rules here in question should not be lightly set aside. If it be assumed that in a proper case and upon a sufficient showing a delayed compliance might be excused, the showing here made is, in our opinion, insufficient to justify a denial of the motion (to dismiss)."

The appeal is dismissed.

---

120 Cal.App.2d 301

PEOPLE v. HULING et al.

Cr. 2889.

District Court of Appeal, First District,
Division 2, California.
Sept. 18, 1953.

In prosecution for possession of heroin and marijuana, the Superior Court, City and County of San Francisco, Michelsen, J., entered judgment of conviction, and entered order denying new trial and defendants appealed. The District Court of Appeal, Nourse, P. J., held that the evidence was sufficient to sustain the verdict.

Judgment and order affirmed.

1. Criminal Law ⚷1144(13)

Where an appeal in a criminal case is devoted entirely to question of sufficiency of evidence, the court must view the evidence most favorably to state.

2. Poisons ⚷9

In prosecution for possession of narcotics, where evidence established that police officers searched room which defendants occupied as joint tenants and found drugs hidden in defendants' clothing, and in cabinet used jointly by defendants, and one defendant admitted an oral agreement with other defendant to pay him to assume full responsibility for crimes, evidence was sufficient to convict defendants of possession of narcotics.

C. L. Shinn, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., David K. Lener, Deputy Atty. Gen., for respondents.

NOURSE, Presiding Justice.

Defendants Huling and Holloway were tried jointly to a jury on an information framed in two counts—one for the possession of heroin; the other for possession of marijuana. Both were found guilty on both counts. Both were given consecutive sentences in the state penitentiary. Appeals were taken by both from the judgment and from the order denying a new trial. Holloway failed to perfect his appeal and it was duly dismissed under rule 17(a), Rules on Appeal.

[1] Huling's appeal cites no error at law—it is devoted entirely to the question of the sufficiency of the evidence. In such circumstances we are required to view the evidence most favorably to the State and will state the facts on that basis.

The defendants were joint tenants of a room in San Francisco. At about 11 P.M. of January 5, 1952, a police officer entered the room and found quantities of both drugs hidden in the pockets of various articles of clothing hanging in a closet owned by both defendants. They also found some in a cabinet used jointly by both defendants. Huling returned to his room at 2:30 A.M., was taken into custody, and both defendants in the presence of each were questioned as to the ownership of the drugs and of the articles of clothing in which they had been found. Huling remained mute. Holloway denied possession of the drugs and of the clothing in which they were found. Both admitted joint occupancy of the room and of the clothes closet and both had a key to the outer door.

While confined in the county jail awaiting trial, and while Holloway was at liberty on bail, Huling wrote letters to Holloway confirming an oral agreement which they had made when in the jail whereby Huling agreed to take full responsibility for the crimes for which Holloway agreed to pay him $200 and $20 or $30 a month during his imprisonment. Later, on advice of counsel, Huling repudiated the agreement. But he freely admitted it during the trial.

[2] The evidence is sufficient to sustain the verdict. The joint occupancy of the room which was the only place of residence of both, the joint use of the clothes closet, and the ownership of the several pieces of wearing apparel in which the narcotics were found, and the agreement with his codefendant to pay him for assuming full responsibility was all the evidence necessary to support the jury's verdict. Sufficient by way of authority are: People v. Bassett, 68 Cal.App.2d 241, 246, 156 P.2d 457; People v. Rumley, 100 Cal.App.2d 6, 8–9, 222 P.2d 913; People v. Torres, 98 Cal.App.2d 189, 193, 219 P.2d 480.

Judgment and order affirmed.

GOODELL and DOOLING, JJ., concur.

---

120 Cal.App 2d 265

HELMS v. THOMAS et al.

Civ. 19530.

District Court of Appeal, Second District, Division 1, California.

Sept. 17, 1953.

Hearing Denied Nov. 12, 1953.

Action by employee against employer and others for damages for assault and battery. The Superior Court of Los Angeles County, Harold B. Jeffery, J., rendered judgment for employee and employer appealed. The District Court of Appeal, White, P. J., held that evidence warranted conclusion of trier of fact that employer interfered in fight between employee and fellow employee to aid fellow employee rather than to keep the peace.

Affirmed.

1. Appeal and Error 🔑1002

Where there was a direct conflict between testimony of plaintiff and a defendant in action for assault and battery, District Court of Appeal could not interfere with choice of jury as to which to believe in absence of extraordinary circumstances.

2. Appeal and Error 🔑989

With respect to conflicts in testimony or conflicting inferences which might be drawn from evidence, power of appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support conclusion reached by trier of fact.

3. Master and Servant 🔑279(7)

In employee's action against his employer for damages for assault and battery, evidence warranted conclusion reached by trier of fact that employer interfered in fight between employee and fellow employee to aid fellow employee rather than to keep the peace.

4. Appeal and Error 🔑1004(1)

On appeal from award entered in favor of plaintiff in action for assault and battery, award would not be held to be excessive unless award was so large as to indicate passion or prejudice on part of jury, and question was not what District Court of Appeal might consider to be a proper award.

5. Assault and Battery 🔑40

$30,000 general damages awarded plaintiff in action for assault and battery was not excessive where at time of assault plaintiff was a twenty-nine year old married man and was permanently deprived of hearing in his right ear and of sense of equilibrium in his middle ear as result of assault and battery, and where plaintiff at time of trial was still periodically hemorrhaging and expectorating blood and was hospitalized for nearly a month and suffered intense pains in head up to time of trial.

Gross & Svenson, Van Nuys, for appellant.

Sims & Wallbert, Los Angeles, for respondent.

WHITE, Presiding Justice.

Trial of an action for damages for assault and battery resulted in a verdict in favor of plaintiff, awarding the sum of $30,000 general damages and $100 punitive damages against the defendants William C. Thomas and Ed O'Conley. Defendant William C. Thomas prosecutes this appeal from the judgment entered upon the verdict. Appellant contends that the evidence is insufficient to support the verdict and that the damages are excessive.

Appellant operated a business of preparing and delivering ready-mixed concrete. Respondent and defendant O'Conley were in his employ as truck drivers. Respondent testified that about noon on December 20, 1950, at appellant's establishment, while respondent was watching the water-gauge on his truck, O'Conley came up behind him and said, "What's this I hear about you getting me blackballed?" to which respondent answered, "I don't want to talk about it." Thereupon O'Conley grasped him by the ear and the collar of his shirt, swung him around and hit him a few times, keeping the respondent off balance. Appellant, who was operating the process of delivering to the trucks the mixture of sand, gravel and cement, ran up, seized respondent, and held him while O'Conley struck him several more times, until appellant said, "That is enough, Eddie." Respondent's injuries rendered him unconscious; he was taken to a receiving hospital, where he remained for four days; after two or three days at home he was taken to the California Lutheran Hospital, where he remained for approximately three weeks. He suffered a complete and permanent loss of hearing in his right ear and damage to his sense of equilibrium.

Appellant makes an earnest effort to sustain the proposition that the verdict is not supported by the evidence. Inconsistencies in respondent's testimony and conflicts with the testimony of appellant are pointed out. The appellant testified that he and another employee, Braugher, were merely attempting to separate the combatants. It is urged that the only reasonable inference is in favor of appellant's version of the occurrence. It is argued that appellant was a business man, owner and manager of the enterprise, and engaged in operating the complex loading machinery when the fight started. Consider, urges appellant, that there is no evidence that he knew there was a fight until the scuffling began; also the speed with which a number of blows are struck in a heated fight and the impossibility of separating the contestants without some further blows being struck while the separation is being effected; that Thomas had no motive to help O'Conley when O'Conley was so obviously having the best of the fight; that in the circumstances, appellant as a business man would not have interrupted an important loading operation when he had every motive to keep the peace and insure efficient operation of his plant. The only reasonable inference, it is urged, favors appellant's version of the affair.

Further argument is presented to the effect that no unfavorable inferences can be drawn from the fact that appellant and O'Conley were friendly (plaintiff testified that they were drinking companions at the place of business); that appellant repeated to O'Conley respondent's statement that he would have O'Conley "blackballed" at the union for telling appellant that respondent had stopped his truck for an hour, when respondent stated he stopped only for some cigarettes; that appellant told respondent's wife he would pay all medical expenses and the salary of respondent and that his job would be waiting for him; and that appellant said he didn't know what happened except that it was a fight between respondent and O'Conley.

[1] Appellant's argument against the sufficiency of the evidence, ably presented as it is, fails under the well established rules governing the function of courts of appeal in a situation such as is here presented. In effect, appellant urges that the appellate court review the conclusions of

the jury as to the credibility of witnesses, and further, to determine that the inferences drawn by the jury from the admitted facts and the testimony were not reasonable. The situation presented is that of a direct conflict between the testimony of respondent and that of appellant. The jury chose to believe the former. With this choice the appellate court cannot interfere, in the absence of such extraordinary circumstances as are suggested in the case of People v. Haydon, 18 Cal.App. 543, 551, 552, 553, 554, 123 P. 1102, 1114.

[2] The basic rule, which has been stated and restated, is that with respect to conflicts in the testimony or conflicting inferences which might be drawn from the evidence, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the trier of fact. In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689; Price v. Price, 114 Cal.App.2d 176, 179, 249 P.2d 841.

[3] Whether appellant interfered in the fight to aid the alleged aggressor, O'Conley, or to keep the peace, was strictly an issue of fact, to be determined by the fact-finding body. The issue has been determined against appellant under instructions which are not criticized on appeal. The verdict must therefore be upheld.

[4, 5] It is further urged that the award of damages is excessive. The award herein was $30,000, as was the award in Potter v. Empress Theatre Co., 91 Cal.App.2d 4, 204 P.2d 120, after reduction from $50,000 by the trial court. Appellant points out that the injuries in the present case are not as severe as those involved in the cited case. The question, however, is not what the appellate court might consider a proper award, but whether the award is so large as to indicate passion or prejudice on the part of the jury. Holder v. Key System, 88 Cal.App.2d 925, 939, 200 P.2d 98. We cannot hold that the award in the present case indicates such passion or prejudice. Respondent at the time of the assault was a married man, 29 years of age. He was permanently deprived of hearing in his right ear and lost the sense of equilibrium in his "middle ear". This term was used by the expert medical witness when he testified as follows: "Now sound is conducted through the external ear and through the middle ear which contains the little bones of hearing to the inner ear." Respondent's injuries were such that bone conduction was lost and he therefore could not use a hearing aid. At the time of trial he was still periodically hemorrhaging and expectorating blood. He was hospitalized for approximately a month. He suffered intense pains in his head up to the time of trial.

Appellant points out that respondent has lost no weight, has a better job, that his equilibrium "and general reactions" are "basically normal". These facts are not sufficient to justify an appellate court in reducing the amount of the award. Respondent's loss of hearing and equilibrium in the right ear are permanent injuries. That this disability will be a handicap to him throughout his life is more than a mere possibility. When the question of excessive damages was raised before the trial court on motion for new trial, the trial court, sitting as a thirteenth juror, with the power to weigh the evidence and judge of the credibility of witnesses, declined to grant a new trial or reduce the award of damages. "His denial * * * is an indication that he approves the amount of the award. An appellate court has no such powers. It cannot weigh the evidence and pass on the credibility of the witnesses as a juror does. To hold an award excessive it must be so large as to indicate passion or prejudice on the part of the jurors." Holmes v. Southern California Edison Co., 78 Cal.App.2d 43, 51, 52, 177 P.2d 32, 37.

Tested by these rules, the instant case does not present a situation warranting interference by an appellate tribunal with the conclusion arrived at by the duly constituted arbiters of the facts. We find here substantial evidence to support the award of damages.

The judgment is affirmed.

DORAN, J., and SCOTT, Justice pro tem.

120 Cal.App.2d 359

PEOPLE v. THOMPSON.

No. 787.

District Court of Appeal, Fourth District, California.

Sept. 24, 1953.

Criminal prosecution for burglary. The Superior Court, San Diego County, Arthur L. Mundo, J., entered an order denying defendant's motion for new trial and entered judgment of conviction, and defendant appealed. The District Court of Appeal, Mussell, J., held that evidence sustained conviction.

Judgment and order affirmed.

1. Burglary ⚷45

In prosecution for burglary where amount of money stolen and amount in accused's possession are approximately equal and of similar types, question of identity of stolen money is for jury.

2. Criminal Law ⚷1160

It is function of jury in first instance and of trial court after verdict to determine what facts are established by evidence, and jury's verdict cannot be set aside on ground of insufficiency of evidence, unless it is clearly apparent that upon no hypothesis whatever is there sufficient substantial evidence to support jury's conclusion.

3. Larceny ⚷64(7)

While mere possession of stolen property is not alone sufficient to sustain conviction for theft, such possession plus slight corroborative evidence of other inculpatory circumstances will suffice.

4. Criminal Law ⚷1159(2)

Where substantial evidence tends to support verdict of jury, appellate court cannot, as matter of law, substitute its judgment on facts for that of jury.

5. Burglary ⚷41(1)

In burglary prosecution, evidence sustained conviction. Pen.Code § 459.

Howard B. Clayton, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

Defendant was charged with and convicted of the crime of Burglary in violation of section 459 of the Penal Code. The jury verdict fixed the degree of the offense as burglary in the first degree. Thereafter a motion for new trial was made and denied and judgment was entered declaring the defendant to be an habitual criminal and sentencing him to the state prison. He appeals from the judgment and the order denying the motion for a new trial and his sole contention here is that the evidence is insufficient to sustain the verdict of the jury.

Statement of Facts and Evidence

At about 7:30 p. m. on November 27, 1952, Mrs. Odie Thornton left her apartment at 831 Broadway in San Diego and proceeded to a sandwich shop nearby, where she worked and of which she was a co-owner. She returned to her apartment at about 8:30 p. m. to "pick up a check" and after remaining there a few moments, again returned to the sandwich shop where she worked until about 4:30 a. m. of November 28th. It was her nightly custom to check the cash register, remove the money therefrom and take it to her apartment. On the night of November 27th she had left approximately $300 in a metal cabinet in the living room of her apartment and upon her return from work on the following morning, at about 4:30 a. m., she found that the apartment had been entered in her absence; that the locks on the filing cabinet had been pushed in and that all the money therein had been stolen, together with a list of the number of rolls of quarters and dimes which she had fastened to some of the currency with a paper clip. The money stolen consisted of currency, a $10 roll of quarters, four $5 rolls of dimes, about 10 silver dollars, and some nickels and pennies. Mrs. Thornton, upon discovering her loss, contacted her brother, who was also part owner of the shop, and he in turn called the police. About an hour later the defendant was arrested in his nearby apartment. He was then fully dressed and on his person and on a table in the apartment the officers found a total of $286.74, consisting of $241 in currency, $8 in silver dollars, one half dollar, $10 in quarters, $19.60 in dimes, $4.45 in nickels and $3.19 in pennies. The currencey consisted of five $20 bills, ten $10 bills, six $5 bills and 11 $1 bills.

When first questioned by the arresting officers, defendant stated that he had been in his room the entire night of November 27th. He later remembered that he had gone out for a few minutes to buy a bottle of Vodka, and when shown a partly used bus ticket found in his room, admitted that he had boarded a Greyhound bus at about 8:00 or 8:30 p. m. on the evening of November 27th and traveled on it as far as Oceanside, when he remembered that he was not to leave San Diego; that he then got off and boarded another bus for San Diego. When asked where he obtained the money found in his room and on his person, defendant stated that it was "savings" and that he had spent a small portion of it for a bottle of Vodka and one or two other items. However, two days before the burglary defendant sought employment in a bakery in San Diego and at that time stated that he did not have $100 with which to post the bond required and that he would be back the next day and would try to borrow the money.

Defendant was employed in the sandwich shop as a dishwasher for about six weeks prior to November 19, 1952, and was then discharged. During his employment he worked on the night shift with Mrs. Thornton and was in the shop when she removed the money from the cash register at night. After having been discharged, he twice visited Mrs. Thornton's apartment to ask "for his job back" and according to the testimony of one of the waitresses, he visited the shop between November 19th and 27th and stated to her that "he thought it was a dirty deal that he had gotten and that he was going to get even." This witness also testified that she saw the defendant in front of a clothing store across the street from the sandwich shop between 6:00 and 6:30 p. m. on November 27th.

We conclude that the evidence set forth in the foregoing statement is sufficient to sustain the verdict of the jury and to support its conclusion that the money recovered from the defendant was part of that stolen from Mrs. Thornton's apartment.

[1, 2] Counsel for appellant (appointed by this court), in his well prepared brief, relies principally upon the following language in People v. Getty, 49 Cal. 581, 583:

> "The possession of money of the same kind as that which was recently stolen is usually of slight, if any, weight as evidence to prove the guilt of the person in whose possession it is found, if money of this kind is in general circulation."

The court was there discussing the weight of the testimony and went on to say:

> "* * * but it is of much greater significance when that kind of money is rarely seen in circulation at that place; and its value as evidence is further increased when both the money found in possession of the accused and that which was stolen consists of a combination of pieces of such money, as in this case, of a large number of Chilian half ounces and a single Peruvian ounce. It strongly tends to the identification of the money as the money which was stolen, and thus to connect the defendant with the burglary. (See People v. Melvane, 39 Cal. 614.)"

Where, as here, the amount of money found in the possession of the defendant and that stolen was approximately the same, as was the number of silver dollars and quarters, and a part of the cash receipts consisted of nickels and pennies, the question of the identity of the property stolen was one of fact for the jury to be considered with all the other evidence. It was the function of the jury in the first instance and of the trial court after verdict to determine what facts were established by the evidence and the verdict cannot be here set aside on the ground of insufficiency of the evidence where it is not clearly apparent that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. As was said in People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 780:

> "'We must assume in favor of the verdict the existence of every fact

which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.' If the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury." (Citing cases.)

[3–5] While the mere possession of stolen property is not alone sufficient to sustain a conviction of theft, such possession plus slight corroborative evidence of other inculpatory circumstances will suffice, and where there is substantial evidence tending to support the verdict of the jury, an appellate court cannot, as a matter of law, substitute its judgment on the facts for that of the jury. People v. Wissenfeld, 36 Cal.2d 758, 763–765, 227 P.2d 833. The record before us contains ample corroborating evidence of defendant's guilt in addition to the evidence of possession of the stolen property.

Judgment and order affirmed.

GRIFFIN, Acting P. J., concurs.

---

120 Cal.App.2d 270

In re HADSELL'S ESTATE.

HADSELL v. GROSJEAN et al.

Civ. 19667.

District Court of Appeal, Second District,
Division 1, California.
Sept. 17, 1953.

Proceedings for the probate of will. The Superior Court of Los Angeles County, James H. Pope, J., admitted the will to probate and appointed brother of testatrix as administrator with will annexed and husband appealed. The District Court of Appeal, Drapeau, J., held that property settlement between testatrix and her husband did not estop husband from petitioning for appointment as executor and from taking under will of testatrix when the will so provided.

Reversed with instructions.

1. Husband and Wife 🔑31(6, 7)

Unless a property settlement agreement between husband and wife specifically renounces the right, the agreement does not estop either party from taking under will of the other, since a will speaks as of the date of death of the testatrix.

2. Executors and Administrators 🔑17(3)

Unless a property settlement agreement contains an express renunciation of the right of one spouse to act as executor of the other's will, the survivor has the right and is entitled to act as such executor.

3. Executors and Administrators 🔑19
Husband and Wife 🔑31(7)

Property settlement agreement of husband and wife that neither would contest or oppose the other's will did not estop husband, upon death of wife, before divorce proceedings were final, from petitioning Probate Court for appointment as executor or from taking under the terms of the will.

4. Executors and Administrators 🔑314(12)

In a proceeding for the probate of a will, the finding of trial court that property settlement agreement between testatrix and her husband waived, forfeited, and renounced any right to testatrix' estate as husband or heir or under will of testatrix, was an order determining persons to whom distribution should be made, which was appealable. Probate Code, § 1240.

Julian P. Van Dyke, Long Beach, for appellant.

No appearance for respondents.

DRAPEAU, Justice.

Hilda M. Hadsell died August 11, 1952. By her last will and testament she left all of her property to her husband, Herbert V. Hadsell. Her estate was of the estimated value of $3,000.

After her will was executed, decedent and her husband entered into a property settlement agreement. When she died husband and wife were not living together, but divorce proceedings between them had not come to final or interlocutory decree.

Only one question is involved in this appeal: Did the husband by the property agreement waive his right to take under his wife's will, or to be appointed her executor?

That part of the property agreement pertinent to this question is as follows:

> "Sixth: That neither party hereto will, in any manner contest or oppose the probate of the other's will, whether heretofore made, or hereafter made, or interfere with the other, their heirs or assigns, in the exercise of the rights of the parties hereto. It is agreed that neither party will at any time hereafter assert any right, title or interest as heir-at-law, or otherwise of the other to any property devised or bequeathed by such will, or as against the estate of the other, should the other die intestate, and all claims as such heir, or as surviving husband and wife respectively, and the right to contest or oppose the will of the other is hereby expressly waived, together with the right to administer, or to apply for Letters of Administration, or Letters Testamentary, upon the estate of the other. The parties also waive all rights of probate, homestead and family allowance."

Petition for probate of the will and for letters testamentary was filed by the husband. Petition for probate of the will and for letters of administration with the will annexed was filed by a brother of decedent. Objections to the husband's petition were filed by the mother of decedent.

After hearing, the Probate Court made the following orders: that the will be admitted to probate, that the brother be appointed administrator with the will annexed, and that letters of administration with the will annexed be issued to the brother upon his taking the usual oath of office and filing the usual bond.

The husband appeals.

[1] Unless a property settlement agreement specifically renounces the right, such agreement does not estop a surviving husband or wife to take under the will of the other. And the will speaks from and as of the date of the testator's death. In re Estate of Crane, 6 Cal.2d 218, 57 P.2d 476, 104 A.L.R. 1101.

A property settlement agreement by a wife, relinquishing all right to any interest in her husband's estate, was not inconsistent with the husband's will, executed before the agreement, leaving his property to her. "The relinquishment amounts to nothing more than leaving the decedent free to dispose of his property as he pleases. * * *" Bennett v. Forrest, 24 Cal.2d 485, 493, 150 P.2d 416, 419.

A property settlement agreement does not revoke a previous appointment of a husband as executor of his wife's will, when the testatrix failed to change her executor in a codicil executed after the agreement. In re Estate of Maddux, 138 Cal.App. 430, 32 P.2d 392.

[2] Unless a property settlement agreement contains an express renunciation of the right of one spouse to act as executor of the other's will, the survivor has the right, and is entitled to act as such executor. In re Estate of Forrest, 43 Cal.App.2d 347, 110 P.2d 1023.

[3] It was therefore error for the Probate Court to deny appellant's petition, and to declare him estopped to take under the will.

The trial court made a finding and also a conclusion of law reading as follows:

> "That the said Herbert V. Hadsell by an instrument in writing waived, forfeited and renounced any right to any part of deceased estate as husband or heir at law or under or by the terms of any will of deceased, or to Letters Testamentary thereon."

[4] In view of the desirability of disposing of all matters here involved, this language may, we think, be treated as an order determining persons to whom distribution should be made, appealable under the provi-

sions of Section 1240 of the Probate Code. So treated, the order is reversed. Cf. In re Estate of Forrest, supra, and Bennett v. Forrest, supra.

The order appointing the brother administrator with the will annexed and the order for letters of administration with the will annexed are, and each of them is, reversed. The probate court is directed to make its order appointing appellant executor under the will, and to proceed with the administration of the estate, in accordance with the views hereunder expressed and the terms of the will.

WHITE, P. J., and DORAN, J., concur.

PEOPLE v. JACKSON.*

Cr. 4965.

District Court of Appeal, Second District, Division 1, California.

Sept. 8, 1953.

Rehearing Denied Sept. 17, 1953.

Hearing Granted Oct. 8, 1953.

A defendant was convicted of bribery in that he offered to give a bribe to specified persons who were executive officers of the State and police officers of a city, with intent to influence them as such officers, such alleged offer allegedly being wilful, unlawful, felonious and corrupt. The Superior Court of Los Angeles County, Arnold Praeger, J., entered an order denying defendant's motion for a new trial, and defendant appealed. The District Court of Appeal, White, P. J., held that giving of instructions relating to entrapment was error where such instructions, though correct in abstract, were not according to theory of either prosecution or defense and were not responsive to any evidence tending to prove entrapment, and that giving of such instructions required granting of new trial under circumstances.

Order reversed and cause remanded for new trial.

1. Criminal Law 🔑814(1)

Jury instructions must be responsive to issues and in criminal cases issues are determined by evidence.

2. Criminal Law 🔑814(8)

In prosecution for offering to give a bribe to specified police officers of a city with intent to influence them as such officers in connection with operation of gambling and bookmaking in city, giving of instructions relating to entrapment was error where such instructions, though correct in abstract, were not according to theory of either prosecution or defense and were not responsive to any evidence tending to prove entrapment. Pen.Code, § 67.

3. Criminal Law 🔑1172(1)

Prejudice or injury must be shown to have occurred from giving of instructions before a reversal of conviction is authorized.

4. Criminal Law 🔑37

When defense of entrapment is invoked it necessarily assumes that act charged as public offense was committed. Pen.Code, § 67.

5. Criminal Law 🔑1172(1)

Where instructions were given on entrapment in prosecution for offering to give a bribe to specified police officers of a city with intent to influence them as such officers in connection with operation of gambling and bookmaking in city, although such instructions were not according to theory of either prosecution or defense and were not responsive to any evidence tending to prove entrapment, and where defense was lack of requisite criminal intent but entrapment instructions advised jury that defendant had necessary criminal intent but contended defendant was inveigled into commission of crime by police officers, giving of such instructions constituted error entitling defendant to new trial. Pen.Code, § 67.

6. Criminal Law 🔑829(3)

In prosecution for offering to give a bribe to specified police officers of a city with intent to influence them as such officers in connection with operation of gambling and bookmaking in city, wherein defense was lack of requisite criminal intent, refusal of trial court to give certain proffered instructions as to defendant's beliefs was not error where court fully, fairly and correctly admonished jury as to intent necessary to establish offense with which defendant was charged.

---

* Subsequent opinion 268 P.2d 6.

◆

Jerome Weber, Los Angeles, Hy Ginsberg, Theodore Flier and Jess Whitehill, Los Angeles, of counsel, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County defendant was accused of the crime of bribery, Pen.Code, § 67, in that he offered to give a bribe to Harold Thomas and W. H. Bornhoft, executive officers of the State of California and police officers of the City of Pasadena, with the intent to influence them as such officers, on or about December 11, 1951, said offer and intent being wilful, unlawful, felonious and corrupt.

Following entry of a plea of not guilty, the cause proceeded to trial before a jury which returned a verdict finding defendant guilty as charged.

Motion for a new trial was denied and defendant sentenced to state prison for the term prescribed by law. Execution of the sentence was suspended and defendant was granted conditional probation.

From the order denying his motion for a new trial defendant prosecutes this appeal.

We consider the following as a fair epitome of the factual background surrounding this prosecution as presented to the jury by witnesses for both the prosecution and the defendant.

There was testimony introduced by the prosecution that W. H. Bornhoft, a member of the Pasadena Police Department since June, 1943, and working in the Detective Division since July, 1947, knew defendant. He first met defendant in 1944, when the latter became a member of the Pasadena Police Department. Officer Bornhoft and defendant worked together frequently as patrolmen from 1944 to 1947 and were on several cases together thereafter in the Detective Bureau. They saw each other socially, visiting in their respective homes. In September, 1951, defendant resigned from the Police Department, stating he was going to be a liquor salesman. There was no interruption in the friendship between Mr. Bornhoft and defendant.

At about 8:00 p. m. Thursday, December 6, 1951, Officer Bornhoft received a telephone call at his home in Pasadena from defendant. Officer Bornhoft was on vacation that particular week. In this conversation, defendant inquired if Officer Bornhoft heard about the changes at the Police Department. The officer said he had just read what was in the papers. Defendant asked if Officer Bornhoft would want to talk about it. The latter said he guessed so. Defendant said he would come to Officer Bornhoft's house.

Defendant and his wife arrived at the Bornhoft home about 9:00 p. m. Present in the house were Mr. and Mrs. Bornhoft and their two children.

Officer Bornhoft asked defendant what he had on his mind. At the latter's request, they went into the kitchen. The ensuing matters were discussed out of the presence of the others.

Defendant asked Officer Bornhoft what he knew about the changes at the Police Department. The latter said he knew nothing about them, that he only read of them in the paper that day. Defendant asked Officer Bornhoft how he thought Harold Thomas, Lieutenant in the Pasadena Police Department, would take his new job as head of the Vice Squad. Bornhoft said he did not know.

(Officer Bornhoft had met Lieutenant Harold Thomas, who was already on the force, when Bornhoft first joined the department. They had become good friends since, visiting socially in one another's homes.)

Defendant next stated that he could not believe in the violent types of crimes and he knew Officer Bornhoft did not believe in them; that they both knew that gambling, bookmaking, and such, were an accepted thing in the community; that if Lieutenant Thomas did not permit these things to go on the Lieutenant would not long remain in charge of the Vice Squad; that he (defendant) and others knew that Bornhoft and Thomas were very good friends; that they felt Bornhoft would be a logical person to contact Thomas to see "how he felt about allowing gambling and bookmaking to operate and continue in Pasadena". Officer Bornhoft said that Thomas was "a peculiar sort", he did not know how Thomas would react to such a thing. Defendant said that if Bornhoft could arrange a meeting between Thomas and defendant to discuss it, Bornhoft "could make anywheres from $25, possibly fifty or a hundred dollars, a week". Officer Bornhoft said that Thomas was the sort one could not "figure out", he did not know if Thomas would even consider it. Defendant asked Bornhoft to talk to Thomas and find out how he felt and arrange a meeting with defendant. The latter said that the Pasadena Elks Club, of which all three were members, would be a good place for the meeting, and on the following Tuesday, a regular lodge meeting night. Officer Bornhoft said that he would see Lieutenant Thomas, discuss it with him and inform him of the meeting.

Officer Bornhoft communicated the next morning with his immediate superior, Stanley Decker, Chief of the Detective Bureau, as to the conversation with defendant; and, in the course of the next several days, Bornhoft communicated with Lieutenant Harold Thomas and Clarence Morris, Chief of Police.

Harold Thomas had joined the Pasadena Police Department in July, 1940. In 1949 or 1950 he became a lieutenant. On December 6, 1951 he was placed in charge of the Vice Division. His duties were to supervise the men engaged in the detecting and apprehension of violators of laws relating to gambling, bookmaking, prostitution and sex deviations.

Lieutenant Thomas had worked on details with defendant as a uniformed policeman. They had, however, little social contact.

Shortly before 6:00 p. m., December 11, Officer Bornhoft and Lieutenant Thomas went to the Elks Club in Pasadena. They were at the bar in the Silver Room, a dining room in the basement, when defendant joined them. The three of them ate dinner. Thereafter, at defendant's suggestion they went to a place in Eagle Rock known as Johnnie's or Jonie's, defendant driving them in his automobile. They arrived around 8:30 p. m., and sat at a table a little off center. Bornhoft stated to defendant that Thomas knew why they were there, and they should "get on with the business"; that he (Bornhoft) was sleepy.

Defendant said that he did not believe in the violent types of crime and he knew that Bornhoft and Thomas did not; that bookmaking and gambling were a common and accepted thing and had been going on in Pasadena for a long time. He said he represented a group of people who wanted to get "action" started in Pasadena (i. e., the exchange of money in gambling). He asked if Lieutenant Thomas would be interested in making some money without being found out. Officer Bornhoft asked defendant what his (Bornhoft's) part would be in the plan. Defendant said that Bornhoft's part was practically completed since he had arranged the meeting.

Defendant stated that Lieutenant Thomas could make from $100 to $1,000 a week by allowing gambling and bookmaking to operate in Pasadena. Lieutenant Thomas said he would have to know more of the details and how much risk would be involved, then he would have to determine if the reward was commensurate with the risk.

Lieutenant Thomas asked defendant if the people he represented had anything to do with the Foothill Charter Club at 10 East Colorado. Defendant asked why Thomas inquired and what the latter knew of it. Lieutenant Thomas said he might know more than defendant thought he did. He asked how much such a place would pay. Defendant asked Lieutenant Thomas how much he would want for such a place to run.

Thomas said that for the place to run as he understood they would like it to run, it would be "a very expensive proposition", that there would be too many people in and out of the building, that his (Thomas') job would not last long, that such a place could not possibly run for long. Defendant asked exactly how much Lieutenant Thomas would need, and the latter said $62,000. Defendant said that was ridiculous. Thomas said that was approximately the amount he would make in the rest of his police career, that with such a place as the Foothill Charter Club he felt he would not be working very long. Defendant said it was ridiculous, that such a place would not pay that kind of money. Lieutenant Thomas reiterated that he could not give an answer either way until he knew more details of the proposition.

(At the Charter Club location many felt-covered tables had been moved in; there were boxes of cards, racks of chips, coffee urns, intercommunication radios with the bar below, two phones and an electric door. Arrangements had been made for a man to sit at the top of the stairs and look down them unobserved. The police had had the place under observation. So far as Lieutenant Thomas knew, it had never operated.)

In the course of the conversation Lieutenant Thomas asked defendant who was "connected" with him, but defendant did not disclose any names. Thomas asked what would be required of him to allow gambling and bookmaking to operate. Defendant said it would be Thomas' duty to let defendant know of any telephone spots (places where bets are received by a bookmaking agent) as to which Thomas received complaints. Defendant said that a place would have to operate six to eight weeks to pay; that thereafter, if complaints were received, it could be arranged for "fall guys" to stand the arrest and undergo the prosecution. Lieutenant Thomas said that before he could give defendant any definite answer he would have to know more particulars and who was "behind" defendant.

The three of them left around midnight and returned to the parking lot of the Elks Club. From there, Officer Bornhoft and Lieutenant Thomas went to the police department where Bornhoft made notes of the conversation.

Defendant telephoned Officer Bornhoft at the police department around 1:00 p. m., December 17th and requested that Bornhoft meet defendant at the Elks Club. Accordingly, Mr. Bornhoft went to the Elks Club Silver Room. There defendant asked what Thomas' reaction had been to the proposal at the previous meeting. Officer Bornhoft said that he did not know, that possibly Thomas might go along with defendant but the latter would have to talk to Thomas personally to find out. Defendant said that "something big" was being planned in connection with the opening of Santa Anita, that there would be five or six agents, that if Thomas would go in on it he could receive from $300 to $400 a week to start. Defendant asked if Officer Bornhoft would arrange to have Lieutenant Thomas meet defendant the next evening at the Elks Club. Bornhoft said he would advise Lieutenant Thomas.

The next evening, December 18th, Bornhoft and Thomas went to the Elks Club. They were eating dinner in the banquet hall on the first floor when defendant arrived near 8:00 p. m. After defendant ate they went to the Silver Room. Defendant asked Lieutenant Thomas why Officer Bornhoft was there. Thomas said that there were too many people who knew about the set-up whom Lieutenant Thomas had never met, that Bornhoft would have to stay in on it for "security" reasons. There ensued a discussion as to why Lieutenant Thomas thought there were "leaks".

At the parking lot defendant said his proposition was tied in with the opening of Santa Anita; that they would have to make up their minds; that it concerned opening five or six phone spots placed around the city so as not to cause curiosity with the general public; that all Lieutenant Thomas had to do was call a certain phone number and report any complaint received; that from time to time, to make Lieutenant Thomas "look good", a "fall guy" would be supplied to take an arrest; that for this operation which was just the beginning, Thomas would receive $300 a week. The latter asked how it would be paid. Defendant said he did not have that information, but should not be too difficult. Thomas asked if Bornhoft would be the payoff man. Defendant said no, that Bornhoft was all through with the case. Lieutenant Thomas repeated that he wished to meet all defendant's associates, that if defendant could arrange for everyone that knew of the proposition to gather around a table, he (Thomas) would be interested. Defendant said that he would see what he could do, that he doubted it could be done, but he would try and would let Lieutenant Thomas know.

That was the last time Lieutenant Thomas and Officer Bornhoft talked to defendant on the subject. During the period of these conversations, neither Bornhoft nor Thomas intended at any time to accept any money from defendant for a dishonest purpose. The officers were under instruction to learn if possible "who was behind the whole thing".

For the defense, defendant testified as to his version of the conversations with Officer Bornhoft and Lieutenant Thomas, which version bore a general resemblance to the conversations as testified to by the officers. Defendant asserted that he did not have the corrupt intent to influence the officers, or either of them, in their official actions; that his intent was to prove to himself that the officers were honest, if they showed unwillingness to go along with such a scheme of accepting money; that, after determining they were honest, he could reveal his true plan to them, which was to entrap one Wiseman, whom he (defendant) considered the head of organized bookmaking in Pasadena, along with certain members of the police department whom he felt were cooperating with Wiseman.

As the basis of his belief that bookmaking was organized in Pasadena and that certain members of the Vice Squad were participating in payoffs, defendant detailed how in attending to his accounts, as a wholesale liquor salesman, he would observe activities and hear conversations in bars indicative to him that bookmaking was afoot, some of which remarks referred to "shakedown" money. Defendant testified to a conversation early in November, 1951, with Wiseman (who had resigned from the police department the year before), in which Wiseman referred to bookmaking activities. Defendant testified to other conversations, incidents and reports as influencing his belief in the existence of organized bookmaking.

Defendant asserted that at the time of the conversations with the officers he did not represent or intend to represent any person or persons interested in bookmaking or payoffs for protection; that he had made no arrangements, nor attempted to make any, with reference to bookmaking or gambling activities. Defendant testified that he first formulated the plan to apprehend Wiseman and his associates, and the members of the Vice Squad he believed were receiving payoffs, around the middle of November, 1951, shortly after he first talked to Wiseman; that he was motivated by the feeling that "the things for which the police department stood might be demoralized and driven into the ground".

Defendant admitted that when he was arrested some four months after the aforesaid conversation, he denied having had the conversations with Officer Bornhoft and Lieutenant Thomas relating to gambling and payoffs, but that he made the denials because he felt the proper place to tell his true story was in court.

It was stipulated that defendant's reputation prior to December 6, 1951, for truth, honesty and integrity, in the community in which he resided, was good.

As his first ground for reversal, appellant earnestly contends that the court committed prejudicial error in giving to the jury the following two instructions on the law of entrapment:

Instruction No. 851

"The law does not tolerate a person, particularly a law enforcement officer, generating in the mind of a person who is innocent of any criminal purpose, the original intent to commit a crime thus entrapping such person into the commission of a crime which he would not have committed or even contemplated but for such inducement; and where a crime is committed as a consequence of such entrapment, no conviction may be had of the person so entrapped as his acts do not constitute a crime.

"If the intent to commit the crime did not originate with the defendant and he was not carrying out his own criminal purpose, but the crime was suggested by another person acting with the purpose of entrapping and causing the arrest of the defendant, then the defendant is not criminally liable for the acts so committed."

Instruction No. 852

"When law-enforcement officers are informed that a person intends to commit a crime, the law, in the interests of law enforcement and the suppression of crime, permits the officers to afford opportunity for the commission of the offense, and to lend the apparent cooperation of themselves or of a third person for the purpose of detecting the offender. When such a practice is followed by peace officers, if the suspect himself, originally and independently of the officers, intends to commit the acts constituting a crime, and if in pursuit of such intent he personally does every act necessary to constitute a crime on his part, his guilt of the crime thus committed by him is not affected by, and he has no defense in, the fact that when the acts are done by him an officer or other person engaged in detecting crime is present and provides the opportunity, or aids or encourages the commission of the offense."

Appellant urges that the giving of the foregoing instructions on entrapment was prejudicial error in that they confused the minds of the jurors as to the true issues involved, since not one scintilla of testimony was offered by either the defense or prosecution upon the theory of entrapment.

It is true, as pointed out by appellant, that he unequivocally admitted that in all his meetings with Officer Bornhoft and Lieutenant Thomas, he (appellant) was the motivating party. He admitted that each and every such meeting was arranged and instituted by him. The initial telephone call to Officer Bornhoft was made by appellant and it was the latter himself who, in that telephonic conversation, requested Bornhoft to arrange a meeting between appellant and Lieutenant Thomas. The former at no time contended, nor is there any evidence whatever that he was inveigled into the commission of the crime charged, or that the police officers had been the procuring cause or instigators of appellant's criminal intent, if any.

[1] It is a settled rule of law that jury instructions must be responsive to the issues, and that in criminal cases, the issues are determined by the evidence. People v. Alamillo, 113 Cal.App.2d 617, 620, 248 P.2d 421. In the state of the record in the instant case it is manifest that had the court refused to instruct the jury on the law of entrapment no prejudicial error would have ensued because that issue was not raised by the evidence.

[2, 3] The question then arises as to whether, under such circumstances, the giving of the challenged instructions constituted prejudicial error. We are satisfied that the foregoing instructions should not have been given. Though correct in the abstract they were not according to the theory of either the prosecution or the defense, and were not responsive to any evidence tending to prove entrapment. It does not follow, however, that in every case wherein such instructions, containing as they do, an abstract principle, are erroneously given, that a judgment will be reversed. It is elementary in our law that prejudice or injury must be shown to have occurred from the giving of the instructions before a reversal is authorized.

In the case now engaging our attention appellant earnestly insists that the challenged instructions tended to confuse the minds of the jurors as to the issues involved and led the jury to consider an issue not presented by the evidence.

[4] When the defense of entrapment is invoked it necessarily assumes that the act charged as a public offense was committed. People v. Lee, 9 Cal.App.2d 99, 109, 48 P.2d 1003. Upon the invocation of the defense

of entrapment, the only defense possible to advance is that officers of the law induced the accused to commit the act for which he is being prosecuted, and that except for the trickery, persuasion or fraud on the part of the officers of the law, the accused would not have committed the offense.

The aforesaid instructions, therefore, entitled the jury to believe that appellant admitted the commission of the offense charged against him but was inveigled into its commission by officers of the law. Appellant's sole and only defense was that he did not have that specific intent essential to the commission of the crime of bribery and that therefore, no crime had, in fact, been committed. The instructions in question might well have led the jury to believe that appellant admitted the commission of the crime but was attempting to shift the responsibility therefor to the officers as the procuring cause or instigators of the criminal intent.

The evidence in this case presented but one single issue to the jury, and that was whether or not appellant possessed the requisite criminal intent necessary to constitute the crime of which he was accused. Appellant's defense was that his conduct and actions were motivated by a desire to perform a civic service. That pursuant to that motive he formulated what he termed "the fictitious payoff scheme" which would ultimately divulge to him the honesty of the police officers, and after determining the honesty of these police officers, it was his plan and intention to inform them of his true purpose, which he claimed was to expose gambling, bookmaking, and other illegal activities in the city of Pasadena, and to expose the claimed protection of these interests by the police department or some of the officers. Therefore, the single and only issue before the jury was the verity of appellant's contentions and the presence or absence of the requisite criminal intent. The error of inapplicable instructions rests in the fact that they pertain to points not pertinent to the issue, and contain matters of law for the jurors' consideration not necessary for their information. Therefore, instead of enlightening they tend to confuse and mislead the jury. Such inapplicable instructions in effect either create, as they did in the instant case, a false issue or constitute a misstatement of the real issue, thereby distracting the attention of the jury from and befogging the real issue.

[5] However fantastic the testimony of appellant may be regarded, whether guilty or innocent, he was entitled to have his case fairly tried according to the established rules of law. True, the court did give full and correct instructions as to the proof required to show a specific criminal intent in bribery cases, but the instructions on entrapment advised the jury that the accused had the necessary criminal intent but contended he was inveigled into the commission of the crime by the officers who were the procuring cause or instigators of such criminal intent. Thus the instructions were contradictory, and in such cases it is almost always impossible to say that the jury has not followed the erroneous instructions rather than the correct ones. The instructions here under attack, if followed by the jury, excluded from their consideration the sole and only defense offered by appellant. Being unable to say "whether appellant would or would not have been convicted but for the errors of the court", People v. Black, 73 Cal.App. 13, 38, 238 P. 374, 385, we must direct a reversal.

[6] Since a new trial will probably take place, we shall give consideration to appellant's further contention "That the court erred in not instructing the jury in any manner as to the appellant's beliefs". This claim of appellant cannot be sustained. The refusal to give certain proffered instructions as to appellant's beliefs was not error because the court fully, fairly and correctly admonished the jury as to the intent necessary to establish the offense with which he was charged. In support of what we have just said, we quote the following language from one of the instructions given:

"Thus in the crime of Bribery, a necessary element is the existence in the mind of the perpetrator of the specific intent to corruptly influence unlawfully the officers in respect to their official duties as such officers, and unless such intent so exists that crime is not committed.

"You are instructed that the defendant has a right to introduce evidence concerning, and to testify himself upon the question of whether or not he had the specific intent to corruptly influence the official action of the witnesses Boernhoeft and Thomas; and in this connection, if you find that such evidence, whether coming from the prosecution or from the defense, convinces you that the defendant did not have such intent, or raises a reasonable doubt in your mind as to whether or not he had such intent, it will be your duty, ~~and I instruct you that you must~~, to return a verdict of not guilty in favor of the defendant."

Furthermore, while the trial was in progress, the court advised the jury as follows:

"Now, ladies and gentlemen of the jury, I should explain this to you: that in admitting evidence of this character, it only goes to the question of the state of mind or the intent of the defendant, and goes to his reasons for his state of mind or his intent at the time. It doesn't establish the truth or falsity of the conversations which he will relate, and it is not necessary, either, for him to prove their truth nor for the People to prove the untruthfulness of them.

"Do you understand that? It merely goes to his recitation of his reasons which were the bases for his state of mind and intent.

* * * * * *

"You must weigh the testimony of this witness by what you observe and hear.

"Now, I should state to the jury that a person may testify directly as to his intention. In other words, as to why he did a certain thing, and that is direct evidence.

"Witnesses may also testify as to the basis upon which they formed their intention and upon which the witness acted. It does not prove—the testimony of the reason, or relating to the reason that the witness gives for the forming of his intention, or why he acted, does not prove either the truth or falsity of the reasons which he gives, and you must weigh those matters in the light of the testimony that you hear from this stand."

The order from which this appeal was taken is reversed and the cause remanded for a new trial.

DORAN, J., and ROBT. H. SCOTT, J. pro tem., concur.

120 Cal.App.2d 308

Ex parte HAYS.

Cr. 5077.

District Court of Appeal, Second District, Division 1, California.

Sept. 21, 1953.

Hearing Denied Oct. 19, 1953.

Original proceedings in habeas corpus to obtain release from custody. The District Court of Appeals, Doran, J., held that Penal Code § 19a, limiting to one year the period of commitment to county jail on conviction of misdemeanor or as a condition of probation, did not preclude commitment to county jail for one year upon revocation of probation, though defendant had previously been confined in county jail for more than 6 months as a condition of probation.

Writ discharged and petitioner remanded to custody of sheriff.

1. Criminal Law 🔑982

Where defendant was convicted of manslaughter in the driving of a motor vehicle with gross negligence and admitted prior conviction of robbery, trial court had authority to grant probation, though verdict recommended punishment by imprisonment in county jail.

2. Criminal Law 🔑982

Condition imposed as part of probation that first eight months of probationary period be served in county jail was valid. Pen.Code, §§ 1203, 1203.1.

3. Criminal Law 🔑982

An order placing defendant on probation is not a judgment and sentence, even though it includes period of detention in county jail as a condition of probation. Pen.Code, §§ 1203, 1203.1.

4. Criminal Law ⚷982

An order for probation is not final and imposes no penalties, but is an act of clemency. Pen.Code, §§ 1203, 1203.1.

5. Criminal Law ⚷982

A defendant has the right to refuse probation. Pen.Code, §§ 1203, 1203.1.

6. Statutes ⚷223.2(8)

Penal Code, section 19a, limiting to one year the period of commitment to county jail on conviction of misdemeanor or as a condition of probation, must be interpreted in connection with sections 1203, 1203.1, authorizing the granting of probation and, as a condition thereof, imprisoning defendant in county jail. Pen.Code, §§ 19a, 1203, 1203.1.

7. Criminal Law ⚷982

Amendment of probation statute so as to omit provisions for deducting any time served in jail as a condition of probation from term of confinement imposed upon revocation of probation and failure to otherwise provide by statute for such credit disclosed legislative intent that upon revocation of probation and imposition of sentence, defendant should not be given credit for time served in jail as a condition of probation. Pen.Code, §§ 1203, 1203.1.

8. Criminal Law ⚷982

Statute limiting to one year the period of commitment to county jail on conviction of misdemeanor or as a condition of probation did not preclude commitment to county jail for one year upon revocation of probation, though defendant had previously been confined in county jail for more than six months as a condition of probation. Pen.Code, §§ 19a, 1203, 1203.1.

◆

J. Perry Langford, Los Angeles, for applicant.

S. Ernest Roll, Dist. Atty., Jere J. Sullivan, Deputy Dist. Atty., Robert Wheeler, Deputy Dist. Atty., Los Angeles, for respondent.

DORAN, Justice.

The records disclose that on January 17, 1951, the applicant, Frank Hays, after trial by jury, was found guilty as charged, of manslaughter in the driving of a motor vehicle with gross negligence. The verdict recommended punishment by imprisonment in the county jail. The information charged a former conviction in San Diego County of the crime of robbery, which prior conviction was admitted by the defendant.

On February 8, 1951, a motion for new trial was denied; the proceedings were ordered suspended, and petitioner was granted probation upon the condition that the first eight months of the probationary period be served in the county jail, with good time allowed if earned. Other conditions were imposed which are not relevant to the present controversy.

Under the above probationary condition, and no sentence having been pronounced, Hays was confined in the county jail for a period of about 6 months and 18 days. Thereafter, and on March 26, 1953, probation was revoked on account of defendant's violation of the terms thereof. A sentence of one year in the county jail was thereupon imposed, and on July 29, 1953, the present writ of habeas corpus was issued by this court.

It is now contended that by reason of the above procedure, petitioner has been committed to a county adult detention facility for a period of more than one year, in violation of Section 19a of the Penal Code, which provides that "in no case shall any person sentenced to confinement in a county or city jail, or in a county or joint county penal farm, road camp, work camp, or other county adult detention facility, or committed to the sheriff for placement in any such county adult detention facility, on conviction of a misdemeanor, or as a condition of probation, or for any reason, be committed for a period in excess of one year, provided, however, that the time allowed on parole shall not be considered as a part of the period of confinement."

The question here presented, as phrased by respondent is, "Does section 19a, Penal

Code, authorize a judgment and sentence in the county jail for a period of one year, after and without crediting thereon, a previous period of confinement in the county jail as a condition of probation in the same cause?".

The contention that petitioner has been committed to a county jail in violation of Section 19a is based upon what respondent terms a fallacious line of reasoning, namely, "upon a process of including the period of about 6 months and 18 days confinement in the county jail *as a condition of probation* with the period thus far served (as of July 29, 1953 of about 4 months and 10 days) of the ordered 1 year confinement in the county jail imposed by the judgment and sentence *as punishment for the crime* after vacation of the order granting probation". (Respondent's italics.)

Among other things, the respondent has urged that "the writ (habeas corpus) was applied for prematurely and issued prematurely", inasmuch as even under petitioner's theory, the added terms of confinement under probation and under the sentence only total, up to March 29, 1953, the date of issuing the writ, a period of about 10 months and 28 days, in other words, less than one year; and that therefore there was at that date, no violation of Section 19a. However, as noted in petitioner's closing memorandum, "taking respondent's figures as correct, applicant will undoubtedly have actually served more than one year by the time this case is decided. The last day of the year would fall on the first or second of September (1953)". That date is now past, and in view of the decision herein, it is unnecessary to further consider this contention.

[1, 2] There is no serious disagreement in respect to the trial court's authority to grant probation in the present case; nor can there be any doubt about the validity of the condition imposed as a part of such probation, namely, that the defendant serve the first eight months of the probation in the county jail.

[3–5] The general nature of the entire probationary procedure is likewise well settled. As said in In re Martin, 82 Cal.App.2d 16, 22, 185 P.2d 645, 649, "An order placing a defendant on probation, even though it include as a condition a period of detention in the county jail, is not a *judgment and sentence*." There is no finality to an order for probation; it imposes no penalties but is "an act of clemency". A defendant has the undoubted right to refuse probation,—a necessary safeguard against the possibility that probationary conditions may be more onerous than sentence. People v. Frank, 94 Cal.App.2d 740, 742, 211 P.2d 350, citing People v. Billingsley, 59 Cal.App.2d Supp. 845, etc., 139 P.2d 362.

[6] As pointed out in In re Marquez, 3 Cal.2d 625, 628, 45 P.2d 342, 343, Section 19a of the Penal Code, relied upon by petitioner, "must be read and construed as a whole in harmony with other statutes relating to the same general subject [matter]." In the present situation, this means that Section 19a, limiting imprisonment in a county jail to one year, must be interpreted in connection with Sections 1203 and 1203.1 of the Penal Code authorizing the granting of probation, and as a condition thereof, imprisoning the defendant in the county jail.

With these preliminary considerations in mind, it becomes apparent that petitioner's complaint deals with two separate and distinct concepts which cannot be safely commingled,—namely probation and sentence. The original imprisonment of 6 months and 18 days was a lawful and proper condition of probation which, as hereinbefore mentioned, might have been accepted as it was, or entirely rejected. Having accepted probation, and thus having voluntarily served this period, defendant is hardly in a position to enter an objection thereto. And, had Mr. Hays complied with the other terms of probation, which he did not, then there would have been no further imprisonment. The further imprisonment,—the only jail sentence ever imposed, came out about solely by reason of defendant's violation of probation terms, resulting in revocation of probation. And so, again, defendant is not in a position to complain of the logical and legal consequences.

[7] Neither Section 19a of the Penal Code, nor Sec. 1203.1, nor any other statute,

provides that time served in a county jail as a condition of probation, shall be deducted from a jail sentence imposed upon revocation of probation, nor considered in reference thereto. Had the legislators intended such a thing, there is no reason to doubt that a definite provision to that effect would have somewhere been incorporated. And in order to approve of the petitioner's contention, it becomes necessary to read such a provision into the law;—a procedure which judicial tribunals have no authority to resort to.

There is, moreover, a further indication that the legislators did not intend that on revocation of probation and imposition of sentence, the defendant should be given credit for time served in jail as a condition of probation. Section 1203.1 of the Penal Code, as it read previous to 1935, contained just such a provision, that "in that event any period of time which such probationer may have served in jail or other detention place or any fine paid, under the terms and conditions of his probation, shall be taken into consideration as a part of his punishment, and he shall have a credit therefor to be deducted from his term of confinement or from the amount of any fine imposed upon final judgment." When the statute was amended in 1935, the quoted matter was omitted and is not contained in the probation law as it exists today. By omitting such provision, a plain intention seems to be indicated that the law makers did not desire the previous situation to continue.

Although dealing with a factual situation somewhat dissimilar to that here presented, the decision in In re Webber, 95 Cal.App.2d 183, 212 P.2d 540, is pertinent. The headnote to that case reads as follows: "A defendant who pleaded guilty to the commission of a felony and who was placed on probation for five years on condition that he serve two years in the county jail, was not entitled, after serving more than one year in such jail, to release on habeas corpus on the ground that Pen. Code, § 19a, limits detention in a county jail to one year, since such section is limited by § 1203.1, expressly permitting the trial judge in granting probation in felony cases as a condition thereof to imprison the defendant in the county jail for a period not exceeding maximum time fixed by law for the offense."

[8] Finally, in the language of respondent's brief, "Petitioner's contention would mean that such a defendant would not be subject to judgment and sentence for the offense of which he was convicted because of the time spent in jail as a condition of probation having been for a period of one year". Under such an interpretation, a defendant could safely violate the terms of probation knowing that no jail sentence could be imposed upon a revocation of the probation. Such cannot have been the legislative intent. Petitioner's conviction, probation, revocation of probation, and sentence, all appear to have been entirely regular and in accord with the provisions of law relating thereto.

The writ is discharged and petitioner remanded to the custody of the sheriff.

WHITE, P. J., and SCOTT, Justice pro tem., concur.

---

120 Cal.App.2d 211

DANDINI v. DANDINI et al.

Civ. 15211.

District Court of Appeal, First District,
Division 2, California.

Sept. 14, 1953.

Proceeding by wife who had been awarded all community property by separate maintenance decree to reach community property allegedly held in trust for husband in fraud of rights of wife. The Superior Court, City and County of San Francisco, entered judgment in favor of wife, and defendants appealed. The District Court of Appeal, Dooling, J., held, inter alia, that evidence supported inferences of fraud and conspiracy forming basis for judgment that third parties and husband had conspired to defraud wife of her interest in certain community property and to conceal from wife and court in separate maintenance action fact of existence of such property.

Judgment reversed in part and affirmed in part.

1. Conspiracy 🔑19

Fraud 🔑58(1)

Fraud and conspiracy are not generally practiced in the open light of day and for that reason are not ordinarily susceptible of direct proof but must be spelled out from circumstantial evidence.

2. Husband and Wife 🔑299(4)

In proceeding by wife who by terms of separate maintenance decree had been awarded all community property to reach community property allegedly held in trust for husband in fraud of rights of wife, evidence supported inferences of fraud and conspiracy forming basis for judgment that husband and third parties had conspired to defraud wife of her interest in community property and to conceal from wife and court in separate maintenance action fact of existence of such property.

3. Husband and Wife 🔑299(4)

Where husband and third parties engaged in elaborate and active conspiracy to conceal existence of community property from wife so that wife was thereby prevented from litigating question of her rights to such property in separate maintenance action, such conduct constituted "extrinsic fraud" entitling court to award property to wife, in action by wife to reach community property held in trust for husband in fraud of rights of wife.

See publication Words and Phrases, for other judicial constructions and definitions of "Extrinsic Fraud".

4. Husband and Wife 🔑299(4)

In action by wife, who by terms of separate maintenance decree had been awarded all community property, to reach community property allegedly held in trust for husband in fraud of rights of wife, where it was established that existence of certain community property was concealed from court in separate maintenance action by extrinsic fraud, court could award newly discovered community property to wife without setting aside separate maintenance decree.

5. Husband and Wife 🔑299(4)

Statute relating to actions to set aside transfer of community property by husband to third person was inapplicable, in action by wife who had been awarded all community property by terms of separate maintenance decree to reach community property allegedly held in trust for husband in fraud of rights of wife. Civ.Code, § 172a.

6. Corporations 🔑1

It is the very essence of corporation law that the corporation is a separate entity with rights and duties separate and distinct from those of its stockholders and no mere transfer of any or all of the stock in a corporation can operate to extinguish any legal obligation which the corporation owes to a third person.

7. Corporations 🔑1

Where corporation was allegedly fraudulently used by husband and third parties to take title to realty which was in fact community property of husband and wife, existence of such property was thus concealed from court in separate maintenance action in which wife was awarded all community property and certain persons in good faith thereafter purchased all stock of corporation and one such person held realty in trust for corporation, transfer of corporate stock did not extinguish corporate liability to wife who was entitled to such realty.

8. Husband and Wife 🔑299(4)

In proceeding by wife, who had been awarded all community property in separate maintenance action, to reach community property allegedly held in trust for husband in fraud of rights of wife, where evidence merely showed that purchaser, who purchased realty from corporation which was allegedly used by husband and third persons to conceal existence of realty from court in separate maintenance action, had gone to see unidentified realty with husband, evidence was insufficient to support judgment against purchaser on theory that purchaser took realty with knowledge of wife's rights.

Frisbie & Hoogs, Berkeley, for appellants Johnson & Montreal Corp.

Leo R. Friedman, San Francisco, Eugene K. Sturgis, Oakland, for appellants Dandini & Sesenna.

Sturgis, Den-Dulk, Douglass & Henes, Oakland, for appellant Stanley.

Kroninger & Zographon, Oakland, for all appellants.

Johnson, Harmon & Henderson, San Francisco, for respondent.

DOOLING, Justice.

The defendants appeal from a judgment in favor of the plaintiff. Plaintiff is the wife of defendant A. O. Dandini and secured a decree for separate maintenance against him in 1946. By the terms of that decree plaintiff herein was awarded all of the community property then disclosed to the court and A. O. Dandini was ordered to pay her $150 per month.

The basis of this action, count two thereof, on which the judgment is rendered is that A. O. Dandini and the defendants Sesenna conspired to defraud plaintiff of her interest in certain community property and to conceal from plaintiff and the court in the separate maintenance action the fact of the existence of such property. The basic facts will be disclosed in the discussion of the appeals of the several parties.

The Appeal of Dandini and The Sesennas.

Three defendants Sesenna are involved. Oreste and Rose, husband and wife, and Juliana their daughter. The judgment against these defendants is for $2,650, the amount received from the sale of two parcels of real property by the Montreal Corporation at a time when the Sesennas controlled that corporation.

In 1936 appellant Dandini caused the formation of the Montreal Corporation to deal in real estate. 15,000 shares were authorized to be issued at $1 per share. Dandini paid $2,300 to the corporation for 2,300 shares of its stock and the corporation purchased a parcel of real property for which it paid $2,300. In 1938 one Scarf who held a contract to purchase the unissued shares of the corporation, as agent for Dandini, assigned this agreeement to Oreste Sesenna. Oreste testified that in 1938 he bought the 2,300 shares held by Dandini and paid Dandini $1,000 in 1938 and $1,000 in 1939, both payments in cash. Dandini had a contract with the corporation to act as its agent in the purchase and sale of its properties for 50% of the profit. This arrangement was continued after the acquisition of its stock by Oreste Sesenna until 1942 when the arrangement was terminated and $200 was paid to Dandini for a full release of any and all liabilities. In 1942 the Sesennas purchased the additional unissued stock of the corporation at $1 per share. A series of checks for amounts of $1,000 and less each were drawn by Rose Sesenna, on an account in which there was never more than slightly over $1,000 on deposit, and delivered to the corporation. In turn the corporation gave a series of checks to Rose Sesenna for the purchase from her of two parcels of unimproved realty. Thus by what the parties designate as a "round robin" transaction Mrs. Sesenna appeared to pay the corporation over $12,000 in cash, when in fact $1,000 and lesser amounts were being shuttled back and forth between the bank accounts of the corporation and Mrs. Sesenna.

Juliana Sesenna, who was secretary of the Montreal Corporation during most of the period while the Sesennas controlled that corporation and who personally handled the sale of one of the properties involved, entered into a marriage ceremony with Dandini in Nevada, where the two are now living as husband and wife, in defiance of an injunctive order of the California Superior Court which held that the Nevada decree of divorce secured by Dandini from plaintiff was invalid. See Dandini v. Dandini, 86 Cal.App.2d 478, 195 P.2d 871.

In the separate maintenance action Oreste and Rose Sesenna were interrogated about their business dealings with Dandini and failed to disclose the purchase of the

Montreal Corporation from him or any other fact connected with that transaction.

The trial court found that Dandini and the Sesennas had conspired together through the device of the Montreal Corporation to conceal the fact that Dandini was acquiring properties in the name of the corporation which in fact were the community property of the Dandinis. Appellants claim that this finding is not supported by the evidence.

[1] Fraud and conspiracy are not generally practiced in the open light of day and for that reason are not ordinarily susceptible of direct proof but must be spelled out from circumstantial evidence. "In cases of conspiracy to defraud it is not to be expected that direct evidence of the conspiracy can be secured, because such evidence could usually only be secured in the event one of the conspirators confessed. The jury may infer the conspiracy from all the circumstances, and, if the inference is a reasonable one, it will not be disturbed on appeal." Johnstone v. Morris, 210 Cal. 580, 590, 292 P. 970, 975; Beeman v. Richardson, 185 Cal. 280, 282, 196 P. 774; Revert v. Hesse, 184 Cal. 295, 301, 193 P. 943; McPhetridge v. Smith, 101 Cal.App. 122, 142, 281 P. 419; McNulty v. Copp, 91 Cal. App.2d 484, 490, 205 P.2d 438; 10 Cal.Jur. 809–810; 12 Cal.Jur. 829.

[2] The elaborate device of the "round robin" exchange of checks between the corporation and Rose Sesenna to make it appear that the full $12,000 was being paid for the stock, standing alone, might as appellants argue be only a device to exchange the real properties for the stock while apparently complying with the corporation commissioner's permit which required the stock to be issued for cash. However there was other evidence from which the court could reasonably infer otherwise. Upon the trial of this action the Sesennas positively testified that they paid the full $12,000 and upon being asked where the $12,000 came from they testified that it had been secured by the sale of other securities. When it was later proved beyond question that this testimony was false neither Sesenna again took the stand to offer any further explanation. It was also proved that in 1936 Dandini had employed a surveyor to survey certain land belonging to a Mr. and Mrs. Rees and that during that year he was sending a check to Mrs. Rees monthly. A part of the property conveyed by Mrs. Sesenna to the Montreal Corporation had been conveyed to Mrs. Sesenna by the same Mr. and Mrs. Rees and was the same property of which Dandini had secured the survey in 1936. The reasonably permissible inferences from this chain of circumstances when fitted together hardly need to be elaborated. Why did Dandini have the property surveyed in 1936? Why was he making monthly payments to Mrs. Rees? Why did this same property pass from the Reeses to Mrs. Sesenna and from her to the Montreal Corporation? Why in connection with this transaction did the Sesennas go to such an elaborate effort to make the stock purchase appear to be a cash transaction and falsely testify in this proceeding that they had in fact paid the full $12,000 in money which they had obtained by the sale of other securities? And why, if the transaction was as innocent as counsel now argue on appeal, did not the Sesennas take the stand again to make that explanation after the falsity of their previous testimony had been fully established by other evidence?

In the circumstances of this transaction and the other evidence in the case the inferences of fraud and conspiracy drawn by the trial court find reasonable support.

[3] We asked the parties to brief the question whether the fraud found by the court was intrinsic fraud in the separate maintenance action. We have concluded that it was not. Had it been limited to false or perjured testimony in the separate maintenance action another question would be presented, but here the conduct of the parties went beyond the giving of false or perjured testimony in the action itself. Under the findings of the court they engaged in an elaborate and active conspiracy to conceal the facts from the plaintiff so that she was thereby prevented from litigating the question of her rights in this property in the separate maintenance action. At least where one party occupied a con-

fidential relation to the other active measures taken by one to conceal the true facts from the other constitutes extrinsic fraud. See the full discussion and the cases collected by the court in Jorgensen v. Jorgensen, 32 Cal.2d 13, 18–21, 193 P.2d 728.

[4] We find nothing in the argument that the court could not award the newly discovered community property to the wife in this action without setting aside the separate maintenance decree. The same argument was summarily disposed of in Milekovich v. Quinn, 40 Cal.App. 537, 545–546, 181 P. 256, 260, "It is not necessary, under the rule announced in Green v. Duvergey, supra, [146 Cal. 379, 80 P. 234], that a divorce decree be set aside in whole or in part." The court in this action gave the plaintiff the additional relief of which Dandini's extrinsic fraud had deprived her in the original action. To do that it was not necessary to set aside the original decree, which had properly disposed of all of the community property disclosed in that action. It would be futile to set aside the disposition of property made by the former judgment only to readopt the same disposition in a new judgment.

[5] We can find no reason for applying section 172a, Civil Code to this proceeding. The gist of the action is not to set aside a transfer of community property conveyed by the husband to a third person. It is to reach community property held in trust for the husband in fraud of the rights of the wife. Since the court in the separate maintenance action had the power to award all community property to the wife, and since by the extrinsic fraud of the husband the existence of this property was not disclosed to the court in the separate maintenance action, the court in this case had the like power in its discretion to award all of this property to the wife.

The Appeal of The Montreal Corporation and The Johnsons.

Appellants Johnson purchased all of the stock of the Montreal Corporation from the Sesennas. The corporation then held two parcels of real property. The corporation transferred this property to L. E. Johnson, he transferred it to his wife who later transferred it back to him. It is clearly established that the property is held in trust by Johnson for the corporation, these several transfers having been made only for convenience and without consideration. The decree awards this real property to plaintiff. It is admitted that appellants Johnson acted throughout in good faith.

[6, 7] The liability enforced by the decree is not a personal liability of the appellants Johnson but the liability of the Montreal Corporation of which they have the misfortune to have acquired all of the outstanding stock. Under the findings the Montreal Corporation was fraudulently used by Dandini and the Sesennas to take title to real property which was in fact the community property of the Dandinis, the legal title being lodged in the corporation in fraud of Mrs. Dandini's rights. The corporation thereby itself became a party to the fraudulent conspiracy with resulting liability to Mrs. Dandini. These appellants argue that in some way the transfer of all the corporate stock to them extinguished this corporate liability. It is the very essence of corporation law that the corporation is a separate legal entity with rights and duties separate and distinct from those of its stockholders and no mere transfer of any or all of the stock in a corporation can operate to extinguish any legal obligation which the corporation then owes to a third person. As the supreme court of Washing tersely put it in one case "a change in the ownership of the stock does not change the obligations of the corporation." Davis v. Bigelow Bldg. Co., 150 Wash. 576, 274 P. 106.

After the transfer of the stock, as before, the corporation held the real property subject to Mrs. Dandini's rights. The liability here enforced is enforced primarily against the corporation and it is only because L. E. Johnson is holding legal title to the property as a naked trustee for the corporation that the judgment also runs against him.

The Appeal of Stanley.

[8] Stanley purchased a parcel of real property in Hayward from the corporation

while it was in the control of the Sesennas. Judgment went against him on the theory that he took with knowledge of Mrs. Dandini's rights. The only evidence claimed to show knowledge on Stanley's part is found in the following testimony of the witness Gleason:

> "Q. During your employment during that year (1938), did you ever have any conversation with Mr. Wilfred Stanley concerning The Montreal Corporation? A. Merely that Mr. —
>
> "Q. Well, you did have such a conversation? A. I did, yes. * * *
>
> "Q. Now, then, just what was said, as you can recall? A. Well, in substance, Mr. Stanley said that he just came back from taking Mr. Dandini out to look at some property in Hayward, relative to putting on a building, house of some kind for amusement purposes, or something to that nature * * *." (An additional statement contained in the answer was stricken by the court.)

Stanley denied that he had known anything about the Montreal Corporation before he bought this lot and that the lot that he purchased from the Montreal Corporation had ever been visited by him with Dandini, although he testified freely that he had visited other property with Dandini.

It will be seen from the quoted testimony that while the witness testified that he had a conversation with Stanley about the Montreal Corporation he recounted no such conversation when asked to give it. Instead he related a conversation about going to see an unidentified lot in Hayward with Dandini. There is nothing to connect this unidentified lot with the one that Stanley later purchased. We agree with this appellant that the judgment against him finds no substantial support in the evidence.

Judgment against appellant Stanley reversed; judgment against all other appellants affirmed.

NOURSE, P. J., and GOODELL, J., concur.

COMPLETE SERVICE BUREAU et al. v. SAN DIEGO COUNTY MEDICAL SOC. et al.*

Civ. 4573.

District Court of Appeal, Fourth District, California.

Sept. 14, 1953.

Rehearing Denied Oct. 6, 1953.

Hearing Granted Nov. 12, 1953.

Cross actions involving the propriety of certain acts being done in connection with a medical practice. The Superior Court, San Diego County, denied the relief sought, and an appeal was taken. The District Court of Appeal, Barnard, P. J., held that the corporation code section relating to health service organizations does not provide an alternative method of organizing such service organizations, and that its provisions also apply to any corporation organized for purpose of paying for professional services of certain licentiates.

Reversed.

1. Trial ⚷404(2)

Where evidence was undisputed, trial court's findings amounted to conclusions of law.

2. Corporations ⚷14(1)

Corporations Code section relating to health service organizations does not provide an alternative method of organizing such service organizations, and its provisions also apply to any corporation organized, under code section relating to nonprofit corporations, for purpose of paying costs of professional services for certain licentiates. Corporations Code, §§ 9200, 9201.

3. Injunction ⚷67

Purported nonprofit medical service corporation which had not carried out the purposes expressed in its articles of incorporation and which had not complied with the laws and regulations applicable to its line of activity, as required by statute under which it was organized, would be enjoined from continuing improper operations. Corporations Code, §§ 9200, 9201; Business and Professions Code, §§ 2008, 2380, 2380.5, 2399.

---

* Subsequent opinion 272 P.2d 497.

4. Injunction ⚷2

Statute authorizing injunctive relief under circumstances of case should be applied when in effect prior to rendition of decision. Business and Professions Code, § 2436.

5. Appeal and Error ⚷843(2)

Questions involved on appeal from denial of injunctive relief against layman's operations in medical service field were not rendered moot upon death of layman, where his will provided for continuance of some of such operations for benefit of his wife.

◆

Gray, Cary, Ames & Frye and Brooks Crabtree, San Diego, Peart, Baraty & Hassard, San Francisco, for appellants.

Sloane & Fisher, San Diego, for respondents.

BARNARD, Presiding Justice.

This is an appeal from a judgment denying equitable relief in a case involving charges of improper and unlawful acts in connection with a medical practice.

There is no dispute as to the material facts. In 1939, Mr. Parmer and two friends, none of whom was licensed to practice medicine, organized Complete Service Bureau (hereinafter called CSB) under the general nonprofit corporation law now found in section 9200 of the Corporations Code. The articles of incorporation stated that its main purposes were to establish and maintain "a fund obtained by means of periodic payment by its members and to be used to defray the cost to such members of medical services, hospital care," etc; to supply or procure for members and their families medical, hospital and other services at the lowest cost and "on a periodic payment plan"; to act as trustee in carrying out these purposes and to handle funds and property subject to such trust; and to furnish to its members medical and hospital services "without profit to any agency."

After organizing the corporation, the three incorporators met as the trustees of CSB, at which meeting one of the friends resigned and Parmer's secretary was elected in his place. Two days later these three, as trustees, adopted by-laws and ratified the lease of a building and grounds which gave CSB an option to purchase the property. Two of the trustees then entered into a contract with Parmer employing him as manager of CSB for 20 years, his rights being made assignable and inheritable in the event of his death. This contract provided that Parmer was to have as compensation 25% of the monthly dues paid by members of CSB, and 25% of all gross revenue received by CSB from any source; that Parmer need not devote his full time but might engage in any occupation he chose; that he might employ such assistants as he saw fit, to be paid by CSB; that if the contract was terminated for any reason Parmer might enter into business in competition with CSB and have the use of its books and records in that competition; and that Parmer was granted an option to purchase at any time any or all of the real and personal property owned by CSB at its original cost less depreciation. In December, 1940, CSB exercised its option and purchased the leased premises for $31,000.

An arrangement was made with a doctor and his partners to do the medical work at the leased building, and an extensive program was put on to secure subscribers or members through solicitors paid on a commission basis and through newspaper and other advertising which continued up to the time of the trial. This advertising matter emphasized the fact that CSB was selling medical services and not merely a system of medical financing, and did not state the names of the doctors who were to perform the services. These advertisements contained, among other things, such statements as the following: "Your money goes for Medical Care and other Health Services exclusively." "Surprise! a 24-hour Medical-Surgical Hospital Service For Only $2.50 a month." "You can never have a big medical or surgical bill," if you subscribe to CSB. "Your Insurance Money will provide your family twice as much service when you are a member of CSB." "You will be surprised how much medical, surgical and hospital care you can buy for $2.50 a month." "Individuals may enroll—

no group required." "Your insurance provides dollars, CSB provides service." "Main purpose of CSB is to keep health up and costs down." "No age or health limitation to join—you may either be sick or pregnant." "Medical, surgical and hospital services when you need them." "Complete Service Bureau provides the following services: general medicine, surgery, obstetrics, gynecology, pediatrics, eye, ear, nose and throat, glasses, X-ray, (etc.)"

Certain changes were made in late 1946. Parmer, his accountant and his head doctor organized a stock corporation, herein called GP, the par value of the stock being $10 per share. Parmer then exercised his option to purchase the land and buildings owned by CSB at a price of $31,000, payable in GP stock. He then agreed to sell the land and buildings to GP for $102,500, payable in its stock, and his head doctor agreed to sell to GP all of the medical equipment previously used in the building, taking GP stock in payment. This deal was completed by CSB deeding the real property direct to GP, and by GP issuing 3317 shares of its stock to CSB, 2833 shares to the head doctor, and 7150 shares to Parmer. (Some extra shares of GP stock were issued to CSB in payment for some fixtures also transferred.) Thereupon Parmer, as president of GP, in effect entered into an oral lease with himself as president of CSB, by the terms of which all the real and personal property acquired by GP through these transactions were leased to CSB on a month to month basis for a rental not exceeding 10% of the gross income of CSB. These transactions were carried through by Parmer, his secretary and his accountant as trustees of CSB and Parmer, his head doctor and his accountant as directors of GP. As a part of this "reorganization" Parmer agreed to reduce his percentage from 25% to 10% of the dues paid by the members, and to waive his right to receive 25% of CSB's revenues from other sources.

Other changes were made after the 1946 reorganization. The contracts issued to the public were then issued in the name of CSB rather than in the name of the head doctor or his group, as had been done prior to that time. The doctors became employees of CSB, being paid a certain part of the fees collected by CSB for various services performed by the doctor in accordance with a unit system. For one class of service the doctors received 50% of the fees charged and collected by CSB, and for most of the services they received various parts of the fees, apparently averaging somewhere near 50%.

After 1946, the subscribers were given agreements reciting that CSB agreed to provide medical, surgical and hospital services according to the provisions set forth in the agreement; that the dues shall be $2.50 per month; that the subscriber is entitled up to 30 days of hospitalization for each illness or injury, and is entitled to ambulance service up to $10 for each illness or injury; and that the subscriber is entitled to various medical services in accordance with the schedule of fees listed. This schedule of fees runs from $1.50 for an office visit, up to $95 for minor or major surgery. The patients were billed by CSB for the services performed by the doctors employed, and the fees were collected by CSB. The solicitation and advertising continued as before, and the doctors were not named in the advertising matter. Originally the subscribers or members had no voting rights but subsequently voting rights were given to part of the members called "charter" members. An annual meeting of members was held every year but the minutes do not disclose the presence of any members other than the officers, and up to the meeting of 1951 the officers of CSB could not recall that any other members had been present. For years notice of the annual meeting was given by posting a notice in Parmer's office, in recent years it has been given by posting a notice on a bulletin board in a room occupied by the telephone operator and, effective March 26, 1951, provision was made for mailing a notice to all subscribers who had been such for seven consecutive years. At the time of the trial Parmer was president of both CSB and GP, his contract gave him control of the business of CSB; his direct income from the corporation was dependent on the amount of "dues" collected and not upon the value of his services; he need render only such services as he saw fit and could not be discharged without violating the contract; he was in a position to take any surplus income which CSB might have by adjusting the rent upward; and he also had a contract giving him the option to buy CSB's stock in GP at its cost to CSB. Under the guise of rental GP, of which Parmer was majority stockholder, received over $108,000 in the two and a half years preceding the trial, which would have been impossible except for the proportion of medical fees collected from subscribers but retained by CSB.

This action was brought by CSB and three doctors employed by it against the County Medical Society and some 30 of its members, seeking damages and an injunction restraining the defendants from interfering with plaintiffs' business or discriminating against them. The defendants answered and filed a cross-complaint bringing in GP and Parmer as additional cross-defendants. They sought to enjoin the cross-defendants from carrying on the acts and practices above set forth, including a number of alleged misrepresentations in their advertising and in their contract with the subscribers, many of whom were not members of CSB. Plaintiffs dismissed, with prejudice, all of the equitable issues raised by their complaint and the cause went to trial on the equitable issues raised by the cross-complaint and the answers thereto, leaving the damage issue to be tried later.

[1] The court found the general facts in accordance with the above summary and found, in brief, that the cross-defendants were not illegally practicing medicine or violating any law, and that no injury has been sustained by the cross-complainants. It was also found that the advertising of CSB was not illegal, false or misleading; that no one of the cross-defendant physicians has ever engaged in splitting fees with unlicensed persons or aided anyone in the unlawful practice of medicine; that none of the cross-defendant physicians has committed any act which licensed physicians are forbidden to do nor any act in violation of the ethics of the American Medical Association; that the cross-complainants, through their sponsorship of the California Physicians Service, are engaging in substantially the same policies and practices as those engaged in by the cross-defendants of which complaint is made; and that the cross-defendants have not been proceeded against by the State Board of Medical Examiners or by the attorney general. The evidence being undisputed, most of these findings amount to conclusions of law. Leis v. City and County of San Francisco, 213 Cal. 256, 2 P.2d 26. In an opinion filed, the court explained his reasons for some of these conclusions. He there stated that section 593a of the Civil Code, now 9201 of the Corporations Code, provided an alternative method of organizing a nonprofit corporation for the purpose of rendering personal service, but did not repeal section 9200 or in any way affect or restrict a corporation organized under section 593a which did not qualify under the new section but continued to operate under section 9200; that the court was not called upon to decide whether Parmer's contract was excessive or unconscionable since CSB and the attorney general are not complaining; that any proof that CSB is a one-man profit corporation must be held to be immaterial since "the nature of a corporation depends upon the provisions of its charter and not upon what, in fact, the corporation is actually engaged in doing"; that the corporation is not the alter ego of Parmer but merely acts through him as an agent, and the terms of Parmer's management contract is nobody's business except CSB's; that the advertising is done by CSB and therefore is not the advertising of the physicians working for CSB; that CSB is like CPS because both are organized under the same law, and CPS is advertising in the same manner; that while the phrase "prepaid medical plan" is used by CSB in its advertising, and a fully prepaid medical plan is not furnished, the members would not be deceived thereby; and that since CSB is a nonprofit cooperative the commercialization which is naturally incident to the corporate practice of medicine is eliminated, and the danger of dividing the physicians' loyalty is here obviated by the fact that the patients are the real employers of the doctors.

Judgment was entered accordingly and the cross-complainants have appealed. Pending the appeal Parmer died and his wife, as administratrix of his estate, has been substituted in his stead.

The appellants contend that Parmer was unlawfully engaged in the practice of medicine through his domination and control of CSB, and that the entire setup was a sham designed to enable him to do this; that CSB is unlawfully engaged in the practice of medicine by advertising and soliciting for patients in a commercial manner, by allowing a layman to control and dominate a large medical practice, and by splitting fees with a stock corporation which is also controlled by the same layman; that the public is solicited to purchase the medical services of a panel of doctors in one office; that CSB has not complied with 9201 of the Corporations Code and is violating 2008 of the Business and Professions Code which forbids a corporation to practice medicine except where no charge for professional service is made; that it is violating 2380 and 2380.5 of that code which regulate advertising; and that it is violating 2399 of that code which forbids the employment of cappers, steerers and "other persons" in procuring patients for a doctor.

The respondents contend that whether there was any violation of the rules of practice specified in the Business and Professions Code, or any illegal practice of medicine or splitting of fees, are questions of fact upon which the findings of the court are conclusive; that CSB is not the alter ego of Parmer, and is not practicing medicine, but is merely organizing prospective patients, retaining doctors and paying all expenses out of funds collected from the members; that CSB is a nonprofit corporation organized under a statute, now 9200 of the Corporations Code, which expressly authorized it to "render services" to its members; that CSB is not restricted to the advertising permitted to doctors but is governed only by the standard of commercial advertising applicable to a cooperative group; that the voting members of CSB could oust Parmer from its management at any time if they were willing to risk both a suit for damages and the punishment he could impose as the controlling landlord; that the distinction between commercial enterprises and nonprofit cooperatives was recognized in California Physicians' Service v. Garrison, 28 Cal.2d 790, 172 P.2d 4, 167 A.L.R. 306; that the Washington case of Group Health Cooperative of Puget Sound v. King County Medical Soc., 39 Wash.2d 586, 237 P. 737, stronglv supports the principles applied here by the trial court; that this case was started by organized patients in self-defense against a long course of persecution on the part of the "medical trust"; and that if "doctor control" is allowed to stifle "patient control" the inevitable result will be the dreaded "state medicine."

A very different situation appears in the cases most strongly relied upon in support of the judgment. In California Physicians' Service v. Garrison, supra, a true cooperative was organized and run for the benefit of the members and not for the benefit of its organizers or of a few doctors employed by the corporation. The doctors are not picked and employed by the corporation and any doctor may participate. It has complied with 9201 of the Corporations Code and holds a certificate required by that section. The control of the corporation is not in the hands of laymen, and it in no way builds up the practice of any one doctor or group of doctors. Among other differences, it furnishes prepaid medical care; its advertising is for the purpose of offering such care to the public, and not to secure patients for the doctors in one office; no doctors are employed by the corporation doing the advertising; and all of the fees for professional services are retained by the doctor who does the work. In the Group Health Cooperative v. King County Medical Soc. case the cooperative was not only organized as a nonprofit corporation but was also registered as a "health care service contractor" under a statute of that state. It was organized by leaders in labor unions, consumer cooperatives and other groups. Prepaid medical and hospital service was furnished. When the collection of any fee from the patient was permitted, it was required that the entire fee be paid to the doctor who renders the service in order to prevent any lay person from profiting from such professional service. The court there pointed out that the objectionable features, such as extravagant promises by salesmen, profit to a third party, tendency to make money out of contracts, and control by laymen, which had earlier applied, had been eliminated by compliance with the state statutes.

The desirability of extending medical services to persons in the lower income groups through prepayment plans, and on a share the risk basis has been, and is, fully recognized. The question here is whether existing laws have been complied with and whether the operations of the respondents come within established rules and regulations, and are in accordance with announced public policy. In California Physicians' Service, supra, the court pointed out that CPS does not promise beneficiary members that it will provide medical care but the services are offered personally by the professional members, and said that by the enactment of what is now 9201 of the Corporations Code "the state's social policy in regard to the corporate practice of medicine, to the limited extent specified, has been determined and the courts are bound thereby." [28 Cal.2d 790, 172 P.2d 11.]

[2, 3] Section 9200 of the Corporations Code permits the formation of a nonprofit corporation for religious, charitable and similar purposes, and also for "rendering services." But it further provides that such a corporation shall be "subject to laws and regulations" applicable to that particular line of activity. One of the laws applicable to the line of activity here involved is now found in section 9201 of that code, originally adopted in 1941, which permits the formation of such a corporation, under that part of the code, for the purpose of defraying the cost of professional services of licentiates under the Business and Professions Code or of rendering any such services. But it further provides that such a corporation may not engage directly or indirectly in carrying out such purposes unless certain definite requirements are met. CSB was organized under the first of these sections but has not complied with the second. It has not carried out the purposes expressed in its articles of incorporation, nor complied with the laws and regulations applicable to its line of activity as required by the statute under which it was organized. The provisions now found in 9201 of the Corporations Code are not an alternative method of organizing such a service corporation, but those provisions also apply to any corporation organized under what is now 9200, with the purpose of paying the cost of professional services of certain licentiates.

CSB has never been authorized by any statute to render the sort of service it claims to have rendered, and many of its activities are forbidden by existing statutes. Its extensive advertising is illegal and misleading and, in actuality if not in form, its operations involved the splitting of fees for professional services. Some steps in this involved scheme appear innocent in themselves, giving a basis for plausible argument as to the right of groups of people to organize in order to protect themselves from some of the effects of serious illness or injury. Some are well designed to obscure what is actually taking place. But when the effect of the various steps are viewed in relation to each other, and as a whole, the result is one which is not permitted under existing laws and rules, and which is against public policy. Instead of this being a voluntary organization of individuals and groups for the purpose of providing medical care and hospitalization for themselves on a risk sharing prepayment basis, which is permitted by our statute, this corporation was organized by a few laymen, one of whom immediately took and always retained what is actually a complete control, and operations were begun and have been carried through under an arrangement with a few doctors in one office in a manner which contravenes the purpose and intent of many statutes designed to regulate and control that line of activity. The net result is that as many as 15 salesmen were employed to ring doorbells and solicit patients for the doctors in one office; and extensive advertising commercial in its nature and often misleading, was carried on for the same purpose. While a small amount of prepaid hospital service was furnished no prepaid medical service was furnished, each patient secured was charged the fee fixed by the corporation for each such service rendered, and the majority of the patients were not made members of the so-called cooperative. Those who were members were given no reasonable notice of meetings until about the time of the trial, and apparently none of them even attended any such meetings. The fees for professional services were not fixed by the doctors but were fixed by the corporation, and the doctor performing the services received only a part of such fees. A large part of the fees paid by the patients, whether ostensible members of the corporation or not, went to another private corporation controlled by the same layman who controlled CSB, under the guise of rent, which even included rent for the use of the medical appliances and equipment used by the doctors. Although Parmer was free to do as much or as little work as he chose, he received 10% of all dues paid by members and subscribers of all kinds, and in addition, through his stock in GP, he received the major portion of an exorbitant rent. There was no valid reason for CSB to pay any rent at all. As soon as it had paid for the building it purchased, it was compelled to sell it to Parmer for less than one-third of its value. It then rented it back, not at its rental value but at a percentage share of the business done. Parmer and GP then received a rental varying in accordance with the amount of fees for professional services collected by CSB from the patients, and in reality shared in those fees.

In our opinion the controlling findings and conclusions of law, upon which the judgment is based, are not supported by the evidence. If the undisputed facts shown by the evidence do not disclose a failure to comply with existing laws, and do not constitute a plain evasion of those laws and the existing regulations, it appears beyond question that the existing laws designed to regulate and control the practice of medicine, and other professions, should either be repealed or greatly changed.

[4] While not raised by the respondents, the appellants have raised the question as to whether or not they are entitled to injunctive relief to protect their rights as licensed physicians. This right was partially recognized in this state in People ex rel. Chiropractic League of California v. Steele, 4 Cal.App.2d 206, 40 P.2d 959, 41 P.2d 946. The acts complained of might well be held to be "unfair competition", and to be injurious to the profession in general which must comply with existing statutes. The right has been recognized in many out of state cases, only a few of which need be cited. Taylor v. New System Prosthetic Dental Lab., 29 Ohio N.P., N.S., 451; Judd v. City Trust & Savings Bank, 133 Ohio St. 81, 12 N.E.2d 288; Smith v. Illinois Adjustment Finance Co., 326 Ill. App. 654, 63 N.E.2d 264; Childs v. Smeltzer, 315 Pa. 9, 171 A. 883; Johnson v. Purcell, 225 Ia. 1265, 282 N. W. 741; Neill v. Gimbel Bros., Inc., 330 Pa. 213, 199 A. 178; McMurdo v. Getter, 298 Mass. 363, 10 N.E.2d 139; State v. Boren, 36 Wash.2d 522, 219 P.2d 566, 20 A.L.R.2d 798. Moreover, injunctive, under the circumstances here appearing, is provided for in section 2436, which is added to the Business and Professions Code by Chapter 269 of the Statutes of 1953. This being an injunctive proceeding this new statute, being in effect when this decision is rendered, should be applied, Tulare Irrigation District v. Lindsay-Strathmore Irrigation District, 3 Cal.2d 489, 45 P.2d 972; Dr. Miles California Company v. Sontag Chain Stores Company, 8 Cal.2d 178, 64 P.2d 726, and would be important in any further proceedings in the trial court.

[5] At the hearing of this cause a motion by the respondents to dismiss the appeal, on the ground that all questions have become moot because of the death of Parmer, was also submitted. The will of Parmer, in which he provides for the continuance of some of these operations with his wife as the beneficiary, is attached to the motion. Substantial issues still remain and the request for a dismissal of the appeal should not be granted.

The motion to dismiss is denied, and the judgment is reversed.

GRIFFIN and MUSSELL, JJ., concur.

120 Cal.App.2d 252

CITY OF SOUTH SAN FRANCISCO v. BERRY et ux.

Civ. 15508.

District Court of Appeal, First District,
Division 1, California.
Sept. 17, 1953.

Action by city to enjoin defendants from using buildings on certain parcel of land as a place of residence for more than one family, and for order requiring defendants to so remodel buildings that they would be unusable as a place of multiple residence. The Superior Court, County of San Mateo, dismissed complaint, and plaintiff appealed. The District Court of Appeal, Fred B. Wood, J., held that when land located in county having ordinance limiting its use to single family residences was annexed to city having no such ordinance, land left the territorial jurisdiction of the county, and was no longer subject to ordinance and such limitation.

Judgment affirmed.

1. Counties 🔑21½

Municipal Corporations 🔑589

The police powers given to a county and to a city by the Constitution, may be exercised by each governmental unit only within its respective territorial jurisdiction. Const. art. 11, § 11.

2. Municipal Corporations 🔑37

Where land subject to county ordinance zoning it for single family residences was annexed by city having no such ordinance, land left the territorial jurisdiction of the county, and ceased to be subject to its zoning ordinance or any other limitation of it to single family residences. Const. art. 11, § 11.

◆

Richard P. Lyons, South San Francisco, for appellant.

R. A. Rapsey, San Bruno, for respondents.

FRED B. WOOD, Justice.

According to the amended complaint, the County of San Mateo, in June, 1945, issued to defendant Luther E. Berry a permit to construct a single family residence on a certain parcel of land which by and pursuant to the land use ordinances of the county had been classified as residential and limited to single family dwellings; on August 19, 1946, this parcel of land, with other lands, was annexed to and made a part of the City of South San Francisco; the permittee and his wife Christine Berry have constructed a building for use by more than one family and have permitted three families to occupy it, in violation of the county land use ordinances; and defendants have constructed an additional building on this land, a building now occupied by a family. It is not alleged that the city has a similar or any ordinance on this subject.

Upon the basis of those facts the city seeks a permanent injunction restraining the defendants from using the buildings on this parcel of land as a place of residence for more than one family, and an order requiring the defendants to so remodel these buildings that they will be incapable of use as a place of residence for more than one family.

The city has appealed from the judgment of dismissal rendered after the sustaining of a general demurrer to the amended complaint and plaintiff's failure further to amend.

[1,2] The judgment must be affirmed. The police power has been given the county and the city, respectively, for exercise only "within its limits". State Const. art. XI, § 11. When the land in suit was annexed to plaintiff city it left the territorial jurisdiction of the county, ceased to be "within its limits". For various applications of this principle, see Petition of Sanitary Board of East Fruitvale Sanitary Dist., 158 Cal. 453, 111 P. 368; San Francisco-Oakland Terminal Rys. v. County of Alameda, 66 Cal.App. 77, 225 P. 304; In re Knight, 55 Cal.App. 511, 203 P. 777; City of El Cajon v. Heath, 86 Cal.App.2d 530, 196 P.2d 81; 18 Cal.Jur. 833, Mun. Corp., § 138.

Plaintiff relies on this statement in 8 McQuillin on Municipal Corporations, 3rd edition, page 38, section 25.14: "it has been said that zoning imposes restrictions on the use of the land which attach to and run with the land," citing Orme v. Atlas Gas &

Oil Co., 1944, 217 Minn. 27, 13 N.W.2d 757, 759, 761. The court was there defining the term "*zoning* statute or ordinance" incident to ascertaining whether the words "other * * * Governmental action, law or regulation" (in the expression "zoning statute or ordinance, or any other Municipal or Governmental action, law or regulation") comprehended and included federal regulations restricting the sale of gasoline. The court's remarks obviously had no bearing on the question whether or not a county zoning ordinance "runs with the land" when the land leaves the county upon being annexed to a city.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

---

120 Cal.App.2d 261

LUKIN et al. v. STATE BOARD OF EQUALIZATION et al.

Civ. 19340.

District Court of Appeal, Second District, Division 1, California.

Sept. 17, 1953.

Proceedings upon the application for an off-sale general liquor license. The State Board of Equalization refused to receive act upon or grant the application and the applicants petitioned for an alternative writ of mandamus and for damages. The Superior Court of Los Angeles County, Frank G. Swain, J., sustained the board's demurrer without leave to amend and applicants appealed. The District Court of Appeal, Doran, J., held that statute providing that off-sale general liquor licenses should be limited to one license per thousand population intended that beer and wine off-sale licenses should be computed together with general off-sale licenses in ascertaining the present number of licensees.

Judgment affirmed.

1. Intoxicating Liquors 🔑46½

Under statute providing that off-sale general liquor licenses shall be limited to one per thousand population and that no additional off-sale general license shall be issued when the number of all off-sale liquor licenses exceeds one per thousand population, off-sale wine and beer licenses were to be used in computation of all off-sale licenses. Gen.Laws, Act 3796, § 38f.

2. Intoxicating Liquors 🔑46½

Where total number of off-sale licenses, including off-sale beer and wine licenses, exceeded the number allowable for county, population increase did not allow issuance of new off-sale general liquor license, and State Board of Equalization's refusal of application without hearing was not an abuse of discretion and did not render board liable for damages for loss of profits which might have been received had license been granted. Gen. Laws, Act 3796, § 38f.

Philip E. Poppler, Long Beach, for appellants.

Edmund G. Brown, Atty. Gen., Alexander Googooian, Deputy Atty. Gen., for respondents.

DORAN, Justice.

According to appellants' brief, "Petitioners applied for an off-sale general liquor license and the Board refused to receive, act upon or grant the application. Petitioners thereupon petitioned for an alternative writ of mandamus and for damages, to which petition the Board demurred. The demurrer was sustained without leave to amend, from which order (judgment of dismissal) petitioners appeal".

The Board's refusal to act on appellants' application, renewed several times, was based, as respondents state, "on its interpretation of Section 38f of the Alcoholic Beverage Control Act [Gen.Laws, Act 3796], which interpretation did not allow the issuance of any new off-sale general licenses in Los Angeles County on the basis of a population increase, as the total number of off-sale licenses, including off-sale beer and wine licenses, was in excess of the number allowable for the population of Los Angeles

County, (one per 1,000 persons in a county)".

Section 38f reads as follows:

"It is hereby determined that the public welfare and morals require that there be a limitation on the number of premises licensed for the sale of distilled spirits.

"The number of premises for which an on-sale general license is issued shall be limited to one of such premises for each 1,000, or fraction thereof, inhabitants of the county for which the premises are situated, provided that no additional on-sale general licenses, other than a renewal or transfer or as permitted hereinafter in this section, shall be issued in any county where the number of all premises for which on-sale licenses, other than on-sale beer licenses, are issued shall be more than one of such premises for each 1,000 or fraction thereof, inhabitants of such county, and provided further that no on-sale general license shall be issued in lieu of or upon the cancellation or surrender of an on-sale beer and wine license. The number of premises for which an off-sale general license is issued shall be limited to one of such premises for each 1,000, or fraction thereof, inhabitants of the county in which the premises are situated, provided that no additional off-sale general license, other than a renewal or transfer or as permitted hereinafter in this section, shall be issued in any county where the number of premises for which *all* off-sale licenses are issued shall be more than one of such premises for each 1,000, or fraction thereof, inhabitants of such county. Population * * * shall be determined by the most recent United States decennial or special census." (Italics added.)

The trial court's judgment of dismissal, entered after the sustaining of respondents' demurrer to petitioners' petition for a writ of mandate, without leave to amend, states that judicial notice is taken of official statistics published in the Alcoholic Beverage Control Bulletin for June, 1951, showing that "there are 3,336 premises with off-sale general liquor licenses, 198 premises with off-sale and on-sale general liquor licenses, and 3,747 premises with off-sale beer and wine licenses, making a total of 7,281 premises with off-sale liquor licenses in the County of Los Angeles." Under this computation, as respondents' brief points out, the Board could not possibly issue a new license to appellants, possessed no discretion in respect to the matter; therefore no hearing was required.

Appellants object to the Board's interpretation of Section 38f of the Alcoholic Beverage Control Act, "so as to include in the computation of the total number of off-sale *general* licenses the number of existing off-sale *beer and wine* licenses". In support of this contention appellants cite such cases as Johnstone v. State Board of Equalization, 95 Cal.App.2d 527, 213 P.2d 429. Unlike the present case, the Johnstone opinion involved an attempt to compel the Board to cancel a seasonal on-sale general liquor license. The reviewing court held that seasonal licenses had never been used in computing the number of licenses permitted. There was no decision concerning off-sale licenses.

A reading of Section 38f, particularly that part relating to off-sale licenses which is the only matter here involved, indicates the correctness of the trial court's ruling, the propriety of the Board's interpretation of the statute, and the untenable nature of appellants' contentions.

As pointed out in respondents' brief, the Board was without any power, jurisdiction or discretion to issue new off-sale general licenses other than under the conditions expressly laid down in the statute. It appellants' application for a new license did not fall strictly within the statutory conditions, and if the statutory maximum had already been reached, then obviously a hearing could accomplish nothing. As is well known, the law does not require idle acts. Had the Board possessed any discretionary power to grant or withhold a license, a different question would be presented.

The consideration of the first part of Section 38f, relating to on-sale licenses, or of cases relating thereto, is of no assistance in dealing with the latter portion of the section pertaining to off-sale licenses. The separation of the two classes of licenses, the one permitting consumption of beverages upon the premises, and the other, such as the off-sale license requested by appellants, permitting only the sale of packaged goods for consumption off the premises, is complete.

As hereinbefore indicated, that part of the statute governing the present situation, expressly provides that "no additional off-sale general license, other than a renewal or transfer or as permitted hereinafter in this section, shall be issued in any county where the number of premises for which *all* off-sale licenses are issued shall be more than one of such premises for each 1,000, or fraction thereof, inhabitants of such county." (Italics added.)

[1] The respondents are correct in saying that "If any effect at all is to be given to the use of the word 'all' in the phrase 'all off-sale licenses', the conclusion is inescapable that both off-sale general licenses and off-sale beer and wine licenses are to be used in computing the number of off-sale general licenses that may be issued in a particular county. The adjective 'all' would be wholly unnecessary if we were to follow appellants' argument that 'all off-sale licenses' means solely off-sale general licenses." The term "all" must be construed to mean exactly what it seems to mean, and there is no authority for inserting the additional limiting words which appellants' theory would require. Had the legislators intended something else, the all inclusive term would not have been employed.

The appellants' contention that "The board has blown hot and cold in its interpretation of 38f", and that the denial "even of a hearing was clearly arbitrary, capricious, and in abuse of discretion, for which the remedy of mandamus should be granted", is without merit. In support thereof appellants cite City of San Diego v. State Board of Equalization, 82 Cal.App.2d 453, 186 P.2d 166, which, like Johnstone v. State Board of Equalization, 95 Cal.App.2d 527, 213 P.2d 429, hereinbefore mentioned, involves the issuance of on-sale licenses. Such cases do not support appellants' position.

[2] Since, as already pointed out, the Board had no power to issue a license to appellants and consequently a hearing would have been pointless and without benefit to appellants' cause, which position was sustained by the trial court's sustaining of the general demurrer, it "would logically follow", as said by respondents, "that no damage can result from the failure to do an official act by public officer, where the public officer is powerless to act". Moreover, as respondents state, "appellants were seeking damages for the loss of profits which they *might* have received in operating a retail liquor department in conjunction with their grocery store".

Under the circumstances shown by the record, it would be manifestly improper for an appellate tribunal to reverse the order and judgment of the trial court, and to order the Board to do something which the law prohibits, namely the granting of a license in defiance of the statutory provisions.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

---

120 Cal.App.2d 377

SOUTHERN HEATERS CORP. v. NEW YORK CAS. CO.

Civ. 19680.

District Court of Appeal, Second District, Division 1, California.

Sept. 25, 1953.

As Modified on Denial of Rehearing Oct. 14, 1953.

Hearing Denied Nov. 19, 1953.

Action for damages upon a contractor's surety bond. The Superior Court of Los Angeles County, Arthur Crum, J., rendered a judgment adverse to defendant and defendant appealed. The District Court of Appeal, Scott, J. pro tem., held that evidence sustained implied finding that supplier of water heaters and magnesium rods for a construction job was a subcontractor acting under general contractor, as agent of owner, and was not a materialman, and manufacturer who furnished supplies to such subcontractor was entitled to benefits of action on bond which secured payment of claims for labor and materials furnished to subcontractor.

Judgment affirmed.

1. Mechanics' Liens ⚿313

When a bond is given for purpose of complying with mechanic's lien law terms of statute relating thereto are to be read into bond and control its interpretation and effect.

2. Mechanics' Liens ⚿315

In action for damages under contractor's surety bond, evidence sustained implied finding that supplier of water heaters and magnesium rods for a construction job was a subcontractor, acting under general contractor, as agent of owner, and was not a materialman, and manufacturer who furnished supplies to such subcontractor was entitled to benefits of action on bond which secured payment of claims for labor and materials furnished to subcontractor.

Boller, Suttner & Boller, Arcadia, for appellant.

Austin, Austin, Jones & Chaffee and Irving P. Austin, Compton, for respondent.

SCOTT, Justice pro tem.

Defendant appeals from an adverse judgment awarding damages upon a contractor's surety bond. It states that the facts are not in dispute.

John R. Donaldson was doing business at 600 East Front Street in Ventura, California, under two fictitious firm names as sole owner: (1) Allison Supply Co., and (2) Traveling Mechanics. Under the name Traveling Mechanics he entered into a contract as subcontractor with Hal B. Hayes Construction Company, the general contractor, to furnish and install all plumbing at the Edwards Base Housing Project. The Hayes Company required completion bonds and Donaldson secured one G. Vella as an individual indemnitor for Donaldson individually and doing business under both of his fictitious names, Traveling Mechanics and Allison Supply Company, and that agreement being signed by Donaldson and Vella. He also secured a bond executed by defendant, as surety, which secured payment of claims for *labor and materials used in the work* in which Traveling Mechanics was named as principal and defendant was named as surety in favor of the Hayes Company and signed by defendant and by "Traveling Mechanics by John R. Donaldson."

John R. Donaldson, using his fictitious name of Allison Supply Co., placed an order with the sales agent of plaintiff for 550 water heaters and 550 magnesium rods. These were charged to Allison Supply Co. but each invoice was carefully marked for the "Muroc" (Edwards Base) job. These heaters went directly to the job site from plaintiff's plant in Compton in a truck driven by Donaldson's only truck driver, Charles Henderson. This truck driver and all other employees of Donaldson were paid by him under the name Traveling Mechanics. Allison Supply Company had no payroll.

When Donaldson was billed for payment under the name Allison Supply Co. his bookkeeper would bill Donaldson under the name Traveling Mechanics at a price mark up. Donaldson's bookkeeper testified that this mark up was the difference between the manufacturer's price per unit of $31 and the wholesale price per unit of $47 resulting in a profit of $16 per unit. No checks passed between Traveling Mechanics and Allison Supply Company for this Edwards Base job but there were checks from the above named G. Vella received on this account.

The heaters and rods were installed on the Edwards Base job and were paid for in part. Plaintiff filed and recorded a mechanic's lien for the balance and served on defendant a notice of furnishing said materials. The judgment awarded plaintiff the amount of its claim for the unpaid balance of the purchase price.

Defendant states its two points on appeal as follows:

I. The Trial Court erred in finding the defendant surety liable for the default of Donaldson as "Allison Supply Co." where it contracted only for the liability of Donaldson as "Traveling Mechanics".

II. The plaintiff manufacturer, having furnished supplies to a materialman, was not entitled to the benefits of a mechanic's lien, or an action on the bond.

[1] When a bond is given for the purpose of complying with the mechanics' lien law, Code of Civil Procedure, Sec. 1183 et seq., the terms of the statute are to be read into the bond and control its interpretation and effect. Carpenter v. National Surety Co., 25 Cal.App.2d 90, 93, 76 P.2d 523. "If any doubt remains as to the proper interpretation of the bond, we should be governed by the express statutory direction that it shall 'be construed most strongly against the surety and in favor of all persons for whose benefit' it is given." Myers v. Alta Construction Co., 37 Cal.2d 739, 743, 235 P.2d 1, 3.

From the record it is apparent that John R. Donaldson operated one business at one address. He had recorded two fictitious names under sections 2466 and 2468 of the Civil Code, which are designed to protect those dealing with an individual doing business under a fictitious name. Bank of America N. T. & S. A. v. National Funding Corp., 45 Cal.App.2d 320, 327, 114 P.2d 49. This was a device by which he presumably hoped to profit but apparently did not succeed. We may assume that the trial court concluded that defendant surety company was aware of the two fictitious names covering one man operating one business. It could infer that defendant would be concerned as to Donaldson's agreement with the individual indemnitor, G. Vella, and that it had learned that this agreement covered Donaldson under both fictitious names.

[2] There can be no doubt that the evidence supports the trial court's implied finding that Donaldson was a subcontractor, acting under the general contractor, as agent of the owner and that he was not a materialman. This distinguishes the instant case from that of Harris and Stunston v. Yorba Linda Citrus Ass'n, 135 Cal.App. 154, 157, 26 P.2d 654, relied on by appellants, in which the trial court was sustained in its finding that the party under consideration was a materialman and not a subcontractor acting as the agent of the owner. Other cases cited by appellant do not require discussion because they in no way strengthen its case on appeal.

Judgment affirmed.

WHITE, P. J., and DORAN, J., concur.

120 Cal.App.2d 246

PEOPLE v. COX.

Cr. 2905.

District Court of Appeal, First District,
Division 2, California.

Sept. 16, 1953.

Hearing Denied Oct. 15, 1953.

In prosecution for violation of Penal Code, § 288, the Superior Court, City and County of San Francisco, Sapiro, J., entered judgment of conviction and sentence was imposed on October 31, 1952. Oral notice of appeal was given in open court at that time, but no written notice of appeal was filed until December 11, 1952. The District Court of Appeal, Dooling, J., held that the oral notice of appeal was ineffective and the written notice of appeal, not having been filed within ten days after judgment, was too late.

Appeal dismissed.

1. Criminal Law ⚷1081

Where oral notice of appeal was given in open court but written notice was not given until about 1½ months later, fact that defendant was informed that an appeal was made by his attorney, and thought that appeal was handled in correct manner, was not sufficient excuse for late filing of new notice of appeal.

2. Criminal Law ⚷1081

Where oral notice of appeal was given in open court but written notice was not given until about one and one-half months later, oral notice of appeal was ineffective, and written notice of appeal, not having been filed within ten days after judgment, was too late. Rules on Appeal, rule 31.

3. Criminal Law 🔑1081

The courts have recognized no excuse for late filing of a notice of appeal, whatever the hardship or apparent justice involved. Rules on Appeal, rule 31.

Norman D. Watson, Oakland, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., for respondent.

DOOLING, Justice.

Defendant was convicted of a violation of section 288 Pen.Code and sentence was imposed upon him on October 31, 1952. Oral notice of appeal was thereupon given in open court but no written notice of appeal was filed until December 11, 1952. An affidavit of defendant, which accompanied the written notice of appeal, explains that defendant was informed that an appeal was made by his attorney and thinking the appeal was handled in the correct manner he failed to seek any further information until recently writing to the Clerk of the Court.

[1–3] The oral notice of appeal was ineffective, People v. Behrmann, 34 Cal.2d 459, 211 P.2d 575, and the written notice of appeal, not having been filed within 10 days after judgment, was too late. Rules on Appeal, rule 31. The courts have recognized no excuse for the late filing of a notice of appeal, whatever the hardship or apparent injustice involved. People v. Lewis, 219 Cal. 410, 27 P.2d 73; People v. Dawson, 98 Cal.App.2d 517, 220 P.2d 587.

Appellant is represented on this appeal by counsel appointed by this court at his request. He was represented in the trial court by the public defender and his present counsel suggested on oral argument that the failure of the public defender to perfect his appeal brings the case within the rule of People v. Slobodion, 30 Cal.2d 362, 181 P.2d 868. In the Slobodion case the written notice of appeal was actually placed in the hands of the prison authorities in ample time for transmission to the county clerk and the court held this to be a constructive filing. Here no written notice of appeal was filed actually or constructively within the time provided by the Rules on Appeal.

Appeal dismissed.

NOURSE, P. J., and GOODELL, J., concur.

120 Cal.App.2d 347

PEOPLE v. MARCUS.

Cr. 2403.

District Court of Appeal, Third District, California.

Sept. 23, 1953.

Defendant was convicted of having a knife in his possession while a prisoner at a state prison. The Superior Court, Sacramento County, Raymond T. Coughlin, J., entered judgment of conviction and denied motion for new trial, and defendant appealed. The District Court of Appeal, Peek, J., held that alleged fact that defendant had received knife in order to prevent serious trouble between two fellow-prisoners and that prisoner had surrendered knife to defendant pursuant to defendant's urging did not constitute a valid defense.

Judgment of conviction and order denying motion for new trial affirmed.

Convicts 🔑5

Alleged fact that defendant had received knife in order to prevent serious trouble between two fellow-prisoners and that a prisoner had surrendered knife to defendant pursuant to defendant's urging, did not constitute a valid defense, in prosecution of defendant for having knife in his possession while a prisoner in a state prison. Pen.Code, § 4502.

Joseph G. Babick, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., Doris H. Maier, Deputy Atty. Gen., Sacramento, for respondent.

PEEK, Justice.

This is an appeal by defendant from a judgment of conviction entered pursuant to the verdict of the jury finding him guilty of violation of section 4502 of the Penal Code in that on the date specified, while a prisoner at Folsom State Prison, he had in his possession a knife, contrary to the provisions of said statute. His motion for a new trial was denied and he now appeals from that order as well as the judgment.

His sole contention on appeal is that the verdict is contrary to the law and the evidence for the reason that by his acknowledged possession of the knife he was seeking to accomplish the very object and purpose of said code section. In this he relies upon statements taken from context such as "The statute was passed to protect the guards and other inmates of the prison", People v. Scherbing, 93 Cal.App.2d 736, 742, 209 P.2d 796, 800, and that the section was passed "to protect inmates and officers of state prisons from the peril of assaults with dangerous weapons perpetrated by armed prisoners." People v. Wells, 68 Cal.App.2d 476, 156 P.2d 979, 981. See also People v. Harris, 98 Cal.App.2d 662, 666, 220 P.2d 812.

His testimony in explanation of his possession of the knife was simply that he had received it from one Henderson in order to prevent serious trouble between Henderson and one Joe Perez and that pursuant to his urging Henderson surrendered the knife to him.

In view of what this court said in People v. Wells, 68 Cal.App.2d 476, 156 P.2d 979, it would seem unnecessary for us to discuss at length the argument made by defendant concerning his good intentions in arming himself with a knife. In discussing the code section in question we said, 68 Cal. App.2d at page 481, 156 P.2d at page 981:

"That section of the code absolutely prohibits all prisoners in any state prison, without qualification, from possessing or carrying on their persons certain designated deadly weapons. The intention with which the weapon is carried on the person is not made an element of the offense. Proof of the possession of the prohibited weapon infers that it is carried in violation of the statute." (Citing cases.)

Furthermore, we said, 68 Cal.App.2d at page 482, 156 P.2d at page 982: "* * * intent is not made a necessary element of the crime [and] it is not essential to affirmatively prove the purpose for which the act is performed. Section 4502 of the Penal Code is unqualified in its prohibition against prisoners of a state prison having in their possession or on their persons the weapons enumerated therein. We are convinced that the intent or purpose with which a prisoner arms himself with a prohibited weapon is not a necessary element under that statute."

See also People v. Crenshaw, 74 Cal.App. 2d 26, 167 P.2d 781.

The judgment of conviction and the order denying the motion for a new trial are affirmed.

VAN DYKE, P. J., concurs.

120 Cal.App.2d 219

In re BAIRD'S ESTATE.

HENIGBAUM et al. v. SECURITY FIRST NAT. BANK.

Civ. 19479.

District Court of Appeal, Second District, Division 3, California.

Sept. 14, 1953.

Proceeding by heirs at law of donee of testamentary power of appointment against bank, which was trustee and donee's executor, to object to bank's petition for distribution of trust corpus, particularly that portion which was allegedly not disposed of by donee's will. The Superior Court of Los Angeles County entered orders directing distribution of trust property, allowing distribution fees to trustee, and allowing extraordinary fees to trustee's attorney, and heirs appealed. The District Court of Appeal, Parker Wood, J., held that, where settlor provided in testamentary trust that, upon termination of trust, trust corpus was to be distributed in accordance with donee's will duly probated or, if she should die intestate, then to her heirs at law, and, donee, in her will, provided that if trust corpus was insufficient to pay donee's medical and funeral expenses, her debts, and legacies created by her in full, legacies should be proportionately decreased, but donee did not purport to distribute residue of trust assets, residue would be distributed to donee's heirs.

Orders directing distribution and allowing distribution fee reversed and order allowing attorney's fees reversed in part.

1. Wills 🔑694

Where settlor provided in testamentary trust that, upon termination of trust, trust corpus was to be distributed in accordance with his wife's will duly probated or, if she should die intestate, then to her heirs at law, and wife, in her will, provided that if trust corpus was insufficient to pay wife's medical and funeral expenses, her debts, and legacies created by her in full, legacies should be proportionately decreased, but wife did not purport to distribute residue of trust assets, residue would be distributed to wife's heirs. Probate Code, § 229.

2. Wills 🔑692(7)

Where donee of testamentary power of appointment of testamentary trust corpus did not appoint all trust corpus nor provide for residuary clause in her will, trustee was to distribute trust corpus in accordance with trust provision, appointed portion of trust corpus was not distributable as part of donee's estate, and trust corpus should not be delivered to donee's executor except as necessary to pay amounts appointed by donee for expenses of her last illness, her funeral expenses, and her debts. St.1935, p. 1269, § 2(6).

3. Trusts 🔑313, 317

Where trust property was not to be distributed in accordance with trustee's petition, trustee's distribution fee and extraordinary fees to its attorney in connection with distribution would not be allowed.

◆

John E. Clay and Helen P. Clay, Los Angeles, for appellants.

Rodney F. Williams, No. Hollywood, for respondent.

Guy Richards Crump, Los Angeles, amicus curiæ, in behalf of Clarence Baird, Ethel Baird Scott and Dorothy Hodges, surviving heirs of William M. Baird, deceased.

PARKER WOOD, Justice.

The will of William M. Baird, admitted to probate November 12, 1924, provided, in part, as follows:

"*Eighthly*: All the rest, residue and remainder of my estate I give, devise and bequeath as follows:

"I.

"One-fourth thereof to said Pacific-Southwest Trust & Savings Bank and Margaret L. Baird, in trust, however, upon the following terms and conditions:

"1. * * *

"2. Said Trustees shall possess, manage * * * invest and reinvest the said trust property * * * and shall collect and receive all of the rents * * * and after the payment of the charges and expenses of the administration of this trust * * * shall make payment of the income then remaining * * * in as nearly equal monthly installments as possible to my said wife Margaret L. Baird, such payments to be made to her for and during the term of her natural life * * *.

"3. Upon the death of my said wife this trust shall finally cease and terminate and payment and distribution of the principal of such trust, together with any undisbursed net income in the hands of the Trustee shall be made as follows, to-wit:

"(a) In accordance with the terms of any last will and testament of hers duly probated.

"(b) If she shall die intestate then to her heirs at law per the then existing statute of succession of the State of California."

The will also provided that said Margaret L. Baird should not have power or authority to transfer or encumber the trust property during the term of the trust.

Under the decree of final distribution, which was made on August 7, 1929, certain property was distributed to said trustees in trust as provided in the will. Said decree provided, in part, as follows:

"*Fourth*: That the balance of said estate, to wit, the sum of $492.78 and all other property belonging to said estate, whether described herein or not, be and it is hereby distributed as follows:

"Item 1. One-fourth thereof to Security-First National Bank of Los Angeles [successor to Pacific-Southwest Trust & Savings Bank, one of the trustees named in will] and Margaret L. Baird, but in trust and as trustees nevertheless, with the powers and duties * * * provided by said testator in * * * section Eighthly of said will * * * to execute the trust * * * and upon the termination of said trust * * * to pay and distribute the principal of said trust together with any undisbursed net income in the hands of the surviving trustee as follows, to wit:

"(a) In accordance with the terms of any last will and testament of said Margaret L. Baird duly probated, or (b) if she shall die intestate then to her heirs at law per the then existing statute of succession of the state of California."

Margaret L. Baird died on March 6, 1951. Her will was admitted to probate, and the Security-First National Bank of Los Angeles was appointed executor. Her will provided, in part, as follows:

"I, Margaret L. Baird, do make this as and for my last will and testament, as follows:

"After the payment therefrom of the expenses of my last illness and of my funeral and burial, and all of my just debts, I give, bequeath and devise all of the principal of that certain trust described and created by William M. Baird, my deceased husband, in and by subdivision 'I' of item 'eighthly' of his last will, date September 4, 1923, and which was admitted to probate as his last will and testament in and by the Superior Court of the County of Los Angeles, State of California, November 12, 1924, in a proceeding, No. 70841, entitled 'In the Matter of the Estate of William M. Baird, Deceased,' then pending in said Court for the probate of said will and the administration of his said estate, to the following named legatees who shall survive me, as follows: [Here 26 money bequests were set forth—3 for $10,000 each, 1 for $5,000, 19 for $2,000 each, and 3 for $500 each.]

"If said principal of said trust shall be insufficient to pay all of said expenses, debts and legacies in full, each of said legacies shall be decreased in that proportion that the amount thereof, as above set forth, bears to the total amount of all said legacies, as above set forth.

"I hereby appoint Security-First National Bank of Los Angeles, a national banking association, and H. L. Carnahan as executors of this will.

"In witness whereof, I have hereunto subscribed my name this 9th day of November, 1934."

There was no residuary clause in her will. Her individually owned property was of the value of approximately $48,000.

On August 3, 1951, the Security-First National Bank of Los Angeles, as trustee of said trust, filed (in the matter of the estate of William M. Baird) its twenty-fifth and final account and its petition for order decreeing termination of said trust and for final distribution thereof. In said petition the trustee asked for distribution of all the assets of said trust to itself as executor of the will of Margaret L. Baird. The said petition stated, in part, that the amount of the specific bequests in Margaret's will is "less than the amount of assets" in the trust, and that her will "does not purport to distribute the residue of the assets of said trust over and above the amount of said specific bequests." The trustee asked therein that it be allowed $343.47 as ordinary compensation and $888.45 as a distribution fee; and that its attorney be allowed $150 for ordinary services.

On August 28, 1951, the appellants herein, as heirs at law of Margaret L. Baird, filed objections to said petition for distribution, wherein they objected to the distribution of the trust property, by the bank as trustee to itself as executor of Margaret's will, particularly the portion thereof which was not disposed of by Margaret's will. The objectors stated that they did not object to the trust property being listed in Margaret's estate for the purpose of assessing and collecting taxes due thereon; nor did they object to distributing to her estate such portion of the trust property as was appointed by Margaret to pay the expenses of her last illness, her funeral expenses, and her debts. They asked that the court order as follows: (1) distribution to the executor of the will of Margaret L. Baird, as trustee for her appointed creditors, of a sum of money commensurate with the allowable claims for the expenses of her last illness, her funeral expenses, and her just debts, as appointed by her in her will; (2) distribution of the amounts designated in her will to the legatees therein named who survived her, subject to the determination and collection of taxes through her estate if required by law; (3) distribution of the remainder of the trust property to her heirs in accordance with the law of succession.

On March 31, 1952, the bank filed its supplement to said account and petition, and asked for extraordinary compensation of $250 for the bank as trustee and $1,000 for its attorney by reason of additional services required in connection with the objections.

On April 30, 1952, appellants filed objections to said supplemental petition, wherein they objected to the allowance of extraordinary fees.

The court found that Margaret, by her said will, intended to and did exercise the power of appointment set forth in William's will and in the decree of distribution in his estate; that she intended to and did appoint all the distributable assets of the trust to the executor of her will to blend and merge the same with her own individually owned assets for the purposes of administration and distribution in her estate.

The court ordered that the distributable assets of said trust estate be delivered by the trustee (bank) to the executor of Margaret's will (bank) to be blended and merged with the assets individually owned by Margaret for the purposes of administration and distribution in her estate; that the trustee be allowed $343.47 as ordinary compensation, $888.45 as a distribution fee, and $700 for further ordinary and for extraordinary fees; that the trustee's attorney be allowed $150 as ordinary compensation in the twenty-fifth account, and $950 as ordinary and extraordinary compensation in the supplement to that account.

This appeal, by certain heirs at law of Margaret, is from said order.

[1] Appellants assert that there is a remainder or portion of the trust property which was not effectively appointed by Margaret in her will; and that such remainder consists of the portion of the trust property which remains after deducting (1) the total amount of the money bequests appointed by Margaret's will to legatees who survived her, and (2) the total amount of Margaret's expenses and debts designated by her will to be paid from the trust property. Appellants contend that the court erred in not ordering that such remainder be distributed under the alternative or subdivision "(b)" provision of William's will and the decree of distribution in his estate. They argue that under said "(b)" provision the said remainder (not disposed of by her will) should be distributed, under the trust decree in William's estate, to her heirs at law. As above shown, the decree of distribution in William's estate establishing the trust (and also his will) provided that the trust should terminate upon the death of Margaret. Under said decree in his estate (and under his will) the trust property, upon termination of the trust, was to be distributed (a) in accordance with any will of Margaret duly probated, or (b) if she shall die intestate then to her heirs at law. It therefore appears that Margaret was given the power of appointing, by her will, a person or persons to take the trust property. It also appears that in the event she should "die intestate" the trust property should be distributed to her heirs at law. She left a will, but the total amount of the money bequests therein to legatees who survived her (approximately $60,000, according to statement of appellants' counsel) plus the amount of her expenses and debts ($1,801, according to the claims filed within the time allowed for filing creditors' claims) plus the estimated tax ($1,450) was several thousand dollars less than the appraised value of the trust property (appraised value being $81,796.27 or $88,845). (The trustee said that it evaluated the

trust property at $81,796.27 for inheritance tax purposes, and evaluated it at $88,845 for the purpose of fixing trustee's fees.) It therefore appears that Margaret failed to appoint or dispose of trust property of the value of several thousand dollars. Respondent (trustee) argues, however, that Margaret intended to exercise her power of appointment fully and to dispose of all the trust property by her will; that even if she did not dispose of all the property expressly, she intended that the residue should be transferred to her executor to be disposed of as a part of her estate. As evidence of such intention, the respondent refers to provisions in her will as follows: that "I give, bequeath and devise all of the principal" of the William M. Baird trust; and that "if said principal of said trust shall be insufficient to pay all of said expenses, debts and legacies in full" each of the legacies shall be decreased proportionately. Respondent argues further that the use of the word "give" in her will instead of such words as "appoint" or "convey" indicates her intention to take the trust property out of the trust and make the property her own. Irrespective of her intention, the result is that she did not appoint or dispose of or give all the trust property, and she did not make provision in her will for the disposition of the residue thereof. It is to be noted also that she did not make a provision in her will for disposition of any of her individually owned property. In Re Estate of Beldon, 11 Cal.2d 108, it was said at page 112, 77 P.2d 1052, at page 1054: "A testator has the right to make a will which does not dispose of all of his property but leaves a residue to pass to his heirs under the law of succession. Such a will is not the usual one, but when the language which leads to that result is clear the will must be given effect accordingly. * * * Possibly * * * Beldon intended to leave his property as it was distributed by the decree of the probate court. But he did not express this intention in his will. * * * To say that because a will does not dispose of all of the testator's property it is ambiguous and must be construed so as to prevent intestacy, either total or partial, is to use a rule of construction as the reason for construction. But a will is never open to construction merely because it does not dispose of all of the testator's property." The remainder or portion of the trust property as to which Margaret did not exercise her power of appointment should be distributed under the said subdivision "(b)" provision of the decree of distribution in the estate of William M. Baird, that is, it should be distributed by the trustee, under the provisions of the testamentary trust of William, to the heirs of Margaret according to the law of succession, as bequests or gifts direct from William to the heirs of Margaret. The words "die intestate," as used in the provision of the trust decree that if Margaret should "die intestate," should be interpreted to mean that if Margaret should die without leaving a will wherein she appointed or designated persons who should receive the trust property. It cannot be said that she "died testate" within the meaning of the trust decree merely because she left a will. The said "(a)" provision of the trust decree was to the effect that the trust property should be distributed in accordance with the terms of any will of Margaret. The said "(b)" provision of that decree follows the "(a)" provision immediately, and the words "die intestate" were used therein in the sense that if Margaret died without leaving a will stating the terms for distribution of the trust property. The power of appointment, granted to her under the trust decree, was a valuable right which she could exercise by appropriate provisions in her will. If she left a will which did not fully exercise the right and thereby she failed to dispose of all the trust property, then it would appear that she died intestate, within the meaning of the trust decree, with reference to the matter of exercising a part of her power of appointment. In the case of In re Terwilligar's Will, 135 Misc. 170, 187, 237 N.Y.S. 390, at page 408, where there was a partial exercise of a power of appointment, the court upheld the exercise of the power to the extent that it was a valid appointment, and said: "The method of disposition of these remainders which were not validly appointed will be determined by the alternative gift of Mr. Terwilligar [the donor of the power]: 'In case she [wife, donee of the power] shall die intestate, then I give, devise and bequeath my said residuary estate to my wife's next of kin and to my sister' * * *." The alternative provision in the trust decree herein is similar to the alternative provision in said Terwilligar matter. In 72 C.J.S., Powers, § 55, page 465, it is said: "[W]hen a power terminates without having been executed, the subject matter passes to those to whom it may have been limited in default of execution * * * and, similarly, where a power is partially unexecuted at its termination, the portion of the subject matter or the interest therein as to which it has not been exercised usually remains in the donor or passes as in default of execution." In 41 American Jurisprudence, it is said at page 866: "Where an appointment is good in part and bad in part, that which is good may stand and the balance distributed as though that part had not been appointed, and the persons who have received a part under a valid part of the appointment are not thereby barred from sharing in the balance, which passes as in default of appointment."

Appellants assert further that the unappointed or undisposed of part of the trust property should not become a part of Margaret's estate, because the trust property was the separate property of William and since Margaret was not survived by a husband or issue, the property, if it should become a part of her estate, would go, under section 229 of the Probate Code,[1] to the children of William. The will of William and the trust decree indicate that it was the intention of William that the trust property (here involved) should go to the heirs of Margaret if she did not appoint the property in her will.

The court erred in ordering that the unappointed part of the trust property be delivered to the executor of Margaret's will to be blended and merged with her individual assets for the purpose of administration in her estate.

[2] Under the circumstances here, the appointed portion of the trust property (the portion disposed of by Margaret in her will) also was not distributable as a part of Margaret's estate. In the case of United States v. Field, 255 U.S. 257 at page 264, 41 S.Ct. 256, at page 258, 65 L.Ed. 617, it was said: "[W]hether the power be or be not exercised, the property that was subject to appointment is not subject to distribution as part of the estate of the donee. If there be no appointment, it goes according to the disposition of the donor. If there be an appointment * * * then * * * it goes not to the next of kin or the legatees of the donee, but to his appointees under the power." In the case of In re Taylor's Will, Sur., 116 N.Y.S.2d 314, it was said at page 317: "There being no provision in the will, express or implied, that the appointive property * * * be brought into the donee's estate and blended with her individual property * * * such property passes directly under the instruments granting the powers to the appointee." In Hooker v. Drayton, 69 R.I. 290, at page 296, 33 A.2d 206, at page 210, 150 A.L.R. 723, it was said: "[T]he appointee of the appointed property benefits not out of the estate of the donee of the power, but out of the estate of the donor. 'It is a recognized rule of the common law that a bequest which comes to a beneficiary through the exercise of a power of appointment, or by reason of a failure of its exercise, is a gift to the beneficiary from the creator and not from the donee of the power.'" In Re Estate of Elston, 32 Cal.App.2d 652, it was said at page 659, 90 P.2d 608, at page 613: "A power of appointment is a delegation by the donor, in the disposition of his property, to the donee who does not become the owner and holds only as trustee." The

---

[1] Section 229 of the Probate Code provides: "If the decedent leaves neither spouse nor issue, and the estate or any portion thereof was separate property of a previously deceased spouse, and came to the decedent from such spouse by gift * * * such property goes in equal shares to the children of the deceased spouse * * *."

appointed portion of the trust property would be the portion required to pay (1) the money legacies to the persons who survived her; and (2) the money necessary to pay the expenses of her last illness, her funeral expenses and debts. In addition to the amounts to be deducted from the trust property to pay said legacies, expenses and debts, it would also be necessary to deduct therefrom amounts to pay taxes and charges in connection with the trust administration. The amounts necessary to pay said legacies can be ascertained only after it has been determined which legatees survived her—which determination could be made in the administration of her estate. The amounts necessary to pay the expenses of her illness and funeral, and her debts, and the taxes, can also be determined in the course of administration of her estate. When the names of the beneficiaries (including her heirs at law) and the said amounts have been so determined, the trustee will be in a position, by referring to the proceedings in Margaret's estate, to designate the persons to whom distribution should be made under the trust decree and the amount to be distributed to each person thereunder. Especially, it is to be noted that such information as to the proceedings in her estate would be readily accessible to the trustee since the trustee is also the executor of her will. Since there was no residuary clause in Margaret's will and since there was an unappointed portion of the trust property which should be distributed directly by the trustee, it appears that it would not be convenient or advantageous to distribute the appointed portion of the property to the executor of Margaret's will to become a part of her estate. However, for the purposes of assessing and collecting taxes in connection with the trust property the property may be considered a part of Margaret's estate. The exercise of the power of appointment by Margaret, or the transfer of trust property by her, was taxable in her estate. In Re Estate of Newton, 35 Cal.2d 830, it was said at page 836, 221 P.2d 952, at page 955, 19 A.L.R.2d 1399: "[T]he exercise of the power of appointment is deemed 'a transfer taxable under the provisions of this act, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power * * *.'" In the concurring opinion of Justice Traynor in the Newton case, it was said, 35 Cal. 2d at page 838, 221 P.2d at page 957: "The imposition of an inheritance or estate tax does not depend on the decedent's ownership of the property under common-law principles. The tax is not imposed on the property, but on the decedent's transfer of that property. When, as in the present case, the statute expressly makes the transfer of property taxable 'in the same manner as though the property * * * belonged absolutely' to the decedent, it is irrelevant that under common-law concepts of property ownership the property did not belong absolutely to the decedent." It was also said in the concurring opinion, 35 Cal.2d at page 840, 221 P.2d at page 958: "There has been no change in the concept of property ownership enunciated by the Field case [referred to herein, supra]; that decision is still applicable to powers of appointment exercised before the enactment of section 811(f) [of Internal Revenue Code]." In the present case, as in In re Estate of Newton, supra, the donor of the power died prior to June 25, 1935, date of amendment of Inheritance Tax Act, section 2, subdivision (6), St.1935, p. 1269, and the power was exercised after that date. If the property were distributed to the executor and distributed as a part of Margaret's estate, there would be additional executor's fees, attorney's fees and appraiser's fees to be paid by reason of the increased amount of her estate. Under the circumstances here, especially since Margaret did not appoint all the trust property and there was no residuary clause in her will with respect to the trust property or at all, the appropriate procedure would be for the trustee to distribute the trust property under and according to the provisions of the trust decree, after having ascertained the names of the beneficiaries and the other necessary information from the proceedings in Margaret's estate; and the trust property should not be delivered by the trustee to itself as executor to become a part of the estate, except as is necessary to pay the amounts appointed by her for expenses and debts.

[3] Appellants contend further that the trustee should not have been allowed a distribution fee; and that the attorney for the trustee should not have been allowed a fee for extraordinary services in connection with the distribution of the trust property. In view of the above conclusion to the effect that the trust property should not be distributed in accordance with the petition of the trustee, a distribution fee to the trustee and extraordinary fees to the attorney in connection with the distribution should not be allowed. The amount allowed as extraordinary fees for the attorney was included in the sum of $950 which was allowed for ordinary and extraordinary services of the attorney in connection with the supplemental account. It cannot be determined from the order how much of the $950 was allowed for such extraordinary fees. Since $150 was asked by the attorney as ordinary fees in the twenty-fifth account, it is to be assumed that the ordinary fees allowed for his services in the supplemental account would be a similar amount and therefore the major part of the $950 was allowed for extraordinary fees.

The order directing distribution of the trust property, and the order allowing the trustee $888.45 as a distribution fee, are reversed. The order allowing $950 to the attorney for ordinary and extraordinary fees is reversed insofar as it includes an allowance for extraordinary fees.

SHINN, P. J., and VALLÉE, J., concur.